The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 26 Autumn Edition 2001

DEFENDER'S MESSAGE

The Federal Defender's Office joins the nation in mourning the national tragedy of September 11, 2001. Thanks to the Federal Public Defender for the Southern District of Florida and recognizing as they have the community's desire to help, we are publishing the following list of organizations that are accepting donations for disaster relief. These websites are drawn from a more comprehensive listing provided by the Combined Federal Campaign, and for more information you can visit their website at:

http://www.opm.gov/cfc/html/PCFO.htm

American Red Cross - www.redcross.org

AmeriCares - www.americares.org

Int'l Assn. Of Fire Fighters - www.iaff.org

Int'l Relief Teams - www.irteams.org

Lions Club Int'l - www.lionsclub.org

Mercy MedFlight - www.mercymedflight.org

Kiwanis Int'l - www.kiwanis.org/kif

Nat'l Fallen Firefighters - www.firehero.org

Nat'l Law Enforcement Officers Memorial Fund - www.nleomf.org

Nat'l Organization for Victim Assistance - www.try-nova.org

The Salvation Army - www.salvationarmy-usaeast.org/disaster

The September 11th Fund - www.national.unitedway.org

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

Table Of Contents

CHURCHILLIANA

We usually use this space for some of Winston's witticisms. However, in these trying times I felt the following message was more appropriate.

Churchill made this June 1940 radio broadcast on the BBC. It was an address to rally Londoners as they were being subjected to nightly bombings while they awaited the expected German invasion from across the Channel. If one imagines our country in 2001 and substitutes bin Laden for Hitler, the message is still strong and applicable to this very day. (The Editor)

"Here is the strong City of Refuge, which enshrines the title-deeds of human progress and is of deep consequence to Christian civilisation....{W}e await undismayed the impending assault. Perhaps it will come tonight. Perhaps it will come next week. Perhaps it will never come. We must show ourselves equally capable of meeting a sudden violent shock or (what is perhaps a harder test) a protracted vigil. But be the ordeal sharp, or long, or both, we shall seek no terms, we shall tolerate no parley. We may show mercy — we shall ask for none....

This is no war of chieftains or of princes, of dynasties or national ambition. It is a war of people and of causes. There are vast numbers not only on this island, but in every land who will render faithful service in this war but whose names will never be known, whose deeds will never be recorded. This is a war of the unknown warriors; but let us strive without failing in faith or in duty, and the dark curse of Hitler will ever be lifted from our age."

Dictum Du Jour

"When I despair, I remember that all through history the way of truth and love has won. There have been tyrants and murderers and for a time they seem invincible, but in the end, they always fall - think of it, ALWAYS."

- Mahatma Ghandi

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"It's nice to be important, but it's more important to be nice."

- "Tip" O'Neal (D.Mass.)
Former Speaker of the House

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"I have a lot left. I love what I do. As long as the passion is there, I'll be around for years."

- Lance Armstrong
(after winning his third straight *Tour de France* championship AND surviving life-threatening cancer.)

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"Secrets are like meat; they can be frozen or eaten but not kept."

- Jim Lehrer, Blue Hearts

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A friend is someone who understands your past, believes in your future, and accepts you today just the way you are.

- Proverbs 27:17

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"Give me my books, my golf clubs and leisure, and I would ask for nothing more. My ideal in life is to read a lot, write a little, play plenty of golf and have nothing to worry about."

- J.A. Balfour

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If you would sup with the Devil, you must bring a long spoon.

- English proverb

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Never believe anything until it's officially denied.

- Jim Hacker in *Yes, Minist*er

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No mean person may keep a greyhound.

- Statute enacted during the
reign of King Canute

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I asked her if she had any guns, dope, bombs, nuclear devices or dead bodies in the car. She reassured me there was none. I asked "Would you mind if I look?" She replied "No, go ahead." I said "Okay, then?" She reiterated "Go ahead."

Excerpt from report of Springfield, Illinois police officer (a motion to suppress was filed).

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In times like these, when the public mind is agitated. . . . .it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from

the best of motives. We ought to be on our guard lest our zeal for public interest lead us to overstep the bounds of the law and the Constitution: for although we may bring one criminal to punishment, we may furnish the means by which a hundred innocent persons may suffer.

The Constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.

In Re Byrd, 2001 WL 1230314, slip op. (6th Cir., Sept., 2001) (Jones, J., concurring in Order extending the Stay of Execution) (quoting Dissent of Judge Cranch in an unnamed case).

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FBI Special Agent Hadaway testified that he was not sure why Officer Kotowicz drew her pistol, and that she was only two to three feet from Leon when she did. As to where it was pointed, Agent Hadaway understandably had a vivid memory as, he explained, her gun was pointed at him. He described her gun as "a little bit larger than average," larger than the .357 Magnum he normally carried. There apparently was no reason for anyone to have been concerned, as Officer Kotowicz testified that she drew her .38 caliber pistol for only about thirty seconds to a minute, and that she had it pointed at the ground the whole time, never at Leon or anyone else. She added, however, that she saw two other committee members, both FBI agents, draw their guns, which somehow escaped the notice of the other testifying officers. In any event, no one got shot.

United States v. Richard W. Novak, 870 F.2d 1345, 1347 (7th Cir. 1989).

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In cases like the present one, the question is whether defense counsel had access to Brady material contained in a witness' head. Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document. But the position the state advances would require a defense witness' knowledge to be treated exactly as information in a document the defense possesses. This stretches the concept of reasonable diligence too far.

Boss v. Pierce, 263 F.3d 734, 741 (7th Cir. 2001).

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Although Bradshaw says that she was intoxicated, she also says that she drank only two beers. The record does not disclose the brand. Too bad.

United States v. Jackson, 177 F.3d 628, 631 (7th Cir. 1999).

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The evidence of his guilt of the other counts was overwhelming; a baker's dozen of lawyers could not have gotten him an acquittal on those counts.

United States v. Oreye, 263 F.3d 669, 671 (7th Cir. 2001).

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"Defendants who appeal from sentences following plea agreements always point to unanticipated and unwelcome developments." [United States v Woolley, 123 F.3d 627, 637 (7th Cir. 1997).] This case is no different.

United States v. Matchopatow, 259 F.3d 847 (7th Cir. 2001)(dismissing appeal in light of appeal waiver in plea agreement).

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[T]his was not a quick "grab and release" wedgie, a childhood prank between friends that even the court remembers.

Ulichny v. Merton Community School District, 249 F.3d 686, 691 (7th Cir. 2001).

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Even when a lawyer tries to mislead jurors about the significance of how many witnesses have testified, Instruction 1.09 leaves something to be desired: reasons. It tells the jurors that they "may" do one thing and "need not" do the opposite, but that just states the obvious. *Of course* jurors "may" find the testimony of a single witness more persuasive. Any juror who did not think that to begin with is unfit to serve. ... The underlying principle is that quality should govern the verdict; ten weasels are no more persuasive than one. That's a thought that district judges could convey directly–though again the point is obvious, so usually it is best left to the jurors' good sense. Why insult the jurors' intelligence?

U.S. v. Hill, 252 F.3d 919, 922 (7th Cir. 2001).

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In or out of the criminal justice system, people freely assume risks that they do not fully understand. Anyone who chooses a profession or a spouse, or decides to have children, takes chances subject to more variables than the mind can juggle. Yet we do not call these decisions unintelligent; venturing into the unknown with a sketchy idea of what lies ahead may be the wisest choice even when the odds are beyond calculation.

U.S. v. Hill, 252 F.3d 919, 928 (7th Cir. 2001).

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Up until the time of his conviction, Brian Lea was an entrepreneur dealing in animal remains. Lea owned and operated a mink ranch, an enterprise that sold meat to alligator farms and greyhound kennels, a deadstock pickup and removal business, an animal hide business, and a trucking business to transport his products. Lea also had concerns unrelated to animal carcasses, including a strawberry business. From 1991 through 1996, Lea had various dealings with NBP, a national corporation involved in the rendering business. NBP produced animal food and feed additives in the form of liquid fat and dry meat meal by processing otherwise wasted materials such as used restaurant grease, deadstock, and unused material from meat packing plants ("offal"). Lea and NBP developed a symbiotic relationship, whereby Lea sold his deadstock to NBP's Berlin, Wisconsin plant, and in return was leased space at that location to process his chicken offal into mink food.

. . . . .

In order to recoup the raw materials lost by Leas's actions, NBP created its own deadstock collections business. NBP aggressively competed with Lea for deadstock [including] paying for deadstock–a frowned-upon tactic in the deadstock removal field.

United States v. Lea, 249 F.3d 632, 635 (7th Cir. 2001).

POSITION ANNOUNCEMENT

Due to Assistant Federal Defender Ivan Davis' decision to move closer to his family, he will be leaving our office in the Central District of Illinois for a similar position with the Federal Defender for the Eastern District of Virginia. All of us who have been privileged to work with Ivan since he started with the office will miss his contribution to our team. We are glad, however, that he will still be defending the indigent citizen accused in Virginia, where his clients in that district will no doubt benefit greatly from his professionalism, legal acumen, and congenial personality.

If you or someone you know are interested in stepping into Ivan's shoes, please see the Position Announcement attached at the end of this newsletter. As the announcement states, the position is opened until filled and subject to the availability of funding. We are an equal opportunity employer, and women and minorities are encouraged to apply.

Immigration, Deportation and Acceptance of Responsibility

By: David Mote
Deputy Chief Federal Defender

After the terrible events of September 11, 2001, many people have called for a review of our immigration policies. Any system as complex as our immigration laws could be improved through a thoughtful process of review and modification. We should keep in mind, of course, that "bad facts make bad law" and in September, the facts were very bad. Thus, it is especially important to resist overhauling the legal system based on the emotions of the moment.

One topic discussed on the news shows has been our screening, or lack of screening, of the people entering this country from foreign lands. That issue needs to be addressed. The Statue of Liberty has an inscription inviting other countries to give us their poor; it does not invite them to give us their criminals.

A criminal conviction can bar someone from obtaining admittance to this country. If an immigrant is in the country legally, a criminal conviction may make them deportable. In the case of an adult who comes to this country and embarks on a life of crime, it is appropriate to rescind our welcome. Those who are deported and reenter without permission face serious criminal penalties. Unfortunately, the law does not currently limit deportation following a criminal conviction to aliens who come here as adults.

In United States v. Lipman, 133 F.3d 726 (9th Cir. 1998), the defendant had been brought to this country by his mother at the age of twelve. He attended public schools in New York through high school and married a U.S. citizen with whom he had five children. His mother and siblings are U.S. citizens. At the age of thirty-five, Lipman was deported after being convicted of several offenses. After it was discovered that he was back in the country, probably because of the fact he had been arrested for another offense, he was charged with the federal offense of unlawful reentry after deportation. He was sentenced to twenty-one months. After his sentenced was served, he would again be deported.

In United States v. Pacheco, 225 F.3d 148 (2nd Cir. 2000), the defendant was admitted to the United States as a permanent resident at the age of six. Between the ages of twenty and twenty-seven, he was convicted of numerous misdemeanors and subsequently deported. When he was caught attempting to reenter the United States, he was charged with illegal reentry. In the Never-Never land of immigration, some of his misdemeanors qualified as "aggravated felonies" for immigration purposes, and he received a sentence of forty-six months. After service of his sentence, he will be deported again.

Our office's experience with similar cases includes two defendants with American fathers and non-citizen mothers. In such cases, if the parents are not married, citizenship is not automatic for the child. One was born in Nuevo Laredo, Mexico. His mother was living with his father in Texas at the time, but had gone back across the border for a day of shopping when he made his early arrival into this world. His sister was born a year later in Laredo, Texas, making her a U.S. citizen. He married a U.S. citizen with whom he has three children. After a felony conviction, he was deported. His illegal reentry earned him a sentence in excess of six years.

Another was born in Thailand. His father was an American soldier, but the parents never married. Before he reached age two, his mother immigrated with him to the United States. As a young man, he was convicted of a federal drug offense and received a ten-year sentence. Upon his release, he will be deported to Thailand where he does not speak the language or know anyone.

Assuming for the moment that these individuals would continue to be a burden on society when they are released from prison, and that the hardship their deportation causes to their families in this country is less important than relieving ourselves of that burden, other questions remain. Whose criminals are they? If it is reasonable for us to refuse to accept criminals from other countries into our own, is it appropriate for us to deport our criminals to other countries? When someone legally immigrates to our country before he is old enough to talk, lives in our communities, is educated in our public schools, grows up in our culture, and turns out to be a criminal, isn't he our criminal? And if we accept responsibility for that criminal as a product of our society, should we impose the burden of that criminal on the country where the person happened to be born? Clearly, if the criminal has no family in the country where he was born and does not speak the language, his chance of becoming a productive citizen of that country is minimal. In re-examining our immigration laws, we should review not only whether we should change the rules on whom we allow into our country, but also whether we should change the rules on whom we deport to other countries.

Baker's Dozen:
Tips for the Experienced Advocate

By: Alan Ellis
Criminal Justice, Winter 1997

With 85% of all indicted federal criminal defendants being convicted, and 85% of these pleading guilty, according to statistics from the Administrative Office of the U.S. Courts, the most pressing questions your client will have are:

"How much time am I going to do?" and, "Where am I going to do it?" The following baker's dozen of sentencing tips suggest how to get your client the lowest possible sentence at the best possible place.

1. Remember the safety valve provisions of the Crime Bill. (18 U.S.C. §3553(f) and U.S.S.G. 5C1.2.) Under appropriate circumstances, without the necessity of the government filing a 5K1.1 motion, a defendant may receive a sentence below the mandatory minimum. Also, if the defendant meets the criteria for the safety valve and his or her offense level is determined to be 26 or greater, it is decreased by two levels. (U.S.S.G. §2D1.1(b)(4).)

2. Accompany your client to his or her meetings with the probation officer during the preparation of the Presentence Investigation Report (PSI) stage. Probation officers are often overburdened, so obtain in advance the forms they need filled out and the documents they need produced and have your client complete and bring them with him or her to the initial interview. If you have any cases supporting your position

regarding anticipated disputed issues in the guidelines, bring the cases with you and highlight the relevant sections. Remember, probation officers are not lawyers and often have a difficult time with memoranda of law. Highlighted cases are more helpful to them.

3. When you meet with the probation officer, find out what his or her "dictation date" is. This is the date by which he or she must dictate the first draft of the PSI. When possible, it is extremely helpful to have the probation officer and the Assistant U.S. Attorney (AUSA) buy into what you believe is your client's offense behavior, his or her role in the offense, and any grounds for downward departure before the dictation. Obviously, "buying in" does not mean paying anybody off. It simply means getting them to agree that your position is not unreasonable. Remember that probation officers often have a proprietary interest in their original
draft PSI, and getting them to change it through making objections is often very difficult. Hence, you want the best draft PSI you can get so you don't have to file that many objections.

4. If your client is a cooperating witness, accompany him or her to any debriefings in case there's a later dispute as to what the client said. Also your presence will often facilitate the discussions, particularly if you've debriefed and prepped your client in advance.

5. Before doing any of this, hire a sentencing specialist if your client can afford it. These people are often social workers, former U.S. probation officers, and other criminologists. They are able to interview a criminal defendant and get information that lawyers are not necessarily trained to do. For example, a forensic social worker with a background in psychiatric social work is able to identify mental illness, which will give you grounds for a downward departure based on diminished capacity, and unique family circumstances, which give you grounds for departure based on "extraordinary family circumstances." If you need a referral to a sentencing specialist, contact the author at 34 Issaquah Dock, Waldo Point Harbor, Sausalito, California 94965 (fax: 415/332-1416), or the National Association of Sentencing Advocates (202/628-2820), which has a listing of over 200 sentencing specialists throughout the country. Such a specialist is more important than ever in guideline sentencing now that there is less information devoted to a defendant's personal characteristics and no evaluation as to why he or she committed the offense. Judges always want to know why a defendant committed a particular offense. Giving him or her the answer to the "why" question through your sentencing specialist goes a long way towards getting the lowest possible sentence.

6. File a presentence memorandum five to seven days prior to sentencing. Statistics show that in 80% of the cases, judges come to the bench with their minds made up as to what sentence they will impose. This is called a "tentative sentence." Unless you can put on a tremendous dog-and-pony show at sentencing, it is likely that your client is going to receive that sentence. Consequently, if you can get a solid presentence memorandum with character letters to the judge before a decision has been made, your sentencing specialist's report (or your own cannibalized version) will go a long way in helping the judge determine a sentence before he or she has crystallized his or her thoughts on the case.

7. Many clients ask me whether they're entitled to credit for time served while on bail under conditions of home confinement. The answer is no. However, if the court orders your client officially

detained and then simply recommends to the U.S. Marshal that he or she be kept under home confinement, this qualifies as official detention. The client will get credit for time served even though the place of confinement may be a home or even the Ritz.

8. While a single mitigating factor may not warrant a downward departure, a combination of these factors, taken together, may persuade the court otherwise. (United States v. Cook, 938 F.2d 149 (9th Cir. 1991); U.S.S.G. §5K2.0 Commentary.) Even if you don't get a downward departure, these mitigating factors can often help in getting a sentence at the low end of the guideline range. This is particularly important when the offense level and/or the criminal history score render high guidelines.

9. Let's face it, when your client enters a guilty plea, absent a binding stipulation as to his or her guidelines, the client has no idea what the range will be and what sentence will be received within, below, or above it. Consequently, more and more sentencing authorities are recognizing the need for a pre-plea PSI and even a settlement conference before a magistrate unrelated to the case in order to get a third party's view as to the base offense level, and whether there'll be upward or downward adjustments or departures. It's also helpful, in some cases, to see what the magistrate would recommend if he or she were the sentencing judge. Currently, both the Southern District of Alabama in Mobile and the District of Arizona in Phoenix and Tucson are utilizing a variation of this procedure. For more information, contact the probation offices in those cities. In short, if you request and are granted a pre-plea PSI, your client will have a pretty good idea as to what he or she faces at sentencing and can then make a realistic, intelligent, and voluntary decision as to whether to enter a guilty plea.

10. Let judges be judges. Koon has altered the ground rules for downward departure giving defense lawyers and judges more latitude. Indeed, in a recent case by the Fifth Circuit upholding the downward departure, the court stated:

"Our conclusion that the district court's sentence should not be disturbed is all the more buttressed by the recent Supreme Court case of Koon v. United States,
which emphasized in the strongest terms that the appellate court rarely should review *de novo* a decision to depart from the Sentencing Guidelines, but instead should ask whether the sentencing court abused its discretion." (U.S. v. Walters, 87 F.3d 663, 672 n.10. (5th Cir. 1996).)

Be creative. Don't pigeonhole yourself to downward departures identified in the guidelines themselves. Think of things that make your case unusual. Remember that not only must your offender have been an unusual offender, but if the offense behavior is unusual in and of itself—specifically, less serious than envisioned by the guidelines—this is a good ground for an "unusual" case as defined by Koon: one that is outside of the heartland of the guidelines justifying a downward departure.

Departures based on the fact that the guidelines overstate the seriousness of the offense have been recognized by three Second Circuit cases, U.S. v. Restrepo, 936 F.2d 661 (2d Cir. 1991); U.S. v. Alba, 933 F.3d 1117 (2d Cir. 1991); and U.S. v. Lara, 47 F.3d. 60 (2d Cir. 1994), all of which support the position of awarding a defendant a departure below the four-level downward adjustment for a minimal role in the offense.

11. Many of us have been in situations where our client has cooperated and yet the government has refused either to file a 5K1.1 motion for downward departure based on substantial assistance or both a 5K1.1 and an 18 U.S.C. §3553(e) motion enabling the judge to depart below the mandatory minimum. Faced with this unpleasant situation, seek a downward departure based on "super/extraordinary acceptance of responsibility." If you spell out to the judge the cooperation the client has provided, even though it may not be all the government had hoped for, it might persuade the judge, many of whom are opposed to the government's unilateral power to control departures for cooperation, to depart downward as much as if the government had filed 5K1.1 and 3553(e) motions, particularly if the "safety valve" applies. Again, this makes your case unusual, thereby taking it out of the heartlands, and, under Koon, justifying a downward departure.

12. Seek a lateral departure that requires your client to serve the same amount of time as called for by the guidelines but addresses the conditions of confinement rather than seeking less time. For example, if the guidelines call for a 21-month sentence, ask the judge to depart downward to a sentence of seven months of incarceration, followed by supervised release with a special condition that the client serve seven months in the correctional component of a community corrections center (CCC), considered the most onerous unit in a halfway house, followed by seven months of supervised release with home confinement and an appropriate amount of community service. Not only does this add up to the same 21 months that the client would normally serve, but it actually requires him or her to serve more time since the client will not get any good conduct time on the seven months nor the community corrections center and home

confinement portion of the sentence. Indeed, he or she will serve the entire 21 months as opposed to less than 18 months with good conduct time credit. It doesn't reduce the amount of time to be served; it only alters the conditions of confinement. At a recent presentation to a workshop of the U.S. district and appellate judges of the First Circuit, this idea received favorable response from both the judges and representatives of the probation department.

Finally, in order to receive a report on the "onerous" conditions of confinement in the correctional component of a CCC, ask the Bureau of Prisons for Program Statement 7310.03 and provide it to the sentencing judge as an exhibit to your presentence memorandum well in advance of sentencing. Also, of course, run it by the federal probation officer to see if you can get him or her on your side in the hope that the probation officer will recommend it to the court.

13. Some judges don't like to recommend particular places of confinement at sentencing. Their reasons include, but are not limited to:

the fact that they don't believe they are "correctional experts" who are able to determine where a client should serve his or her sentence, and;

they often get letters from the Bureau of Prisons advising them that their recommendations cannot be honored in a particular case.

Generally, the reason behind the letters is that the judge has recommended a facility incompatible with the defendant's security level. As to their lack of knowledge of "correctional practices," however, a lawyer is only asking a judge to recommend a facility if the defendant qualifies based on his or her security level. In fact, Program Statement 5100.06 from the Bureau of Prisons indicates that the Bureau welcomes a sentencing judge's recommendation and will do what it can to accommodate it. Indeed, Bureau statistics show that in 85% of the cases in which the defendant qualifies for a particular recommended institution, the court's recommendation is honored.

Without a recommendation, your client may not wind up in the facility for which he or she qualifies (as close to his or her home as possible) due to prison overcrowding. Should there be only one slot open at a prison such as the Federal Prison Camp at Nellis Air Force Base in Las Vegas, for example, and there are two defendants who want that placement, the one with the judicial recommendation is more likely to get it. It may help to get a copy of the bureau's Program Statement 5100.06 and show the page that deals with judicial recommendations to the court.

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.

Helpful

Websites

http://www.crimelynx.com - The legal resource center for the criminal defense practitioner.

http://www.bop.gov - The Bureau of Prisons website, which provides many of their program statements under the "public info" link and inmate locator under the "inmate info" link.

http://www.jflax.com - Contains links to useful legal and investigative sites.

CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender
Appellate Division Chief

With Assistance From:
Johanna Christiansen, Staff Attorney

March 26 - October 2, 2001

APPRENDI

Ashley v. U.S., ___ F.3d ___, No. 01-1733 (7th Cir. 09/12/01). Upon consideration of the district court's dismissal of the petitioner's 2255 petition as untimely, the Court of Appeals reversed. The petitioner's conviction became final on April 24, 1996, but he did not file his 2255 petition until August 28, 2000, long after the statute of limitations expired. The petition was premised on an argument based on Apprendi. The district court dismissed the petition as untimely. The Court of Appeals noted that an initial petition may be filed within one year of a decision that is "made retroactively applicable to cases on collateral review." For *initial*

petitions, the language of 2255 indicates that the retroactivity decision need not be made solely by the Supreme Court. Indeed, for initial opinions, the statute makes no reference to a decision by the Supreme Court. Rather, only the provision addressing *successive* petitions explicitly requires that a decision must be made retroactive by the *Supreme Court*. Given this statutory difference between the provisions governing initial and successive petitions, the court must give that language effect. Accordingly, it is the district court which must, in the first instance, determine whether Apprendi or any other decision of the Supreme Court applies retroactively, for initial petitions only. Noting that this interpretation conflicts with the Seventh Circuit's very recent decision in Montenegro v. U.S., 248 F.3d 585 (7th Cir. 2001) wherein the court held that the standard should be the same for both initial and successive petitions, the court overruled Montenegro. Thus, the Court of Appeals issued a certificate of appealability and remanded to the district court for a determination of whether Apprendi should apply retroactively. In doing so, the court noted that the petitioner may still not prevail, for he must show cause and prejudice for failing to make the Apprendi claim on direct appeal.

U.S. v. Alanis, ___ F.3d ___, No. 00-3073 (7th Cir. 09/07/01). In prosecution for distribution of narcotics, the Court of Appeals rejected the defendant's Apprendi argument under a plain error standard of review. Although the indictment charged that the defendant's offense involved in excess of 5 kilograms of cocaine, this question was not presented to the jury for a determination. Moreover, the indictment was never read to the jury. However, because the issue was not raised below, the appellate court applied a plain error standard of review. Under this standard, the evidence presented at trial was overwhelming regarding drug quantity, and reversal was therefore not warranted.

U.S. v. Watts, 256 F.3d 630 (7th Cir. 07/05/01). On cross-appeal by the United States, the Court of Appeals reversed the district court's application of Apprendi to a conviction under 924(c). At sentencing, the district court held that the spirit of Apprendi required the government to plead in the indictment that the defendant "brandished" a firearm before subjecting him to an enhanced 7-year mandatory minimum sentence, rather than the default minimum of 5 years. While noting that the Sixth Circuit had adopted the approach used by the district court, and noting that the Sixth Circuit's interpretation of Apprendi may be the "wave of the future," the majority decision in Apprendi made clear that its decision did not affect mandatory minimum sentences. Accordingly, the Court of Appeals refused to apply Apprendi under such circumstances.

U.S. v. Gilliam, 255 F.3d 428 (7th Cir. 06/28/01). In prosecution for conspiracy and possession of drugs charges, the Court of Appeals held that Apprendi is applicable to the career offender provision of the Guidelines. Because U.S.S.G. § 4B1.1 makes the "offense statutory maximum" the determinative factor in calculating a sentence under the career offender guideline, Apprendi is implicated when a court relies upon an indictment listing no drug quantity, and only referencing § 841(a)(1), in setting the offense statutory maximum for career offender purposes at life imprisonment. Unfortunately for the defendant in this case, because he failed to make this argument in the district court, the court nevertheless affirmed his sentence under the plain error standard of review, noting that the defendant never disputed the fact that the drug quantity in his case was sufficient to bring him within the "life imprisonment" statutory maximum sentence.

U.S. v. Noble, 246 F.3d 946 (7th Cir. 04/05/01). In prosecution for conspiracy to distribution cocaine and cocaine base, the Court of Appeals vacated the defendant's sentence. In this case, the drug quantity was neither pled in the indictment nor submitted to the jury for a finding. Because the defendant failed to raise the issue in the district court, the court reviewed the Apprendi error under the plain error standard. Under this standard, the court first found that there was an error that was plain which affected substantial rights. These factors were clearly established in light of Apprendi. Thus, the key determination became whether the plain error seriously affected the fairness, integrity or public reputation of judicial proceedings. Such was the case here, for the court characterized the case as having limited physical evidence and minimal corroborating testimony. Indeed, the defendant disputed the drug

quantity at sentencing and the district court's determination ultimately rested on credibility determinations. In other words, given the closeness of the question of drug quantity and its dependence upon credibility determinations, the court concluded that a reasonable jury would not have been compelled to make the same conclusion as the district court. The sentence was therefore vacated, and the district court was instructed to re-sentence the defendant within the default 20-year statutory maximum sentence.

U.S. v. Rodgers, 245 F.3d 961 (7th Cir. 04/05/01). In prosecution for conspiracy to possess cocaine and cocaine base, the Court of Appeals rejected the defendant's argument that Apprendi required that drug quantity be pled in the indictment and proved to the jury when either a mandatory minimum sentence is imposed due to drug quantity or the quantity of drugs makes the offense a more serious one. The court disposed of the defendant's argument regarding the mandatory minimum by noting that the Supreme Court expressly refused to overrule McMillian in Apprendi. Thus, McMillian's holding that a fact which triggers a mandatory minimum is not an element of the offense precluded the defendant's argument. But, the defendant also argued that the drug quantity finding in his case transformed his offense from a Class C felony to a Class A felony. In Apprendi, the Supreme Court noted that the finding increasing the defendant's statutory maximum sentence had the effect of transforming the offense in that case from a second-degree offense into a first-degree offense. Because of the "more severe stigma attached," the Court in Apprendi noted that the "differential here is unquestionably of constitutional significance." Using this line of reasoning, the defendant argued that his 10-year minimum statutory sentence brought Apprendi into play, regardless of whether his 10-year sentence was within the default 20-year statutory maximum sentence. The Court of Appeals, however, rejected this argument, noting that it is the maximum term which is of significance for Apprendi purposes. Thus, so long as the defendant is sentenced within the default statutory maximum, as in this case, there is no error.

ASSISTANCE OF COUNSEL

U.S. v. Oreye, ___ F.3d ___, No. 99-3577 (7th Cir. 08/24/01). On appeal from convictions for drug offenses, the Court of Appeals rejected the defendant's claim that he was denied the assistance of counsel. Prior to trial, the district court allowed two of the defendant's lawyers to withdraw, based upon the defendant's dissatisfaction with them. Six days before trial, new counsel filed a motion to withdraw, noting that, although he was prepared to go to trial, irreconcilable differences existed on how to conduct the trial. The judge gave the defendant three choices: proceed with current counsel, find a new lawyer who could go to trial on schedule, or proceed *pro se*. The defendant proceeded to trial *pro se*, with his lawyer as stand-by counsel. On appeal, however, the defendant argued that the trial court should have appointed him a new lawyer or explained in greater detail the disadvantages of proceeding *pro se*. The court rejected this argument, noting that the district court attempted to persuade the defendant to proceed with counsel. Noting that the district judge's warnings were rather perfunctory, his mention of the difficulties of self-representation were sufficient. Moreover, stand-by counsel in fact performed as if he represented the defendant. The lawyer performed so actively in the trial that the defendant, in effect, both represented himself and had counsel. Accordingly, the Court of Appeals affirmed.

U.S. v. Morris, 259 F.3d 894 (7th Cir. 08/13/01). On appeal after the district court's denial of the defendant's motion to withdraw his guilty plea, the Court of Appeals reversed and held that the defendant was denied effective assistance of counsel. After entering his guilty plea, the defendant filed a pro se motion seeking to withdraw his guilty plea based on his attorney's ineffective assistance of counsel regarding the effect the plea would have on his right to appeal. The district court forced the defendant to choose between representing himself on the motion or allowing his counsel to make the argument, the very counsel he claimed was ineffective. The defendant chose the latter. However, on appeal, the defendant argued that the attorney labored under a conflict of interest, for the attorney had an interest to protect himself from a malpractice claim. The Court of Appeals held that such a conflict existed and that the district judge was aware of this conflict. In such a situation, prejudice is presumed.

Accordingly, the Court remanded the case for a hearing to establish whether he should be allowed to withdraw his guilty plea on the basis that his attorney falsely led him to believe that the plea would not waive his ability to appeal certain pre-trial issues.

DOUBLE JEOPARDY

U.S. v. Hatchett, 245 F.3d 625 (7th Cir. 03/26/01). Upon the defendant's convictions for distributing crack cocaine and of aiding and abetting his purchaser's re-sale of the same cocaine to an informant and an undercover officer, the Court of Appeals rejected the defendant's claim that his concurrent sentence on the aiding and abetting charge amounted to a second punishment for the same offense. The court initially noted that the two punishments imposed on the defendant were based on two separate transactions--his distribution to his purchaser and his purchaser's re-distribution. Thus, each successive distribution constituted a separate offense which may be punished separated. However, the court also noted that the defendant's asserted liability as an aider and abettor depended on proof that he distributed the narcotics to his purchaser. After undergoing a lengthy analysis of the current state of the law regarding lesser and greater included offenses, the court concluded that the distribution and aiding and abetting charges constituted separate charges. Specifically, the court focused on the fact that the defendant's liability for aiding and abetting did not depend on his commission of the distribution offense. Indeed, one can aid and abet the commission of an offense without engaging in activity that amounts to a crime in and of itself. Although it just so happened that in this case the defendant aided and abetted the re-distribution with an offense--i.e, his distribution to the re-distributor--this fact was incidental to proving aiding and abetting. Thus, the two charges were distinct in the sense that each required proof of an element that the other did not. Moreover, although, under the circumstances of this case, the aiding and abetting charge required proof of the very same conduct which underlay the distribution charge, the aiding and abetting charge did not demand proof that the defendant committed any other crime, be it narcotics distribution or something else. Thus, the court affirmed the defendant's convictions on both counts.

EVIDENCE

U.S. v. Centracchio, ___ F.3d ___, No. 00-3963 (7th Cir. 09/04/01). On interlocutory appeal by the government, the Court of Appeals reversed the district court's exclusion of a guilty plea allocution and the statements of a deceased co-conspirator. At the defendants' RICO trial, the government sought to introduce the guilty plea allocution of a key witness who refused to testify at trial. The defendants, however, argued that the government had claimed at the witness' sentencing hearing that he was a liar, and the statements therefore lacked indicia of reliability as required by Rule of Evidence 804. The district court agreed and excluded the allocution. The government also sought to introduce statements made by a witness concerning admissions of a defendant, the witness now being dead and the conversations occurring over 20 years prior. The court found the statements to be attenuated and not probative under Rule 403. Regarding the allocution, the Court of Appeals noted that when determining whether evidence is admissible as a statement against penal interest, the court must first determine whether the statements were self-inculpatory, and if so, whether, in light of the surrounding circumstances, a reasonable person would have made those statements unless he believed they were true. Looking at the facts in this case, the court concluded that the witness's statements were self-inculpatory because he admitted his guilt in accepting bribes. Moreover, the court concluded that a reasonable person would not have made the statements unless he believed they were true, for although he was pleading guilty to get a "good deal," it is unlikely he would risk losing that deal by making a false statement. Additionally, not only was the statement admissible under the rules of evidence, but the court also concluded that the admission of a guilty plea allocution does not violate the Confrontation Clause Regarding the exclusion of the dead witness's testimony under Rule 403, the Court of Appeals reversed as well. First, although the statements occurred 20 years prior, so too did the alleged RICO conspiracy. According to the court, there is no expiration date on probative testimony. Additionally, the court concluded that the other Rule 403 consideration weighed in favor of admission as well. Thus, the court reversed both evidentiary rulings.

U.S. v. Green, 258 F.3d 683 (7th Cir. 07/25/01). In prosecution for drug offenses, the Court of Appeals rejected the defendant's claim that the district court improperly allowed the government to introduce a prior consistent statement of a government witness through a third party. Specifically, through a police officer, the government introduced a statement made by a witness as a prior consistent statement. Under previous circuit authority, United States v. West, 670 F.2d 675 (7th Cir. 1982), the court held that Rule 801(d)(1)(B)'s requirement of cross-examination means that out-of-court statements must be elicited through the declarant, and not through a third party to whom the declaration was made. Since West, however, the court noted that every other circuit had rejected this approach. These other circuits permit a third party to testify about another witness's prior consistent statement, so long as the witness who made the out-of-court statement is available for cross-examination at the same time during trial. Joining these other circuits, the court overruled West and affirmed the district court.

U.S. v. Ruiz, 249 F.3d 643 (7th Cir. 05/02/01). Following his conviction for possession with intent to distribute, the defendant appealed contending the district court erred when it permitted Officer Sanchez (who did not observe the actions of the defendant that led to his arrest) to testify as to his partner's contemporaneous descriptions via walkie-talkie of Ruiz's actions on the night of his arrest. The government argued the evidence was admissible under Rule 803(1) (present sense impression), and the Court of Appeals agreed. The defendant argued the evidence did not qualify under Rule 803(1) because Sanchez was not a disinterested party, he had motivation to bolster his partner's credibility, and there was no independent corroboration of the statements. The Court held that whether Sanchez had motivation to bolster his partner's credibility does not render the evidence inadmissible because credibility is a determination for the jury. Likewise, the lack of independent corroboration of the evidence was a jury question. The Court went on to state that, even if the government offered the evidence to bolster the partner's credibility, the statements were still admissible under Rule 801(d)(1)(B) as prior consistent statements.

U.S. v. Lea, 249 F.3d 632 (7th Cir. 05/02/01). Defendant sought to introduce the results of a polygraph examination supporting his defense theory of third-party culpability. The district court denied his request and defendant appealed contending the district court incorrectly analyzed the admissibility of the evidence under a Daubert framework because the Seventh Circuit has stated that such inquiries are to be handled under a Rule 403 balancing of probative value versus prejudicial effect. After noting district courts have a great deal of discretion when deciding whether to admit polygraph evidence, the Court stated, "We continue to hold that a district court need not conduct a full Daubert analysis in order to determine the admissibility of standard polygraph evidence, and instead may examine the evidence under a Rule 403 framework. Nonetheless, we posit that the factors outlined in Daubert remain a useful tool for gauging the reliability of the proffered testimony, as reliability may factor into a 403 balancing test." The Court affirmed the district court, stating that the district court appropriately used the Daubert analysis to assist in its reliability determinations required under Rule 403.

U.S. v. Hoover, 246 F.3d 1054 (7th Cir. 04/12/01). In prosecution for various charges arising out of the operations of the Gangster Disciples, the Court of Appeals affirmed the defendants' convictions over an argument that a Bruton violation had occurred. At trial, the government introduced the statement of a co-defendant wherein he implicated two of his co-defendants. Although Bruton prohibits such evidence where the declarant will not testify, the government sought to avoid this rule of law by redacting the names of the co-defendants. Thus, the government substituted the names of the co-defendants with "incarcerated leader" and "unincarcerated leader." The Court of Appeals concluded that only a person unfit to be a juror could have failed to appreciate that these substitutions were the codefendants in question. Moreover, "redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that . . . the law must require the same result." Notwithstanding

this finding of error, however, the court concluded that it was harmless. According to the court, seven weeks of damning evidence, including the defendants' implausible defense, made it clear beyond a reasonable doubt that the defendants would have been convicted even without the error.

U.S. v. Abdelhaq, 246 F.3d 990 (7th Cir. 04/10/01). In prosecution for numerous counts of bank fraud, mail fraud, securities fraud, and welfare fraud, the Court of Appeals rejected the defendant's argument that the court improperly allowed evidence in at trial which related to various severed counts. Specifically, the district court severed several counts from the case which ultimately went to trial. At trial, however, the government introduced evidence which referred to facts relating to the severed counts during trial. The Court of Appeals held that severance does not prohibit the introduction of evidence related to severed counts so long as that evidence is relevant to the charges being tried. According to the court, severance is not the equivalent of a ruling granting a motion in limine to exclude specified evidence from trial. Although evidence relevant *only* to a particular count in the indictment becomes irrelevant if the count is severed, relevant evidence is unaffected. When such evidence is presented, the defendant can object to its admission on any of the grounds for such an objection that the Federal Rules of Evidence allow, but severance is not one of those grounds. Accordingly, because the evidence introduced was relevant to the charges being tried, no error occurred.

U.S. v. Scott, 245 F.3d 890 (7th Cir. 03/26/01). In prosecution for conspiracy to distribute narcotics, the Court of Appeals rejected the defendant's contention that the government violated Brady v. Maryland when it failed to disclose exculpatory grand jury testimony prior to a suppression hearing. Because the defendant made this argument for the first time on appeal, the court reviewed the question for plain error. Applying this standard, the court first noted that neither the Supreme Court nor the Seventh Circuit has yet addressed the question of whether Brady requires the disclosure of exculpatory information prior to a suppression hearing, and the court refused to rule on the question in the present case. Rather, the court noted that the exculpatory information was ultimately revealed to the defendant prior to trial and used by the defendant at trial for purposes of cross-examination. Therefore, given that the defendant had the material prior to trial and was able to use it, the court could not conclude that a plain error occurred such that the error "seriously affected the fairness, integrity or public reputation of the judicial proceedings."

EXPERTS

U.S. v. Lamarre, 248 F.3d 642 (7th Cir. 04/20/01). In prosecution for bank fraud, the defendant argued that the district court improperly excluded his proffered expert. The defendant's theory of defense was that he was incapable of reading or understanding the various loan documents he signed and therefore could not have formed the specific intent to defraud the bank. In support of his theory, he proffered the expert testimony of a board-certified psychologist who intended to testify as to the defendant's limited intellectual aptitude. The district court, however, excluded the testimony, finding that the testimony would invade the province of the jury and would do nothing more than suggest that the defendant was not intelligent enough to lie and defraud. The Court of Appeals held that the district court erred in making this conclusion, it improperly applying the "relevance" portion of the Daubert analysis. The court noted that although laypersons are qualified to evaluate things within their everyday experience, scientifically valid social science can be offered to show a jury that their commonly held beliefs are incorrect. Such was the case here. The expert's testimony was directed at the defendant's very theory of defense, and although the jury had commons sense to determine whether the defendant understood that he was defrauding the bank, that fact alone was insufficient to exclude the evidence. Notwithstanding the error, the court went on to find it harmless. Looking to the evidence as a whole, even with the expert's testimony, no rational jury could conclude that the defendant did not know he was defrauding the bank.

GUILTY PLEAS

U.S. v. Jeffries, ___ F.3d ___, No. 00-2373 (7th Cir. 09/07/01). On appeal after a plea of guilty, the defendant argued that his guilty plea was invalid because the

district court failed to inform him that, if he were to go to trial, he would be able to appeal his conviction. The court rejected this argument, noting that Rule 11 does not require a district court to give such an advisement. Nor has any court required such an advisement. Accordingly, the defendant's plea was knowing and voluntary, for the district judge complied with Rule 11 and the defendant posited no other grounds for invalidating the plea. Given that the judge was not required to make the advisement, the court also held that trial counsel was not ineffective for failing to move to withdraw the plea on this basis.

HABEAS / 2255

Edwards v. U.S., ___ F.3d ___, No. 99-4162 (7th Cir. 09/24/01). Upon consideration of a motion under 28 U.S.C. § 2255, the Court of Appeals held that the "mailbox rule" articulated by the Supreme Court in Houston v. Lack, 487 U.S. 266 (1988), applies to motions filed under 59(e), as well as most other court pleadings. In Houston, the Supreme Court held that for purposes of Fed. R. App. P. 4(a)(1), a notice of appeal filed by a *pro se* prisoner would be considered "filed" at the moment of delivery to the prison authorities, rather than at a later point in time after the authorities had forwarded the notice to the court and the court had formally recorded its receipt. Rule 4(c)(1) now reflects that holding. The Court of Appeals noted that the policy on which the Houston Court relied--that is, that institutional constraints prevent prisoners from monitoring the delivery of a notice of appeal after it has been entrusted to the prison authorities--applies with equal force to the filing of a motion under Rule 59(e). Although the court noted that it need not decide whether there is any kind of paper, or any circumstance, under which a district court would be entitled to hold a *pro se* litigant to an actual receipt standard, it also stated that it was "confident that this would be an exceptional situation."

Dixon v. Snyder, ___ F.3d ___, No. 00- 142 (7th Cir. 09/20/01). Upon consideration of a district courts grant of a petition for habeas corpus in connection with an Illinois murder conviction, the Court of Appeals affirmed the grant, finding that the petitioner had demonstrated that his trial counsel was ineffective. Only one witness directly implicated the defendant in the murder, and before trial, that witness recanted his statement to police implicating the defendant. He recanted in both an affidavit and in a statement made before a court reporter. Based upon this recantation, defense counsel assured his client that there was no need to prepare a defense and no need for him to testify. At the subsequent bench trial, the witness testified that the defendant did not commit the murder. The State, however, attempted to introduce the witnesses' prior statement made to police, relying upon Section 115-10.1 of the Illinois Code of Criminal Procedure. That section allows prosecutors to introduce prior inconsistent statements as substantive evidence rather than solely for impeachment when the following three conditions are met: (1) the prior statement had to be inconsistent with the testimony at trial; (2) the witness had to be subject to cross-examination concerning the statement; and (3) the statement had to describe an event of which the witness had personal knowledge and had to be signed by the witness. Despite this statutory provision, defense counsel objected and argued that the statement could only be introduced for purposes of impeachment. He did not argue that one of the three statutory requirements had not been met. Despite the trial judge's repeated references to the statute, defense counsel insisted that the law in Illinois did not allow such statements to be introduced as substantive evidence. The court found that not only was defense counsel's ignorance of a 7-year old change in Illinois law a "startling ignorance of the law," but that this ignorance caused defense counsel to engage in a fundamentally flawed trial strategy. Specifically, because defense counsel erroneously believed that the prior inconsistent statement could not be introduced as substantive evidence, he did not present any defense, introduce the witness' sworn recantations, or cross-examine the witness. Specifically, had counsel been aware of the relevant statute, he would have known that the prior inculpatory statement could only be introduced if the witness was available for cross-examination. Given that the witness had repeatedly "taken the Fifth" upon direct examination by the government, he would likely have done so upon cross-examination, thereby precluding the application of the statue allowing the introduction of the previous statement. However, because defense counsel did not even attempt to cross-examine the witness, the State could meet

all three parts of the statutory test. Moreover, the deficient performance was prejudicial, for had counsel properly understood the law, he could have prevented the introduction of the only piece of evidence directly linking the defendant to the murder.

Ruth v. U.S., ___ F.3d ___, No. 01-2006 (7th Cir. 09/12/01). On consideration of the district court's holding that the petitioner filed a successive 2255 petition without permission from the Court of Appeals, the court reversed. After the conclusion of the defendant's trial, the petitioner filed a motion for new trial based upon new evidence. The district court denied the motion, finding that the new evidence was merely cumulative. The petitioner thereafter filed a 2255 petition. However, interpreting United States v. Evans, 224 F.3d 670 (7th Cir. 2000), the district court held that the petitioner's motion for new trial constituted a previous collateral attack, thereby requiring permission for the filing of a 2255. The Court of Appeals noted that a Rule 33 motion for a new trial must be considered a collateral attack for purposes of 2255 ¶ 8, the provision governing successive habeas corpus filings, when the substance of the motion falls withing the scope of 2255 ¶ 1. However, a *bona fide* motion for a new trial on the basis of newly discovered evidence falls outside 2255 ¶ 1 because it does not contend that the conviction or sentence violates the Constitution or any statute. In the present case, unlike Evans, the defendant made a legitimate Rule 33 motion, offering new evidence. Accordingly, his subsequent 2255 petition was not successive.

Pierson v. Bell, ___ F.3d ___, No. 00-4296 (7th Cir. 09/10/01). Upon consideration of the district court's grant of a habeas petition, the Court of Appeals reversed upon appeal by the state. The petitioner, a former police officer, was convicted in state court of first-degree murder and aggravated discharge of a firearm. In his habeas petition, he alleged his counsel was ineffective for failing to call an eye witness of whom he was aware. At the evidentiary hearing on the petition, the potential witness testified that he saw petitioner firing at the victim, but the victim was also standing and firing at the petitioner as well. This testimony differed from testimony at trial indicating the petitioner shot the victim while he sat in his car. Based on this evidence the district court found trial counsel to be ineffective for failing to investigate with respect to this witness, and held that a fundamental miscarriage of justice would occur if the petitioner's conviction were to stand unless it were the product of a fair trial including this new evidence. On appeal, the Court of Appeals noted that the district court by-passed any procedural default analysis, instead relying on the narrow class of cases which implicate a fundamental miscarriage of justice where the petitioner shows a constitutional violation has probably resulted in the conviction of one who is actually innocent. Under this approach, however, the petitioner must show that no reasonable juror would have convicted had the new evidence been presented at trial. A petitioner's case must be "extraordinary," and requires a "stronger showing than that needed to establish prejudice" under Strickland. Given this heightened standard, the petitioner could not prevail. According to the court, the witness' testimony was isolated in time, and he neither saw the events leading up to the shooting or the conclusion thereof. Thus, even if the testimony was credible as the district court found, it did not establish the petitioner's innocence. Moreover, even under the Strickland standard, the petitioner could not establish prejudice, for the testimony was not inconsistent with much of the testimony presented at trial showing the petitioner did not act in self-defense.

Ramunno v. U.S., ___ F.3d ___, No. 01-1731 (7th Cir. 09/07/01). Upon consideration of the government's motion to vacate a certificate of appealability, the Court of Appeals granted the motion. The district court issued a certificate of appealability specifying one issue: "the date upon which the petitioner's conviction became final for purposes of the one-year statute of limitations." The Court of Appeals noted that 28 U.S.C. § 2253(c)(1)(B) provides that a certificate of appealability may only issue if the applicant has made a substantial showing of the denial of a constitutional right. The issue certified in this case, although concerning an issue of statutory interpretation, does not concern "the denial of a constitutional right." Thus, the court concluded that the certificate should never have issued in this case. The court noted that in the future, upon motion by the government to vacate a certificate of appealability, the court will

invite a response by counsel or the *pro se* petitioner, citing this opinion. If that response does not draw the court's attention to a substantial constitutional issue, the certificate will be vacated and the appeal dismissed.

Chambers v. McCaughtry, ___ F.3d ___, No. 00-1959 (7th Cir. 09/05/01). Upon consideration of the district court's dismissal of a habeas corpus petition, the Court of Appeals held that the defendant had procedurally defaulted his issue presented. Specifically, in the state courts, the petitioner argued that the district court's jury instruction concerning felony murder violated due process because it relieved the state of its burden of proving all elements of the offense of felony murder beyond a reasonable doubt. In federal court, however, he argued that the court's instruction violated his right to due process by retroactively imposing a broader, unexpected definition of felony murder. The Court of Appeals noted that this argument was not fairly presented to the state courts. Rather, he mentioned this argument only in a footnote in another argument. Such a passing reference could not have placed the state courts on notice that he was presenting the argument as an independent basis for relief. Nor did the reference present the state appellate court with sufficient elaboration. Finally, the court noted that although both arguments challenged the same instruction, the two arguments alleged distinct violations. Accordingly, the court affirmed the dismissal of the petition based on procedural default.

Boss v. Pierson, ___ F.3d ___, No. 98-3665 (7th Cir. 08/31/01). Upon consideration of the district court's denial of a habeas petition based upon Brady, the Court of Appeals reversed. At trial on the petitioners' state robbery and murder charges, the defense presented evidence that the defendants were not at the scene on the day of the crimes. This evidence was corroborated by the testimony of Janice Hill, who stated that the petitioners were not at the scene on the day in question. On the last day of trial, the prosecution provided to the defense an investigative summary of an interview conducted with Janice Hill, wherein she stated that another individual, Robert Mitchell, bragged about committing the crimes, and fingered the defendants so that he would not be charged. Based on this new information, defense counsel sought a continuance, but the trial court denied it. The trial court also denied a motion for new trial, wherein counsel indicated that he has spoken with Robert Mitchell and he admitted to committing the crime. On consideration of the habeas petition, the district court held that the state had not suppressed the evidence. The Court of Appeals noted that the prosecution has an affirmative duty to disclose evidence that is both favorable and material to either guilt or punishment under Brady. To establish a Brady violation, the defendant must establish suppression, favorability, and materiality. The state did not contest favorability. Considering suppression, this occurs only if the prosecution failed to disclose the evidence that it or law enforcement was aware of before it was too late for the defendant to make use of the evidence, and the evidence was not otherwise available to the defendant through the exercise of reasonable diligence. The state argued that, because Hill was a defense witness, the defense had ample opportunity to discover the evidence through reasonable diligence. The Court of Appeals, however, rejected the proposition that any information possessed by a defense witness must be considered available to the defense for Brady purposes. A defense witness may be uncooperative, reluctant, or learn of certain evidence in the time between when she spoke with the defense counsel and the prosecution. Moreover, defense counsel cannot be expected to ask witnesses about matters completely unrelated to the witness's role in the case. Additionally, a defense witness's knowledge is quite different from the type of evidence typically found to be available to defense counsel through reasonable diligence. In the typical case, the question is whether defense counsel had access to a document available through an open file policy. Here, the information is contained in a person's head. Mind reading is beyond the capacity of the most diligent attorney. Turning to materiality, the evidence was clearly so, for it consisted of a confession by a state's witness of actually committing the crime. Accordingly, the court granted the writ.

Henderson v. U.S., ___ F.3d ___, No. 01-2989 (7th Cir. 08/29/01). Upon motion to file a successive 2255 petition, the Court of Appeals held that if a petitioner files a Rule 33 motion which is later deemed a collateral attack pursuant to United States v.

Evans, 224 F.3d 670 (7th Cir. 2000), a district court's failure to advise the petitioner that the Rule 33 motion may be deemed a 2255 attack and give him a chance to withdraw it, will result in the motion not being considered a 2255 petition. Accordingly, under such circumstances, the petitioner need not seek approval from the Court of Appeals prior to filing a 2255 petition.

Montgomery v. Anderson, ___ F.3d ___, No. 00-2869 (7th Cir. 08/13/01). Upon consideration of a petition filed under 2254, the Court of Appeals made the following holdings: (1) a 2254 petition is the right way to present a claim of constitutional error in a decision affecting the rate of earning good-time credits; and (2) Indiana's good-time credit system is structured in such a way as to create a liberty or property interest requiring due process before a prisoner's credit-earning class may be reduced. The court also noted that 2254 is the proper vehicle because the ultimate *duration* of imprisonment is implicated, whereas challenges to disciplinary segregation implicate the *severity* thereof, such challenges required to be made through a 1983 action.

Dahler v. U.S., 259 F.3d 763 (7th Cir. 07/17/01). Upon application for leave to file a successive 2255 petition, the Court of Appeals denied the request. The petitioner was originally sentenced as an armed career criminal, but upon the filing of his first 2255 petition, gained a re-sentencing in the district court. The district court, however, re-sentenced the petitioner as an armed career criminal, based on different prior convictions than used originally. The petitioner then sought leave to file a successive attack. The Court of Appeals noted that because the petitioner was re-sentenced after his victorious 2255 petition, he is not entitled to another initial attack. Although he has only one conviction, he has been sentenced twice. Because he has one chance to wage a collateral attack (without needing appellate approval) challenging any constitutional errors made in that re-sentencing proceeding, appellate approval would not ordinarily be required. In the present case, however, the petitioner's argument attacked not events which occurred at his re-sentencing, but rather events that occurred at his original trial. In such circumstances, a belated challenge to events that precede a resentencing must be treated as a collateral attack on the original conviction and sentence, rather than as an initial challenge to the latest sentence. Thus, the court treated the second petition as successive. Moreover, applying the standard for successive petitions, the petition failed to meet the statutory standards for the grant thereof.

Bruce v. U.S., 256 F.3d 592 (7th Cir. 07/05/01). On consideration of a 2255 petition alleging ineffective assistance of counsel in the defense of four armed robbery charges, the Court of Appeals held that trial counsel was ineffective. The petitioner claimed that trial counsel failed to contact two alibi witnesses who placed the petitioner at locations other than the scene of the crime. In support of this claim, the petitioner attached the affidavits of both witnesses wherein the affiants stated that they had contacted defense counsel, but he neither subpoenaed them nor asked them to testify. In response, the government presented the affidavit of defense counsel where in he stated that he had tactical reasons for failing to investigate these alibi witnesses, although the affidavit did not specify what those reasons were. The district court denied the petition without an evidentiary hearing, on the basis that the defense attorney's affidavit demonstrated that defense counsel was aware of the witnesses, discussed them with the petitioner, and made a tactical decision not to call them. Based on the discrepancies between the petitioner's affidavit, the two witnesses' affidavits, and defense counsel's affidavit, the Court of Appeals concluded that the district court could not conclude that counsel provided effective assistance of counsel without an evidentiary hearing. Specifically, while the petitioner and both witnesses stated that defense counsel failed to contact them, defense counsel indicated that he did. Regarding prejudice, the Court of Appeals refused to address the issue, noting that the district court should in the first instance determine what information would have been obtained from a reasonable investigation and whether that information would have produced a different result. Accordingly, the Court of Appeals remanded the case to the district court for an evidentiary hearing.

Miller v. Anderson, 255 F.3d 455 (7th Cir. 06/29/01). Upon consideration of a capital habeas petition, the Court of Appeals held that the petitioner's trial

counsel was constitutionally deficient, thereby warranting a new trial. The state's case revolved around a co-operating co-defendant, who testified against the petitioner in exchange for a lighter sentence. Needing corroboration for this induced and, at times, contradictory testimony, the state introduced an expert witness who testified that a pubic hair found on the victim was almost certainly the petitioner's. Defense counsel did not consult with its own hair expert, nor call one at trial. In the post-conviction proceedings, the petitioner's new counsel did consult a hair expert who testified that not only was the hair unlike the petitioner's, but consistent with that of the victim instead. Moreover, the state's DNA evidence presented at trial was inconclusive, and it never presented the tiretread and footprint evidence it promised in opening statement. Again, defense counsel never consulted or called its own expert in these areas--the testimony of whom would have shown that these sources of evidence provided no basis for supporting a conviction of the petitioner. Additionally, evidence regarding the purchase of shotgun shells by the defendant the day before the murder could have been easily rebutted by defense counsel had he subpoenaed certain records and done some minimal investigation. Finally, and perhaps most egregiously, defense counsel called as an expert witness a psychologist to testify that the petitioner was incapable of the kind of violence with which he was charged. This testimony allowed the government to present as rebuttal evidence of the petitioner's prior conviction for kidnaping, rape, and sodomy. Looking at all these deficiencies, the Court of Appeals concluded that the petitioner would have had a reasonable shot at acquittal had his lawyer been minimally competent. The court stated, "We think the chance of an acquittal would still have been significantly less than 50 percent; but it would not have been a negligible chance, and that is enough to require us to conclude that the lawyer's errors of representation were, in the aggregate, prejudicial." In the last paragraph, the court also referred the matter to the state's attorney disciplinary authority for investigation of defense counsel.

Matheney v. Anderson, 253 F.3d 1025 (7th Cir. 06/08/01). Upon consideration of a capital 2254 petition, the Court of Appeals remanded the cause to the district court for an evidentiary hearing on the question of whether the petitioner was competent to stand trial. Prior to trial, defense counsel petitioned the trial court for an examination of the petitioner to determine if he was competent to stand trial and whether he was sane at the time the crime was committed. The court granted the motion, but failed to include in its order a direction to examine the petitioner's competency to stand trial, and, rather, only directed the psychiatrists to examine for sanity at the time the crime was committed. Accordingly, while both doctors rendered an opinion regarding the petitioner's sanity, neither rendered an opinion as to the petitioner's competency to stand trial. Based on defense counsel's failure to pursue the competency issue originally raised, and given that Indiana requires a competency hearing where there are "reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of his defense," the Court of Appeals concluded that defense counsel's inexplicable failure fell below a minimal level of competency. Moreover, under the *Strickland* prejudice prong, there was enough in the record to raise a legitimate question as to the petitioner's competency. Accordingly, the Court of Appeals remanded the case to the district court for an evidentiary hearing on the issues surrounding the petitioner's competency raised in his appellate brief.

Agnew v. Leibach, 250 F.3d 1123 (7th Cir. 05/21/01). The Court of Appeals reversed the district court's denial of the applicant's writ of habeas corpus. At the applicant's original trial, the bailiff who was in charge of the jury discovered after the State's case-in-chief and after the first day of a two day trial, that he had been the deputy on duty at the jail the night the applicant was arrested. On this evening of the arrest, the applicant and the deputy/bailiff had a conversation during which the applicant made a material statement indicating his guilt of the crime charged. The state called the bailiff as a rebuttal witness at trial. While the government argued that the applicant was required to prove actual prejudice in this case, the Court of Appeals held "a defendant need prove actual prejudice only where the bailiff's contact with the jury is *de minimus* or the bailiff's testimony involves some merely formal aspect of the case. When the

bailiff's contact is extensive and the testimony addresses substantive issues of the defendant's guilt, prejudice is presumed." The government argued any error was harmless. The Court of Appeals again disagreed and stated error was not harmless in this case because (1) evidence of a confession was important to the government's case; (2) the testimony was not cumulative because the bailiff was the only witness to the confession; (3) the evidence was not corroborated by other witnesses; and (4) the case against the applicant was weak.

Denny v. Gudmanson, 252 F.3d 896 (7th Cir. 05/18/01). On appeal from the district court's denial of his writ of habeas corpus, the defendant claimed admissions of his brother's inculpatory statements at their joint trial for first degree murder violated Cruz v. New York, 481 U.S. 186 (1987) (holding that in a joint trial, where a nontestifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant . . . the Confrontation Clause bars its admission at the joint trial, even if the jury is instructed not to consider it and even if the defendant's own confession is admitted against him.) The Court of Appeals first evaluated the defendant's claim under the hearsay exception of statement against penal interest, which the government argued made the statements admissible against the defendant. The Court stated that simply because a statement falls within a hearsay exception does not necessitate a finding that there is not a Confrontation Clause violation. The analysis of reliability under the Confrontation Clause is narrower than under exceptions to the hearsay rule. The Court went on to determine whether the brother's statements possessed sufficient indicia of reliability to warrant their admission. The Court concluded the statement in this case was not of the type usually considered unreliable – such as statements that shift blame from one defendant to another, or statements made during a custodial interrogation. Rather, in this case, the statements were made to trusted friends and family members, therefore rendering them more reliable. The Court recognized that although "the time-honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation, . . . the specific nature of the statements in this instance require a departure from that principle." The Court went on to say that even if the statements had been admitted in violation of the Confrontation Clause, any error would have been harmless because the evidence of guilt in this case was overwhelming.

Brannigan v. U.S., 249 F.3d 584 (7th Cir. 04/20/01). Upon consideration of a successive application for permission to commence collateral litigation, the Court of Appeals dismissed the application with prejudice. After the petitioner's direct appeal and initial collateral attack, he sought permission to file a second collateral attack, contending that Apprendi foreclosed the district court's decision to add two levels to his offense seriousness under the Guidelines for possessing a weapon in the course of his drug dealing. The court denied the application on the merits, noting that Apprendi does not apply to the guidelines. In his current, successive application to file a successive collateral attack, the petitioner argued that the jury rather than the district judge should have determined how much cocaine the conspirators had distributed. In denying the application, the court first noted that Section 2244(b)(1) says that a "claim" presented in a prior application is forever closed. According to the court, the underlying events determining a "claim," rather than legal arguments advanced to obtain relief from those events. The court thus concluded that each of the petitions concerned the same sentence, and the legal theory used to challenged that sentence was the Apprendi principle. Thus, it would cut matters entirely too fine to divide into separate "claims" each element of the calculation under the Sentencing Guidelines. That would fracture a single sentence into dozens of "claims," one for each prior conviction that affects the criminal history level plus one for each offense-severity level. Accordingly, because the application presented the same "claim" as the petitioner's first, the court denied the application with prejudice.

Bracy v. Schomig, 248 F.3d 604 (7th Cir. 04/18/01). On consideration of this habeas petition, the Court of Appeals refused to reverse the petitioners' state court death penalty convictions, notwithstanding the fact that the men were tried by a judge convicted of taking bribes during the course of his entire

career. Although the judge had not solicited or received bribes from these petitioners, they argued that the judge habitually came down harder on defendants who had not bribed him than he would have done had he not been taking bribes. He did this, they argued, both to deflect any suspicion that might arise, in the cases in which he had accepted bribes and as a result acquitted or gone easy on defendants, that he was "soft" on criminals (which might endanger his reelection), and to increase the size and frequency of the bribes offered him. The Court of Appeals held, however, that the Supreme Court requires proof of compensatory bias in the petitioner's own case. In other words, even if the judge engaged in compensatory bias in some cases, this would not be enough to justify a conclusion that the petitioners had been convicted and sentenced in violation of the due process clause. The petitioners would have to prove that the judge in question had been actually biased at their trial. After closely examining the evidence regarding the judge's specific bias in the present case, the court ultimately concluded that the argument that the judge was biased in this case was "hopelessly speculative." Judge Rovner filed a vigorous dissent, outlining in detail the judge's sordid activities, and concluded her dissent as follows: "It strikes me that the court's disposition of this case is laden with irony. Defendants tried before judges of unquestionable integrity, with a possible temptation to favor the government, are entitled to new trials. Defendants who bribed Maloney [the judge in question], only to be convicted by him when he decided that fixing their cases was too risky, have won new trials. Even defendants who managed to initially escape conviction by successfully bribing Maloney are being given exactly what Bracy and Collins seek today--a fair trial before an honest and impartial judge. But these two petitioners, sentenced to death before a judge whose career as an attorney and judge was corrupt from beginning to end, are told that the judgment of a racketeer is perfectly satisfactory. It is a sad day indeed when defendants who attempted to purchase their way out of a conviction receive a greater measure of justice than those who did not."

Horton v. U.S., 244 F.3d 546 (7th Cir. 03/28/01). Upon consideration of a 2255 petition, the Court of Appeals held that a defendant's conviction becomes "final" for statute of limitations period purposes upon denial of certiorari by the Supreme Court, and not upon expiration of the 25 days in which a defendant has to file a motion to reconsider the denial of certiorari. The petitioner argued that because Supreme Court Rule 44.2 gives a petitioner 25 days to file a motion to reconsider the denial of certiorari, his conviction did not become final until that period had expired. In rejecting this argument, the Court of Appeals held that unlike a petition for rehearing in the Court of Appeals, a petition for rehearing before the Supreme Court does not stay the denial of certiorari: the denial is effective when issued. Accordingly, although the petitioner filed his 2255 petition within one year of the expiration of the 25 day reconsideration period, his petitioner was untimely because it was filed more than 1 year after the Supreme Court denied certiorari.

IMMIGRATION

U.S. v. Carlos-Colmenares, 253 F.3d 276 (7th Cir. 06/07/01). In prosecution for illegal re-entry, the Court of Appeals overruled its prior precedent, U.S. v. Anton, 683 F.2d 1011 (7th Cir. 1982), and held that intent to reenter the country unlawfully is an element of the offense. Under prior precedent, a reasonable though mistaken belief that the defendant had the consent of the Attorney General to reenter the country was a defense to prosecution. However, every other circuit to consider the question concluded that such a mistaken belief was not a defense. The Court of Appeals here agreed with those circuits, noting that the relevant statute provided for no such defense. Although illegal re-entry is an element of the offense, showing intent to reenter without the requisite permission is not. In the court's words, "An alien who has been deported renters this country at his own peril. He has better make certain that he has the Attorney General's express consent to enter, because if he does not he is guilty of a felony."

IN FORMA PAUPERIS

U.S. v. McGiffin, ___ F.3d ___, No. 98-3400 (7th Cir. 09/21/01). In this appeal, the Court of Appeals reversed the district court's order requiring the defendant to contribute $12,238 of seized funds to the Federal Public Defender to defray the expense of his defense. The defendant was appointed the Federal Public Defender for the

Southern District of Illinois. Several weeks later, the government filed a motion requesting that the above-noted amount of money seized during the search of the defendant's residence be given to the FPD. The FPD opposed the motion, noting that requiring the defendant to contribute the funds would impose a substantial hardship given his debts and the fact that if incarcerated he would no longer receive social security benefits. The district court, without an evidentiary hearing or explanation, granted the government's motion. On appeal, the court reversed, noting that prior circuit precedent required the district court to usually hold an evidentiary hearing and always make specific findings regarding whether requiring the contribution would impose an extreme hardship on the defendant, whether it would interfere with his obligations to his family, and whether there were third parties with valid claims to the funds. Because the district court made none of these findings, a remand was required.

JURIES / JURY INSTRUCTIONS

U.S. v. Schaffner, 258 F.3d 675 (7th Cir. 07/24/01). In prosecution for sexual exploitation of a child in violation of 18 U.S.C. § 2251(a), the Court of Appeals rejected the defendant's Commerce Clause challenge to the indictment. The defendant was charged with taking a sexually explicit photograph of a child in one state, and transporting that photograph to his residence in another. According to the defendant, this activity had no substantial relation to interstate commerce as required by the Constitution. The Court of Appeals noted that there are three types of interstate commerce connections: channels of interstate commerce, things in interstate commerce, and substantial effects on interstate commerce. First, regarding the channels of interstate commerce, Congress may prohibit the interstate movement of a commodity through the channels of interstate commerce, as well as protect those channels from the immoral impact of child pornography. Because the photo in question moved in the channels of interstate commerce, this type of connection was established. In other words, the relevant inquiry is not whether the activity in question had a substantial impact on interstate commerce, but rather simply whether the item in question actually moved in interstate commerce.

U.S. v. Gochis, 256 F.3d 739 (7th Cir. 07/11/01). After trial and conviction before a magistrate judge by consent, the district court vacated the conviction on the grounds that the magistrate had failed to explain to the defendant his right to be tried by a district judge, as required by Fed. R. Crim. P. 58(b)(2) and 18 U.S.C. § 3401(b). Indeed, because of the failure to so advise, the court concluded that the written consent was invalid. The government appealed, arguing that the district court improperly imposed a per se reversible error rule, and should have instead reviewed the magistrate's omission under Fed. R. Crim. P. 52(a) for harmless error. The Court of Appeals agreed that harmless error analysis applied, and, under this standard, the question was whether the magistrate's omissions affected the defendant's decision to waive his right to a trial before a district judge. Here, there was no evidence that the defendant suffered any prejudice. Nothing indicates that he was actually ignorant of his right to trial before a district judge. Moreover, the defendant did not allege that if properly admonished, he would have had his case reassigned to a district judge.

U.S. v. Skidmore, 254 F.3d 635 (7th Cir. 06/19/01). In prosecution for possession of a weapon by a felon, the defendant argued that the following instruction given to the jury was improper: "The jury will always bear in mind that the law never imposes on a defendant in a criminal case the duty of calling any witnesses or providing any evidence, and no adverse inference may be drawn from his failure to do so." The defendant argued that the use of the word "failure" in the instructions improperly carried with it the possible implication from the court to the jury that the defendant had neglected a responsibility to present testimony and other evidence. The Court of Appeals agreed that the use of the word "failure" was improper, but, because the instruction was not objected to below, reviewed the error under the plain error standard. Under this standard, the court found that reversal was not required because the instruction was one of 26 other properly worded instructions and the court, looking at the instructions as a whole, properly instructed the jury as to the defendant's right to

not present a defense.

U.S. v. Harbin, 250 F.3d 532 (7th Cir. 05/08/01). During trial on a multi-count indictment for conspiracy to possess with intent to distribute, use of a minor in the conspiracy, possession with intent to distribute, and carrying a firearm during a drug trafficking offense, the district court allowed the government to strike a juror on the sixth day of an eight day trial using a peremptory challenge "saved" from the jury selection phase. The juror was one of the two African-Americans on the jury and the only black male. The Court of Appeals stated peremptory challenges are by their nature a jury selection tool and "have no place during the trial." The Court also noted that while the Due Process Clause does not require that defendants have peremptory challenges, it does require a "balance of forces between the accused and his accusers." In addition, defendants have historically been allowed equal or more challenges than the government, reflecting that the "balance" favors the defendant rather than the government. In this case, the defendants used all of their challenges during jury selection and therefore had no tools to counterbalance the government's challenge mid-trial. Furthermore, the Court indicated the alternate juror provisions of Rule 24(c) do not allow peremptory challenges to survive the jury selection process because, if "saving" were allowed, all six or more of the alternate jurors could be used. Rule 24(c) also says alternates should only be used when regular jurors are unable to serve or disqualified; "challenged jurors" are neither. The Court held than this type of error, which affects basic trial rights, can never be treated as harmless error and requires automatic reversal.

U.S. v. Johnson, 248 F.3d 655 (7th Cir. 04/23/01). On appeal from their convictions for conspiracy to possess with intent to distribute and possession with intent to distribute, the defendants claim the district court abused its discretion under the Court Interpreters Act, 28 U.S.C. §§ 1827, 1828 ("CIA") and violated their 5th and 6th Amendment rights by not providing an additional court-appointed interpreter to sit at the defense table, thereby inhibiting their ability to simultaneously communicate with counsel during witness testimony. At trial one interpreter translated from English to Spanish into headsets worn by the defendants. No other interpreter was available if defense counsel wished to speak to the defendants (or vice versa) during testimony. The district court allowed defendants to take notes during testimony and then allowed breaks for the defendants to discuss those notes with their counsel through the interpreter. The Court of Appeals held that the CIA does not create or expand constitutional rights of non-English speaking defendants. District courts have a duty to evaluate whether a defendant is entitled to an interpreter when the court is put on notice that the defendant primarily or only speaks a language other than English (the Court noted this rule is consistent with rules in the 6th, 9th, and 11th Circuits). A district court can decide to appoint more than one interpreter, but the CIA does not mandate such a rule. Regarding the defendants' constitutional claims, the Court held the Constitution does require than a defendant be able to communicate with his or her counsel, however, it does not require an additional interpreter for the defense table. In this case, the defendants' constitutional rights were respected when the district court allowed them to use the interpreter during breaks in testimony.

U.S. v. Banks-Giombetti, 245 F.3d 949 (7th Cir. 03/30/01). In prosecution for bank robbery, the Court of Appeals reversed the district court's imposition of jury costs upon the defendant. Because the defendant pled guilty after the jury venire for his trial had been assembled, the district court ordered him to pay the costs of assembling them. The Court of Appeals, in reversing, noted that a district court's authority to assess costs against criminal defendants is found in 28 U.S.C. § 1918(b) and Rule 57(b) of the Federal Rules of Criminal Procedure. Moreover, absent some express statutory authority, 28 U.S.C. § 1920 lists the costs of prosecution that a court may assess under section 1918(b). Section 1920 does not list jury costs as a cost of prosecution. Moreover, although Rule 57(b) allows a district to adopt local rules, there was no dispute that the district in question did not have a local rule allowing the imposition of jury costs on criminal defendants. Thus, in the absence of any authority for the imposition of the costs, the district court erred.

U.S. v. Scott, 245 F.3d 890 (7th Cir. 03/26/01). In prosecution for conspiracy to distribute narcotics, the Court of Appeals held that the district court erred in instructing the jury on

Pinkerton liability, but that the error was not "plain." The district court gave the following instruction: "A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of the conspiracy. Therefore, if you find a defendant guilty of the conspiracy as charged in Count 1 and if you find beyond a reasonable doubt that while that defendant was a member of the conspiracy, his fellow conspirators committed the offenses charged in Counts 2, 3, 4, and/or 5, then you should find him guilty of Counts 2, 3, 4, and/or 5." According to the court, this instruction was inadequate, for it did not properly inform the jury of the necessary requirements for applying the Pinkerton doctrine. Specifically, for a Pinkerton instruction to be adequate, it must focus the jury on the coconspirator's act, on whether it is a crime, on whether the coconspirator's guilt of this crime was proved beyond a reasonable doubt, and on whether it was committed in furtherance of the conspiracy in which the defendant participated. In the present case, the instruction failed to focus the jury on whether the crime committed was in furtherance of the conspiracy. However, notwithstanding this error, under the plain error standard, the evidence introduced at trial demonstrated that the defendants were not prejudiced by the error.

OFFENSE ELEMENTS

U.S. v. Quilling, ___ F.3d ___, No. 01-1314 (7th Cir. 08/20/01). In prosecution for possession of a weapon by a felon, the Court of Appeals rejected the defendant's argument that the evidence was insufficient to support his conviction. Specifically, the defendant argued that the mere fact that the weapon was found in his home was insufficient to establish constructive possession. The Court of Appeals noted that the government must establish a nexus between the accused and the contraband, in order to distinguish the accused from a mere bystander. However, constructive possession has been found to exist when a defendant had a substantial connection to the residence where the firearm and the contraband were found. Given that the defendant admitted that the residence where the weapon was found was his own, a sufficient nexus had been established.

U.S. v. Conteras, 249 F.3d 595 (7th Cir. 04/25/01). On appeal from convictions for conspiracy to possess with intent to distribute and possession with the intent to distribute, the Court of Appeals vacated the defendant's conviction on the conspiracy charge because the record did not support the inference that the defendant conspired with one or more individuals. After noting a charge of conspiracy requires evidence that the defendant and at least one other person agreed to possess cocaine with intent distribute, the Court proceeded to evaluate all possible co-conspirators. Number 1 did not qualify as a co-conspirator because he was a paid confidential informant whose goal was not to commit a crime but to expose one. Number 2 had only purchased from the defendant on one occasion and there was no evidence of a prolonged operation or that he had a stake in the success of the operation. Number 3 had also purchased from the defendant, but there was no evidence he had a stake in the operation. Number 4, although he and the defendant had a repeat buyer/seller relationship and he had supplied the defendant with ten one-kilo quantities in the last 6 months, did not qualify because there was no evidence he fronted the defendant's operation or benefitted from resale of the drugs. Number 5 was defendant's landlord and a bill with his name on it was found in the defendant's apartment where two buys occurred. However, there was no evidence that he and the defendant had an illicit agreement.

U.S. v. Giles, 246 F.3d 966 (7th Cir. 04/09/01). In prosecution for racketeering, mail fraud, extortion, and tax fraud, the Court of Appeals considered the question of whether the government must prove a *quid pro quo* in all cases where extortion and bribery are alleged. In the present case, a Chicago alderman was alleged to have accepted illegal payments which were not in the form of campaign contributions. He argued that the government was required to prove that the payments were made in exchange for a specific promise to perform or not perform an official act. The court noted that in the case of campaign contributions, the law clearly established that the government must prove a *quid pro quo*. The government, however, argued that such was not the case for non-campaign

related payments. Specifically, campaign contributions are often made with the hope that the recipient, if elected, will further interests with which the contributor agrees. To distinguish legal from illegal campaign contributions, it makes sense to require the government to prove that a particular contribution was made in exchange for an explicit promise or official undertaking. Other payments to officials are not clothed with the same degree of respectability as ordinary campaign contributions, and therefore, perhaps is should be easier to prove those payments are in violation of the law. Notwithstanding this logic, however, the Court of Appeals concluded that a *quid pro quo* most be proved for all payments--campaign or otherwise. The court came to this conclusion base upon the Supreme Court's language in Evans v. United States, 504 U.S. 255 (1992). Unfortunately for the defendant, the court nevertheless concluded that the government had in fact proved a *quid pro quo*. Specifically, the evidence showed that the defendant stated that he had a "deal" with the person making payments to him and circumstantial evidence showing that the defendant accepted $81,000 while intervening with the city to help the payer's business.

RECUSAL

U.S. v. Ruzzano, 247 F.3d 688 (7th Cir. 04/04/01). In prosecution for tax evasion, the Court of Appeals rejected the defendant's argument that the district judge should have recused herself pursuant to 28 U.S.C. 455(a) and 455(b)(3). Specifically, the defendant noted that the district judge worked for the United States Attorney at the time the defendant was indicted. Considering first the defendant's 455(a) claim requiring recusal "in any proceeding in which the judges impartiality might reasonably be questioned," the court noted that circuit precedent requires a defendant to raise such a claim via mandamus. Because the defendant did not file for a mandamus--and indeed did not raise the issue at all in the district court--the court refused to find error. Regarding the 455(b)(3) claim requiring recusal where the judge "served in governmental employment and in such capacity participated as counsel concerning a particular case," the defendant failed to raise this issue or seek mandamus as well. However, the court noted that the rationale requiring mandamus for 455(a) claims did not apply to 455(b)(3) claims. Specifically, mandamus is required for 455(a) claims because an injury to the judicial system as a whole is threatened, where a 455(b)(3) claim implicates the substantial rights of the individual party. Therefore, although mandamus is still the preferred route, the court held it would consider 455(b)(3) claims notwithstanding a failure to petition for mandamus. Unfortunately for the defendant, however, his failure to raise the issue at all in the district court required "plain error" review. Under this standard, the defendant failed to present any evidence that the district judge had any involvement in his case when employed by the U.S. Attorney. Thus, the court affirmed his convictions.

SENTENCING

U.S. v. Martinez-Garcia, ___ F.3d ___, No. 00-2396 (7th Cir. 09/28/01). In prosecution for illegal re-entry, the Court of Appeals held that attempted theft qualifies as an "aggravated felony" for purposes of the 16-level enhancement set forth in U.S.S.G. § 2L1.2(b)(1)(A) and as defined in 8 U.S.C. § 1326(b)(2). The prior to being charged in the present case, the defendant pled guilty to intending to commit theft by unlawfully entering a motor vehicle without the owner's consent. Because 8 U.S.C. § 1101(a)(43)(G) and (U) define an aggravated felony in part as "a theft offense for which the term of imprisonment is at least one year or (U) an attempt or conspiracy to commit an offense described in the paragraph, the prior conviction clearly qualified for the "aggravated felony" enhancement in the Guidelines.

U.S. v. Higgins, ___ F.3d ___, No. 00-2665 (7th Cir. 09/26/01). In prosecution for bank fraud, the Court of Appeals reversed the district court's loss calculation for sentencing purposes. As part of the defendant's scheme, he deposited a bogus $420,000 check into a bank account. He then used the balance statement from this account to induce a Lexus dealer to deliver to him two cars valued at $69,900, after he issued them another bogus check. At sentencing, the district court determined the amount of loss to be $420,000, the full value of the bad check deposited in the account. The Court of Appeals, however, reversed, and noted that there was no indication that the defendant actually intended to deprive the bank of the full $420,000 he purported to be depositing. Indeed, the district

court's comments at sentencing indicated that it believed that the primary purpose of the $420,000 bogus check was to deceive the car dealer into delivery the vehicles. In reaching this conclusion, the court noted that the intended loss analysis turns upon how much loss the defendant actually intended to impose on the financial institution, whether the loss materialized or even whether it was economically impossible to impose such a loss.

U.S. v. McGiffen, ___ F.3d ___, No. 98-3400 (7th Cir. 09/21/01). In prosecution for conspiracy to possess unregistered firearms and destructive devices, the Court of Appeals reversed the district court's obstruction of justice sentence enhancement. The defendant testified at trial. At sentencing, the district court enhanced the defendant's statement based upon this testimony, finding only that "I thought your testimony was riddled with inaccuracies and lies." The Court of Appeals held that this finding was inadequate to support the enhancement. In order to ensure that the obstruction of justice enhancement does not become punishment for any defendant who chooses to exercise his right to testify, the district court "must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same. Among the findings required are that the defendant's misrepresentation was willful, material to the investigation or prosecution of the instant offense, and made with specific intent to obstruct justice rather than as a result of confusion, mistake or faulty memory. Because the district court made no such findings, proper appellate review was precluded and the case was remanded so that the district court could make the necessary findings to support is conclusion.

U.S. v. Sumner, ___ F.3d ___, No. 00-3680 (7th Cir. 09/07/01). In prosecution for distributing cocaine, the Court of Appeals remanded because the government failed to meet its burden of showing that the defendant's relevant conduct was sufficiently related to his offense of conviction. Although the defendant's offense conduct involved 9.4 grams of powder cocaine, the district court sentenced the defendant based upon an additional 57.6 grams of crack cocaine. Thus, the offense conduct accounted for less that 0.2% of the total drug quantity. The PSR noted that the defendant began purchasing quarter ounce quantities of crack in the winter of 1997 each week for about two months. He thereafter voluntarily ceased selling crack cocaine. This information was supposedly based on the defendant's own statements. However, the defendant objected to the PSR, claiming that he did not make such a statement, but rather stated that he bought only 7 grams of crack. At sentencing, both the defendant and the agent who interviewed him testified. The court weighed in on the side of the agent. On appeal, the defendant argued that the crack transactions were not part of the same course of conduct or commons scheme or plan as the offense of conviction, for the crack transactions lasted for at most two moths, occurred two years prior to the offense of conviction, and were voluntarily terminated. Reviewing the issue for plain error, the court noted that the district court failed to make an express finding on the record that the sales of crack were part of the same course of conduct or common scheme or plan as the offense conduct. Indeed, there was no discussion of the relevant factors. Such a failure to establish such a connection was erroneous under well-established law. Moreover, given that the uncharged conduct increased the defendant's imprisonment range from 8-14 months to 121-151 months, the defendant adequately established prejudice. According, the court remanded to the district court to make adequate findings on the record regarding the connection between the offense and relevant conduct.

U.S. v. Williams, 258 F.3d 669 (7th Cir. 07/23/01). In prosecution for carjacking and kidnaping, the Court of Appeals affirmed the district court's imposition of a sentencing enhancement for vulnerable victim (U.S.S.G. § 3A1.1(b)(1)). The defendant took the 71-year old victim's car at gun point, bound her, placed her in the trunk, and savagely beat her. Due to the victim's age, the district court imposed the enhancement. On appeal, the defendant argued that age of the victim alone was not sufficient to warrant the enhancement. Rather, age plus some additional factor was necessary. The Court of Appeals rejected this approach, noting that the relevant guideline section allows for the enhancement due to age, without limitation. An elderly person, alone, will be especially vulnerable to a crime involving

physical violence, the district court therefore did not err.

U.S. v. Palomino-Rivera, 258 F.3d 656 (7th Cir. 07/20/01). In prosecution for illegal re-entry, the Court of Appeals reversed the district court's downward departure based upon its finding that the defendant's 16-level increase for having been deported after being convicted of an aggravated felony overstated the seriousness of the underlying crime. At sentencing, the defendant argued that his underlying felony--theft by taking--was "barely" a felony, and, therefore, should not be treated the same as other, more serious aggravated felonies. The district court agreed and granted an 8-level downward departure. The Court of Appeals noted that Application Note 5 to U.S.S.G. § 2L1.2(b)(1)(A) allows a downward departure if "(A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or a firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year." The Court of Appeals held that, given this Application Note, a case falls outside the heartland of the offense only if these three conditions are met. In the present case, the defendant did not satisfy two of the three criteria: he had four prior felony convictions, and he received a 3-year term of imprisonment on the theft by taking conviction. Accordingly, the court reversed.

U.S. v. Krilich, 257 F.3d 689 (7th Cir. 07/16/01). Upon the government's appeal, the Court of Appeals reversed the district court's grant of a downward departure based upon the defendant's chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain. The court granted a 1-level departure for each of these four conditions. The judge found that, although none of the conditions alone would justify departure, their combination did. The Court of Appeals rejected this basis for departure, finding that the district court apparently believed that any "unusual" medical condition or combination of conditions justifies a departure. However, "extraordinary" is a subset of "unusual." Many defendants similar in age to the defendant in this case have similar physical ailments, but the guidelines put such normal age-related features off limits as grounds for departures. "Older criminals do not receive sentencing discounts." To justify a departure, the court "must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated." In the present case, the district court found just the opposite, noting that the defendant could receive adequate treatment through the BOP. Accordingly, the Court of Appeals reversed.

U.S. v. Bautista, 258 F.3d 602 (7th Cir. 07/12/01). On appeal by the government, the Court of Appeals reversed the district court's 3-level downward departure based on the fact that the defendant's resident alien status would result in his deportation, an "enormously draconian deprivation." At sentencing, the defendant presented evidence that he, his mother, brother, and sister, traveled to the United States in 1987 from Peru in order to get away from his abusive father. A psychologist testified that the defendant suffered from schizophrenia and that return to his father's household in Peru would result in further psychological harm. Based on these facts, he moved for a downward departure, arguing that deportation would be especially hard on him, given that he knew no one in Peru except his father, with whom he could not live. The judge agreed that the unique aspects of deportation in this case brought the case outside the heartland. The Court of Appeals, however, reversed. The court first concluded that, because the defendant's crime was not one related to immigration, the guidelines did not necessarily take into account deportation. Secondly, the court concluded that consideration of the effects of deportation is not forbidden when considering a downward departure. The departure may be granted to offset unusually harsh consequences of deportation. A downward departure based on collateral consequences of deportation, however, is justified only if the circumstances of the case are extraordinary. Having made this statement, the court concluded that the defendant's circumstances were not extraordinary. First, permanent separation from friends and family is a consequence for all aliens who have made the U.S. their home. Second, the defendant's childhood abuse, "although unfortunate," was not extraordinary in comparison with other cases where those factors are present. Accordingly, the court reversed.

U.S. v. Lowell, 256 F.3d 463 (7th Cir. 06/20/01). Upon consideration of the defendant's challenge to the imposition of restitution to a bankruptcy trustee, the Court of Appeals held that such a person was a proper victim under the Mandatory Victim Restitution Act. Because the defendant falsified information on his bankruptcy petition, the bankruptcy trustee engaged in tremendous amounts of unnecessary work. In the present case, the trustee was a private attorney called into service by the U.S. Trustee's Office. Thus, the trustee in this case was in a different position from a full-time government employee who is not entitled to restitution. Here, by falsifying the information regarding assets, he "directly and proximately harmed" the trustee, as the fraud prevented her from easily identifying, seizing, liquidating, and dispersing the concealed assets. This therefore reduced her compensation and increased her costs.

U.S. v. Martinez-Carillo, 250 F.3d 1101 (7th Cir. 05/17/01). Defendant appealed from his conviction and sentence for illegal entry into the US after deportation. First, he contended his conviction for "criminal sexual assault" should not have been considered an aggravated felony. His base offense level was enhanced by 16 levels because he was convicted of an aggravated felony. The guidelines consider sexual abuse of a minor as an aggravated felony and defendant argued that sexual assault and sexual abuse are not the same type of crime. The Court of Appeals held that, in this case, defendant's crime (inserting his finger into his 13 year old daughter's vagina) falls under sexual abuse of a minor. Second, the defendant requested a downward departure under § 2L1.2 because the enhancement for the aggravated felony overstated the seriousness of his crime. The district court denied his request, finding that criminal sexual assault qualified as a crime of violence, therefore making him ineligible for consideration under § 2L1.2. The Court of Appeals affirmed this decision (after distinguishing the two cases on point, Xiong v. INS, 173 F.3d 601 (7th Cir. 1999) & U.S. v. Shannon, 110 F.3d 382 (7th Cir. 1997)) stating that "incest presents an aggravating factor that evokes a serious potential risk of physical injury" and therefore does qualify as a crime of violence. Judge Ripple wrote a concurrence stating, "I write separately solely to suggest that this case also demonstrates the desirability of legislative action to expand the definition of 'crime of violence' to encompass those situations in which the victim, while not suffering physical injury or the threat of physical injury, suffers severe psychological or emotional injury that can be diagnosed under accepted medical standards."

U.S. v. Scott, 250 F.3d 550 (7th Cir. 05/11/01). The defendant was charged with possessing fifteen or more counterfeit "access devices" with the intent to defraud in violation of 18 U.S.C. § 1029, based on the discovery of 414 cloned phone numbers and 200 counterfeit credit cards in his possession. The defendant was ultimately sentenced under U.S.S.G. § 2F1.1(b)(1)(G) based on a loss of $71,400. At sentencing, the defendant argued he should have been sentenced under § 2X1.1 ("attempt to commit a crime") rather than under § 2F1.1 ("fraud and deceit") because § 2F1.1 only applies to completed transactions. He argued only a $10,000 loss resulted from the transactions he completed, the remainder of the loss was merely intended, attempted, or partially completed offenses as defined in § 2F1.1, Application note 10. The Court of Appeals disagreed and held that mere possession of fraudulent access devices completes the crime, actual use of the device and losses resulting from such use are not necessary.

U.S. v. Best, 250 F.3d 1084 (7th Cir. 05/10/01). In prosecution on drug charges, the Court of Appeals affirmed the district court's determination that the defendant was a career offender. The defendant argued that his three prior convictions were "related," such that they could not be considered separately for career offender purposes. Specifically, the defendant pointed out that all three charges were disposed of by means of one plea agreement at a single sentencing hearing. Applying the "functional consolidation" test, the Court of Appeals noted that cases can be deemed consolidated for sentencing even without a formal notice of consolidation, where the cases are factually or logically related, and sentencing was joint. However, the mere fact that a defendant was sentenced for multiple offenses on the same day does not establish that his sentences were consolidated rather than merely disposed of simultaneously for the sake of convenience. According to the court, this is what occurred in the

present case. Although the court imposed concurrent sentences, the sentences varied in length for each count. Moreover, the three prior cases were filed under separate court docket numbers, the court retained the separate docket numbers for sentencing purposes, and entered separate judgments for each case. Under these circumstances, the prior convictions were not "functionally consolidated" for career offender purposes.

U.S. v. Rivera, 248 F.3d 677 (7th Cir. 04/24/01). Following his conviction for possession with intent to distribute 650 kilograms of marijuana, the defendant appeals the denial of his motion to suppress and the application of § 3B1.4 (use of a minor). Shortly after a large shipment of marijuana arrived at the defendant's home, officers conducting surveillance observed several individuals arrive at the home and leave a short time later, presumably purchasing drugs while inside. The officers entered and searched defendant's home without a search warrant and the government argued the exigent circumstances exception to the warrant clause. Regarding the denial of the motion to suppress, the defendant argued the Court should adopt a rule that exigent circumstances do not exist until a substantial portion of the evidence is in danger of being removed or destroyed. The Court of Appeals rejected this argument stating that (1) the proposed rule is not practical – officers cannot gauge how much is being removed or destroyed and how much remains, and (2) even if a small amount of evidence (especially drugs) is removed, the missing portions can have an impact on the amounts applicable to sentencing determinations. The defendant also argued against the application of § 3B1.4 to his sentence because any actions taken by his son (unloading, weighing, and packaging the drug) were of the minor's own initiative and done without the defendant's direction or encouragement. The Court disagreed and held that if the defendant did not want his son involved, he should have stopped him from participating. By not doing so, the defendant endorsed his son's activities and therefore could be sentenced under § 3B1.4.

U.S. v. Scott, 245 F.3d 890 (7th Cir. 03/26/01) In prosecution for conspiracy to distribute narcotics, the Court of Appeals reversed the district court's drug quantity determination. At sentencing, the district court determined that the defendant was responsible for delivering 30 kilograms of cocaine and that he should have foreseen that at least 1.5 kilograms of cocaine would have been converted to crack. The sum total of the district court's findings regarding crack cocaine were as follows: "The evidence also indicates that the Defendant knew or reasonably should have foreseen the conversion to crack form, and at a very minimum one and a half kilograms of crack cocaine." While noting that it is appropriate for a court to attribute a conversion of cocaine into crack, the government must establish a conversion ratio. Such a ratio includes two components--the percentage of powder cocaine that the defendant could reasonably foresee would be converted into crack and the percentage of weight lost during the process of conversion. In the present case, the government presented no evidence on either of these components. Thus, given this absence of evidence and the district court's meager findings, the Court of Appeals vacated the district court's conclusion regarding crack cocaine.

SUPPRESSION

U.S. v. Espinoza, 256 F.3d 718 (7th Cir. 07/11/01). Upon consideration of the government's appeal of the district court's grant of the defendant's motion to suppress evidence, the Court of Appeals reversed and held that violation of the "knock and announce" rule does not always require suppression of evidence. After noting that the exclusionary rule is not constitutionally required, the court stated that the appropriateness of applying the rule is in large part the product of weighing and balancing competing interests. Under this weighing process, the exclusion of evidence is too disproportionately severe a remedy where the Fourth Amendment violation has no harmed the particular interest protected by the constitutional requirement at issue. According to the court, the interests of an individual protected by the "knock and announce" rule are: (1) the opportunity to comply with the law and peaceably permit officers to enter the residence; (2) the avoidance of unnecessary destruction of property occasioned by forcible entry; and (3) the opportunity for individuals to dress, get out of bed, or otherwise prepare themselves for entry by law enforcement officers. In the present case, these interests were not harmed. Specifically, when

the officer's attempted to execute the warrant, the defendant attempted to bar the door with his body, and the officers only gained entry after forcing him from the door. Thus, even had the officer's knocked and announced and waited a reasonable amount of time before attempting forced entry, the defendant would obviously not have complied with the law and allowed the officers to peaceably enter. According to the court, if officers had waited longer before forcing the door, the only "preparation" that would have been made by the defendant would have been the erection of more formidable barricades using furniture or other items. Accordingly, the court reversed the district court's grant of the motion to suppress based on the fact that officers did not wait a reasonable period of time after knocking and announcing.

U.S. v. Mitchell, 256 F.3d 734 (7th Cir. 07/11/01). Upon consideration of the district court's denial of the defendant's motion to suppress, the Court of Appeals affirmed the denial, holding that officers had sufficient information to order the defendant to place his hands on the hood of the police car and submit to a pat-down search. The arresting officers received a dispatch that an anonymous caller had reported "shots fired" in a gang infested area, describing the suspect as a black male walking north on a particular street. The officers arrived at the scene in 90 seconds, and saw only two black males on the street, both known to the officers and known to be dangerous gang members. The officers stopped the car, asked the men if they had heard shots fired, and then ordered them to come to the police car for a pat-down for weapons. The defendant, however, fled, but was wrestled to the ground shortly thereafter. He had a firearm on his person, and was charged in the present case with possession of a weapon by a felon. Under these facts, the court held that the officers possessed adequate information to subject the defendant to a pat-down search. Specifically, all of the facts noted above, under the totality of the circumstances, added up to reasonable suspicion justifying a Terry stop.

U.S. v. Childs, 256 F.3d 559 (7th Cir. 07/03/01). **NOTE: GOVERNMENT'S PETITION FOR REHEARING GRANTED**. In prosecution for possession of cocaine with intent to distribute, the Court of Appeals reversed the district court's denial of the defendant's motion to suppress. Officers stopped the car in which the defendant was riding as a passenger due to the presence of a cracked windshield, a condition the officers observed on the vehicle in a stop of the driver three days previously. While one officer questioned the driver, another officer approached the defendant's side of the car. According to the officer, the defendant appeared nervous, would not look at him, and kept his head down when speaking. The officer asked the defendant if he had any marijuana in his possession, and later asked for consent to search his person. The defendant consented, but placed a cigarette pack on the seat of the car as he did so. As it lay there, the officer observed what he believed to be crack cocaine in the pack and arrested the defendant for possession. On appeal, the defendant argued that the officer's question exceeded the scope of investigation in violation of the Fourth Amendment, and the Court of Appeals agreed. Reviewing the issue for plain error, the court concluded that the officer's stated reasons for questioning the defendant about drug possession did not rise to the level of reasonable suspicion. Specifically, when a police officer questions someone during a routine traffic stop, inquiries falling outside the scope of the detention constitute unlawful seizure because both the duration and scope of the seizure must be restricted to that necessary to fulfill the seizure's purpose. Moreover, the only time questions may exceed the scope of the purpose of the detention is when there is some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. In the present case, the defendant's nervousness and prior criminal history known to the arresting officer did not amount to reasonable suspicion. Specifically, the defendant's criminal record is an aspect of his status, whether he is committing a crime at the time the vehicle is stopped or not. Whether he possessed drugs previously cannot show that he possesses drugs today without some other factor. While such factors can be varied and do not have to be present in great number, nervousness alone is insufficient to supply reasonable suspicion. Accordingly, the Court of Appeals reversed the denial of the motion to suppress, and remanded to the district court for a determination of whether the defendant's consent was nevertheless voluntary.

U.S. v. Whitley, 249 F.3d 614 (7th Cir. 04/30/01). On appeal from denial of defendant's motion to suppress based on Franks v. Delaware, the Court of Appeals reversed the district court and held that the statements in the affidavit were either intentionally false or in reckless disregard for the truth. Officers were conducting surveillance on defendant's hotel room based on information that defendant had recently received a large shipment of cocaine when they observed a woman enter the room and the leave after a short time. When the woman committed a traffic violation driving away from the hotel, the officers pulled her over and obtained her consent to search. The search revealed twenty-two baggies of marijuana in her purse. Although the woman consistently maintained she had not gotten the marijuana at defendant's hotel room, one officer conveyed to another over the telephone that she had received the drugs in the hotel room and this information formed the basis of a search warrant for defendant's hotel room. The Court of Appeals based its holding that the affidavit contained false information on the following factors: (1) the officers were unable to identify, recall, or explain the source of the erroneous information; (2) while the affidavit clearly identified the source of the erroneous information, all of the officers denied knowledge of the identity of the source; (3) the officers made no efforts to verify the erroneous statement before obtaining the warrant, even though the information did not match the defendant's alleged illegal activities (cocaine v. marijuana); and (4) the officers demonstrated an "unequivocal" lack of credibility during their testimony. The Court struck the false information and remanded the matter for consideration of the affidavit without the erroneous statement.

Supreme Court Update

(as of Oct. 17, 2001)

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

CASES FOR THE 2001-2002 TERM

Alabama v. Shelton, No. 00-1214, to be argued Nov. 5, 2001 (whether, in light of "actual imprisonment" standard established in *Argersinger v. Hamlin*, and refined in *Scott v. Illinois*, imposition of suspended or conditional sentence in misdemeanor case invokes defendant's Sixth Amendment right to counsel) (case below: No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000)).

Ashcroft v. American Civil Liberties Union, No. 00-1293, to be argued Nov. 28, 2001 (whether court of appeals properly barred enforcement of Child Online Protection Act, 47 U.S.C. § 231, on First Amendment grounds because it relies on community standards to identify material harmful to minors) (case below: 217 F.3d 162 (3d Cir. 2000)).

Ashcroft v. Free Speech Coalition, No. 00-795, to be argued Oct. 30, 2001 (whether First Amendment is violated by prohibitions in Child Pornography Prevention Act, 18 U.S.C. §§ 2252A and 2256(8), on visual depictions that appear to be of a minor engaged in sexually explicit conduct) (case below: 198 F.3d 1083 (9th Cir. 1999)).

Atkins v. Virginia, No. 00-8452, certiorari granted Sept. 25, 2001 (whether execution of mentally retarded individuals convicted of capital crimes violates Eighth Amendment) (case below: 534 S.E.2d 312 (Va. 2000)).

Dusenbery v. United States, No. 00-6567, to be argued Oct. 29, 2001 (whether prisoner must receive "actual notice" regarding forfeiture notification) (case below: 223 F.3d 422 (6th Cir. 2000)).

Kansas v. Crane, No. 00-957, to be argued Oct. 30, 2001 (whether Fourteenth Amendment's Due Process Clause requires state to prove that sexually violent predator "cannot control" his criminal sexual behavior before state can civilly commit him for residential care and treatment) (case below: 7 P.3d 285 (Kan. 2000)).

Kelly v. South Carolina, No. 00-9280, to be argued Nov. 26, 2001 (whether South Carolina courts' refusal to inform petitioner's sentencing jury that he would never be eligible for parole if sentenced to life imprisonment rather than to death violated *Simmons v. South Carolina*) (case below: 540 S.E.2d 851 (S.C. 2001)).

Lee v. Kemna, No. 00-6933, to be argued Oct. 29, 2001 (in case now on habeas review involving trial court's refusal to grant short continuance so that defendant could contact alibi witnesses who unexpectedly disappeared after lunch break during trial, whether denial of continuance constitutes violation of Fifth and Fourteenth Amendments; whether habeas court should have held hearing to consider testimony of alibi witnesses;

whether claim is barred on federal habeas; and whether petitioner has made substantial showing of actual innocence for his alibi witnesses to be explored further to prevent fundamental miscarriage of justice) (case below: 213 F.3d 1037 (8th Cir. 2000)).

McCarver v. North Carolina, No. 00-8727, certiorari granted Mar. 26, 2001 (whether significant objective evidence demonstrates that national standards have evolved such that executing mentally retarded person would violated Eighth Amendment) (case below: 353 N.C. 366 (2001)). Petition dismissed on Sept. 25, 2001, as improvidently granted. But see *Atkins v. Virginia*, *supra*.

McKune v. Lile, No. 00-1187, to be argued Nov. 28, 2001 (whether revocation of correctional institution privileges violates Fifth Amendment's privilege against self-incrimination when prisoner has no liberty interest in lost privileges and such revocation is based upon prisoner's failure to accept responsibility for his crimes as part of sex offender treatment program) (case below: 24 F.3d 1175 (10th Cir. 2000)).

Mickens v. Taylor, No. 00-9285, to be argued Nov. 5, 2001 (whether defendant must show actual conflict of interest and adverse effect in order to establish Sixth Amendment violation where trial court fails to inquire into potential conflict of interest about which it reasonably should have known) (case below: 240 F.3d 348 (4th Cir. 2001) (en banc)). Counsel are Rob Wagner, a CJA panel attorney in Richmond, VA, and Mark Olive, Habeas Assistance Training (HAT) counsel, Tallahassee, FL.

Newland v. Saffold, No. 01-301, certiorari granted Oct. 15, 2001 (whether time during which petitioner failed to properly pursue state collateral remedies falls within meaning of "pending" set forth in tolling provision in 28 U.S.C. § 2244(d)(2)) (case below: 224 F.3d 1087 (9th Cir. 2000)). Counsel is Mary McComb, a CJA panel attorney in Davis, CA.

United States v. Arvizu, No. 00-1519, to be argued Nov. 27, 2001 (whether court of appeals erroneously departed from totality-of-circumstances test governing reasonable-suspicion determinations under Fourth Amendment by holding that seven facts observed by law enforcement officer were entitled to no weight and could not be considered as a matter of law; whether, under totality-of-circumstances test, Border Patrol agent in this case has reasonable suspicion that justified stop of vehicle near Mexican border) (case below: 232 F.3d 1241 (9th Cir. 2000)). Counsel is Vicki Brambl, AFPD, Tucson, AZ.

United States v. Knights, No. 00-1260, to be argued Nov. 6, 2001 (whether defendant's agreement to term of probation that authorized any law enforcement officer to search his person or premises with or without warrant, and with or without individualized suspicion of wrongdoing, constitutes valid consent to search by law enforcement investigating crime) (case below: 219 F.3d 1138 (9th Cir. 2000)). Counsel is Hilary Fox, AFPD, Oakland, CA.

United States v. Vonn, No. 00-973, to be argued Nov. 6, 2001 (whether district court's failure to advise counseled defendant at guilty plea hearing of right to assistance of counsel at trial is subject to plain-error review rather than harmless-error review, on appeal in case in which defendant failed to preserve claim of error below; whether, in determining whether defendant's substantial rights were affected by district court's deviation from requirements of Rule 11(c)(3), court of appeals may review only transcripts of guilty plea colloquy, or may also consider other parts of official record) (case below: 224 F. 3d 1152 (9th Cir. 2000)). Counsel is Monica Knox, DFPD, Los Angeles, CA.

Reversible Error

United States v. King, 227 F.3d 732 (6th Cir. 2000) (Arson did not affect interstate commerce).

United States v. McCleskey, 228 F.3d 640 (6th Cir. 2000) (Admission of nontestifying co-defendant's statement denied confrontation).

United States v. Rodrigues, 229 F.3d 842 (9th Cir. 2000) (No restitution for speculative loss).

United States v. Ruiz, 229 F.3d 1240 (9th Cir. 2000) (Withdrawal of guilty plea for newly discovered evidence should be allowed for "fair and just reason").

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (Environmental harm enhancement does not apply to meth case).

United States v. Furrow, 229 F. 3d 805 (9th Cir. 2000) (No exigent circumstances for warrantless search of cabin).

United States v. Cantu, 230 F.3d 148 (5th Cir. 2000) ("Knock and announce" applies to all attempts at forcible entry).

United States v. Juvenile (RRA-A), 229 F.3d 737 (9th Cir. 2000) (Agents failed to notify juvenile's parents or Mexican consulate).

Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000) (Counsel's failure to object to prosecutor's misconduct was ineffective assistance).

Cossel v. Miller, 229 F.3d 649 (7th Cir. 2000) (Counsel was ineffective for failing to object to suggestive in-court identification).

Cleveland v. United States, 121 S.Ct. 365 (2000) (Victim must actually receive the item for there to be mail fraud).

United States v. Eschman, 227 F.3d 886 (7th Cir. 2000) (Meth quantities should have been based upon defendant's own ability to produce).

United States v. Gee, 226 F.3d 885 (7th Cir. 2000) (Insufficient evidence of mail and wire fraud).

United States v. Burton, 228 F.3d 524 (4th Cir. 2000) (Officer's safety alone did not justify search of pocket).

United States v. Mondragon, 228 F.3d 978 (9th Cir. 2000) (Prosecutor breached plea agreement by recommending sentence).

United States v. Franks, 230 F.3d 811 (5th Cir. 2000) (Cannot receive enhancement for "express threat of death" as well as conviction for use of a firearm during a crime of violence).

United States v. Bartley, 230 F.3d 667 (4th Cir. 2000) (Drug and money laundering conspiracies should have been grouped).

United States v. Eastern Medical Billing, Inc., 230 F.3d 600 (3rd Cir. 2000) (*Allen* charge was coercive).

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000) (Inadequate mitigation investigation by defense).

United States v. Holt, 229 F.3d 931 (10th Cir. 2000) (Questioning about weapons exceeded stop).

Sandoval v. Calderon, 231 F.3d 1140 (9th Cir. 2000) (Prosecutor invoked religious authority for punishment).

United States v. Mason, 233 F.3d 619 (D.C. Cir. 2000) (Felon could get instruction that firearm was briefly possessed for legal purpose).

United States v. Seesing, 234 F.3d 456 (9th Cir. 2000) (Enhancement for obliterated serial number only applies to firearm counts).

United States v. Ruiz-Lopez, 234 F.3d 445 (9th Cir. 2000) (Presence at border is not the same as being found in the United States).

United States v. Sadler, 234 F.3d 368 (8th Cir. 2000) (Once district court lost jurisdiction over case it could not correct sentence).

United States v. Peterson, 233 F.3d 101 (1st Cir. 2000) (Defendant's prior for breaking and entering did not meet definition of violent felony under ACCA).

United States v. Rodriguez-Fernandez, 234 F.3d 498 (8th Cir. 2000) (Without detention order in place, defendant did not escape from INS).

United States v. Munoz, 233 F.3d (6th Cir. 2000) (Court could not count meth that defendant was incapable of delivering).

United States v. Henriques, 234 F.3d 263 (5th Cir. 2000) (At least three images must travel in interstate commerce for child pornography conviction).

United States v. Moerman, 233 F.3d 379 (6th Cir. 2000) (Defendant merely brandished firearm, not otherwise used).

United States v. Oaxaca, 233 F.3d 1154 (9th Cir. 2000) (Agents could not enter open door of garage).

United States v. Doherty, 233 F.3d 1275 (11th Cir. 2000) (Court should have admitted evidence of agent's threat against defense witness).

United States v. Arvizu, 232 F.3d 1241 (9th Cir. 2000) (Investigatory stop lacked reasonable suspicion).

United States v. Chea, 231 F.3d 531 (9th Cir. 2000) (Court was required to consider undischarged prior when fashioning sentence).

United States v. Rahseparian, 231 F.3d 1257 (10th Cir. 2000) (Jury could not reasonably infer that father knew of son's fraudulent business scheme).

United States v. Lewis, 231 F.3d 238 (6th Cir. 2000) (Absent probable cause, exigent circumstances did not permit entry to home).

United States v. Hayes, 231 F.3d 1132 (9th Cir. 2000) (Defendant did not voluntarily waive representation).

United States v. LaPage, 231 F.3d 488 (9th Cir. 2000) (Prosecutor used perjured testimony).

United States v. Drayton, 231 F.3d 787 (11th Cir. 2000) (Search at depot was not voluntary).

United States v. Randolph, 230 F.3d 243 (6th Cir. 2000) (Prosecution in second jurisdiction violated plea agreement).

United States v. Willard, 230 F.3d 1093 (9th Cir. 2000) (Being a mother is not a position of trust under the guidelines).

United States v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000) (Judge said that defense was a "smoke screen").

Wilkerson v. Cain, 233 F.3d 886 (5th Cir. 2000) (Limit on questioning eye witness violated confrontation).

Nuckols v. Gibson, 233 F.3d 1261 (10th Cir. 2000) (Failure to disclose criminal allegations against key prosecution witness).

Buhl v. Cooksey, 233 F.3d 783 (3rd 2000) (Defendant did not voluntarily waive counsel at trial).

Schaal v. Gammon, 233 F.3d 1103 (8th Cir. 2000) (Admission of videotape of victim's statements violated confrontation).

Glover v. United States, 121 S.Ct. 696 (2000) (Counsel's failure to object to application of guidelines that increased sentence was ineffective assistance).

United States v. Varoudakis, 233 F.3d 113 (1st Cir. 2000) (Evidence of previous fire was more prejudicial than probative).

United States v. Ventrilla, 233 F.3d 166 (2nd Cir. 2000) (Judge was mistaken about authority to depart for diminished mental capacity).

United States v. Castro-Gomez, 233 F.3d 684 (1st Cir. 2000) (Court did not inform defendant he was subject to mandatory life sentence).

United States v. Sprick, 233 F.3d 845 (5th Cir. 2000) (Expert's ambiguous opinion did not support risk of liability to bank).

United States v. Concha, 233 F.3d 1249 (10th Cir. 2000) (Foreign convictions are not predicates under ACCA).

United States v. Jones, 234 F.3d 234 (5th Cir. 2000) (Continued detention tainted search despite initial consent).

United States v. Causor-Serrato, 234 F.3d 384 (8th Cir. 2000) (Court could depart for defendant's agreement to be deported).

United States v. Orso, 234 F.3d 436 (9th Cir. 2000) (Officer used improper tactics to get admissions).

United States v. Grimmett, 236 F.3d 452 (8th Cir. 2001) (Statute of limitations had run since defendant's withdrawal from the conspiracy).

United States v. Corp, 236 F.3d 325 (6th Cir. 2001) (Photos of child taken by defendant did not have sufficient connection to interstate commerce).

United States v. Santa, 236 F.3d 325 (6th Cir. 2001) (Search of apartment lacked exigent circumstances).

United States v. Crowley, 236 F.3d 104 (2nd Cir. 2000) (Jury should have been charged on voluntary intoxication).

United States v. Hishaw, 235 F.3d 565 (10th Cir. 2000) (Insufficient evidence that defendant possessed firearm found under his car seat).

United States v. Osage, 235 F.3d 518 (10th Cir. 2000) (Consent to search suitcase did not extend to sealed can inside).

United States v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000) (Overnight guests had standing to challenge search).

United States v. Tran, 234 F.3d 798 (2nd Cir. 2000) (Pleading guilty does not waive right to be charged with all elements of crime by indictment).

Steele v. Blackman, 236 F.3d 130 (3rd Cir. 2001) (Alien's misdemeanor conviction for distributing less than 30 grams of marijuana was not aggravated felony).

United States v. Corral-Gastelum, 240 F.3d 1181 (9th Cir. 2001) (Mere proximity to drugs did not prove possession).

United States v. Tuter, 240 F.3d 1292 (10th Cir. 2001) (Anonymous tip lacked reliability to support warrant).

United States v. Sanders, 240 F.3d 1279 (10th Cir. 2001) (Evidence did not prove defendant knew that weapon had silencer).

United States v. Abbott, 241 F.3d 29 (1st Cir. 2001) (Government was obligated to disclose linkage between plea agreements of defendant and his mother).

United States v. Neuhausser, 241 F.3d 460 (6th Cir. 2001) (Insufficient evidence to support Travel Act conviction).

United States v. Matthews, 240 F.3d 806 (9th Cir. 2001) (Court lacked documentary evidence to find prior conviction proven under ACCA).

United States v. Austin, 239 F.3d 1 (1st Cir. 2001) (Value of get-away-car was not part of loss from bank robbery).

United States v. Morales, 239 F.3d 113 (2nd Cir. 2001) (No criminal history point for 2nd degree harassment).

United States v. Woodward, 239 F.3d 159 (2nd Cir. 2001) (Unless defendant leaves district intending to miss court, it is not obstruction).

United States v. Davis, 239 F.3d 283 (2nd Cir. 2001) (Counsel was ineffective by threatening to withhold services to encourage plea).

United States v. Galo, 239 F.3d 572 (3rd Cir. 2001) (Prior state sexual abuse conviction was not proper enhancement under child porn statute).

United States v. Castaneda, 239 F.3d 978 (3rd Cir. 2001) (Club workers who were encouraged to provide sexual services for fees were not vulnerable victims).

United States v. Butler, 238 F.3d 1001 (8th Cir. 2001) (Failure to allege marijuana quantity required resentencing to below enhanced statutory maximum).

United States v. Provost, 237 F.3d 934 (8th Cir. 2001) (Federal government cannot prosecute state crime occurring on lands that are no longer in Indian hands).

United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) (Exclusion of defense experts).

Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001) (Defendant was prohibited from cross examining rape victim about prior false claim).

Betts v. Litscher, 241 F.3d 594 (7th Cir. 2001) (Counsel failed to perfect appeal).

Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2001) (Prosecution referred to religious authority for sentence).

Shafer v. South Carolina, 121 S.Ct. 1263 (2001) (Whenever future dangerousness is at issue in a capital case, the jury must be informed about life sentence without possibility of parole).

United States v. Jackson, 240 F.3d 1245 (10th Cir. 2001) (Failure to plead drug quantities required reversal).

United States v. Johnson, 214 F.3d 1049 (8th Cir. 2001) (Government breached plea agreement by failing to file departure motion before sentencing).

United States v. Jones, 242 F.3d 215 (4th Cir. 2001) (Anonymous tip did not justify investigatory stop of vehicle).

United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001) (Kidnapping could not be enhanced by murder, when murder was not pled).

United States v. Garcia, 242 F.3d 593 (5th Cir. 2001) (Drug quantity was not proven).

United States v. Sullivan, 242 F.3d 1248 (10th Cir. 2001) (Ex post facto application of tax guidelines).

United States v. Fraser, 243 F.3d 473 (8th Cir. 2001) (Drug quantities for personal use must be excluded from distribution amounts).

United States v. Dipentino, 242 F.3d 1090 (9th Cir. 2001) (Trial court constructively amended indictment).

United States v. Atkins, 243 F.3d 1199 (9th Cir. 2001) (Evidence was insufficient that defendant had validly waived counsel to domestic violence charge that was basis for federal firearms offense).

United States v. King, 244 F.3d 736 (9th Cir. 2001) (Officer's mistaken belief that ordinance was violated did not provide reasonable suspicion to stop).

United States v. Grimes, 244 F.3d 375 (5th Cir. 2001) (Narratives found on defendant's computer should not have been introduced in child porn case).

United States v. Corporan-Cuevas, 244 F.3d 199 (1st Cir. 2001) (Could not sentence beyond statutory maximum even when concurrent to legal sentence).

United States v. Gardner, 244 F.3d 784 (10th Cir. 2001) (Failure to instruct on uncorroborated accomplice testimony).

United States v. Sigma Intern. Inc., 244 F.3d 841 (11th Cir. 2001) (Prosecutorial misconduct before grand jury invalidated indictment).

United States v. Odiodio, 244 F.3d 398 (5th Cir. 2001) (No bank fraud when bank not subject to civil liability).

United States v. Finley, 245 F.3d 199 (2nd Cir. 2001) (Single gun could not be used for two possessions during a drug trafficking crime).

United States v. Matsumaru, 244 F.3d 1092 (9th Cir. 2001) (Insufficient evidence that attorney set up practice to evade immigration laws).

United States v. Boone, 245 F.3d 352 (4th Cir. 2001) (Two attorneys must be appointed for defendant facing death-eligible crime).

United States v. Reinholz, 245 F.3d 765 (8th Cir. 2001) (Warrantless arrest lacked probable cause).

United States v. McDermott, 245 F.3d 133 (2nd Cir. 2001) (Variance between conspiracy charged and proof at trial).

United States v. Herrera-Ochoa, 245 F.3d 495 (5th Cir. 2001) (Defendant's presence at trial could not be evidence that he had previously entered United States).

United States v. Trice, 245 F.3d 1041 (8th Cir. 2001) (Abuse of trust adjustment does not apply to arms-length business relationship).

United States v. Ratliff, 245 F.3d 1246 (8th Cir. 2001) (Superceding indictment violated statute of limitations).

United States v. Velasquez, 246 F.3d 204 (2nd Cir. 2001) (Sentence exceeded statutory maximum).

United States v. Thomas, 246 F.3d 438 (8th Cir. 2001) (Sentence exceeded statutory maximum).

United States v. Johnson, 246 F.3d 749 (5th Cir. 2001) (Plea lacked

factual basis for connection to interstate commerce).

United States v. Noble, 246 F.3d 946 (7th Cir. 2001) (Failure to charge drug quantity was plain error).

United States v. Bradford, 246 F.3d 11107 (8th Cir. 2001) (Sentence violating statutory maximum cannot be upheld because trial court could have stacked sentences to reach same result).

United States v. Brandon, 247 F.3d 186 (4th Cir. 2001) (Absent an element of intent to distribute or manufacture, prior was not a serious drug felony).

United States v. Miles, 247 F.3d 1009 (9th Cir. 2001) (Manipulating small box in clothing exceeded pat-down search).

United States v. Sigmond-Ballesteros, 247 F.3d 943 (9th Cir. 2001) (Lacked reasonable suspicion to search car for undocumented aliens).

United States v. Williams, 247 F.3d 353 (2nd Cir. 2001) (In conspiracy case, drugs meant for personal use were not to be counted).

Dunn v. Collernan, 247 F.3d 450 (3rd Cir. 2001) (Prosecutor's recommendation of "lengthy sentence" violated plea agreement).

Gardner v. Johnson, 247 F.3d 551 (5th Cir. 2001) (Pyschiatrist's warnings about self-incrimination were insufficient).

United States v. Adkinson, 247 F.3d 1289 (11th Cir. 2001) (Bad faith inclusion of bank fraud charge warranted reimbursement of attorney's fees).

United States v. Wright, 248 F.3d 765 (8th Cir. 2001) (No evidence of serious bodily injury).

United States v. Howerter, 248 F.3d 198 (3rd Cir. 2001) (Person authorized to write checks did not commit bank larceny by cashing checks payable to himself).

United States v. Loe, 248 F.3d 449 (5th Cir. 2001) (When legitimate and illegal funds were commingled, government had to prove illegal funds were laundered).

United States v. Diaz, 248 F.3d 525 (11th Cir. 2001) (Co-defendant's brandishing firearm did not support enhancement for defendant).

United States v. Marshall, 248 F.3d 525 (6th Cir. 2001) (Purchase of personal property was not money laundering).

United States v. Palmer, 248 F.3d 569 (7th Cir. 2001) (Unreliable hearsay did not support drug quantity).

United States v. Hardemann, 249 F.3d 826 (9th Cir. 2001) (Violation of speedy trial).

Agnew v. Leibach, 250 F.3d 1308 (11th Cir. 2001) (Bailiff was called to testify about defendant's confession).

Judd v. Haley, 250 F.3d 1308 (11th Cir. 2001) (Total closure of courtroom violated right to public trial).

Lockhart v. Terhune, 250 F.3d 1223 (9th Cir. 2001) (Counsel had actual conflict of interest).

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