The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 27 Winter Edition 2002

DEFENDER'S MESSAGE

In October of 1993, as President of the Illinois Attorneys for Criminal Justice, it was my honor to welcome several hundred members of the National Association of Criminal Defense Lawyers to Illinois and Chicago for their Fall meeting. In my remarks, I noted to them that as "Liberty's Last Champions" (the NACDL's motto), we needed to be ever vigilant as evidenced by the events occurring in England and Ireland at the time. Specifically, I pointed out that as an American of Irish descent, I was concerned that in an effort to fight terrorist activity, Irish "suspects" were being picked up off the street without being charged with a crime, prevented from communicating with an attorney or their family, and detained for as long as three years until any semblance of a trial was held. I emphasized, however, that given the vigilance of the criminal defense bar in the United States, the same could never happen here. Today, I fear that I may have spoken too soon, given the current climate created by the 9/11 War.

I, like most Americans, love my country and believe that all constitutional measures should be taken to protect it from threats both here and abroad. Indeed, my only son has spent the better part of his life protecting our country serving in the United States Special Forces as a Green Beret, he having been in Afghanistan in the early days of our war with the Taliban and Al-Qaeda. Happily, he has returned home safely.

But, what is my son and people like him protecting? I believe it is those basic constitutional rights and freedoms which we, as Americans, hold so dear. Those freedoms are an important part of what makes us Americans. If we ignore those freedoms protected by the Constitution in the name of national security, we pursue an external threat while creating an internal one.

One such freedom which many of us take for granted is our Fourth Amendment right to be free from unreasonable seizures. The idea that an American could be picked up off the street, imprisoned, and held without ever being charged with a crime is, I think, repugnant to most of us. Yet, that is precisely what we seem to be doing in the context of the war against terrorism. By claiming that individuals are "material witnesses," the government has been able to arrest and detain people indefinitely, without any claim that the person has committed a crime.

This process is not unique to the war on terrorism. In virtually every period of American history where our country faced an external threat, the government has detained innocent people and threatened its citizens' constitutional rights. During the Civil War, Abraham Lincoln suspended the writ of habeas corpus, imprisoning people without any charge for sometimes the duration of the war. During the First World War, the Espionage Act of 1917 was used to imprison citizens who merely spoke out in protest of government policy. In the Second World War, in the name of national security, the government detained American citizens of Japanese descent for no other reason than their ancestry. Finally, during the Cold War, the Smith Act and the McCarthy hearings allowed the prosecution and stigmatization of citizens because of their political affiliation. In each of these cases, the passage of time has proven these extra-legal actions to have been unnecessary and the cause of much irreparable harm. In the case of the Japanese-American detainees, only after 40 years did the government finally acknowledge the illegality of its actions, and offer $20,000 to the victims of the injustice--a pittance in comparison to the irremediable harm they suffered. As demonstrated by these cases, the government in time of war has unfortunately turned on its own citizens in the name of national security. These are dark chapters in American history which I fear that the government may repeat during our current war efforts.

Perhaps the persons detained as material witnesses do have important information relevant to the investigation of the World Trade Center and Pentagon Bombings. Perhaps they are also a risk of flight and are rightly detained until they can be brought before a grand jury. If this be the case, then the government is acting appropriately within the bounds of our laws and Constitution. However, given the closed proceedings, sealed pleadings, and veil of silence surrounding the investigations, we have no means of scrutinizing the legitimacy of the government's claims. Knowing our government's track record under similar circumstances already mentioned, even the most patriotic of Americans have a legitimate cause for concern.

Lest one think that any potential abuses are isolated, even Peoria has seen the arrest and detention of a local resident in connection with the 9/11 War. Unfortunately, because of the veil of secrecy surrounding the proceedings, like Will Rogers, "all we know . . . is what we read in the newspapers." As reported in the local media, Ali S.Al-Marri, a citizen of Qatar and student at Bradley University has been detained since mid-December as part of the terrorism investigation. Mr. Al-Marri was taken from his wife and five children, detained, and whisked off to the Southern District of New York. He has now been indicted in New York on an unrelated credit card fraud. Because the government refused to reveal the basis for Mr. Al-Marri's arrest and detention, and all court proceedings were conducted behind closed doors, the public has no way of knowing whether a terrorist indeed lurked in their midst or whether the government was abusing its seizure power.

From what we do know, however, the facts are disturbing. It appears as if the government has used the war on terrorism to arrest and detain a man without charging him with a crime and then using the seizure of his person as an opportunity to search his personal effects. Apparently failing to find sufficient evidence during the search to charge him in connection with the terrorist attacks (otherwise they surely would have charged him), they found other incriminating evidence supporting a charge on the unrelated credit card offense. Rounding people up and searching them without probable cause in an effort to find incriminating evidence of a crime, any crime, turns the Fourth Amendment on its head. Hopefully, this is not what happened in this case, but we may never know given the secrecy. The same is true for hundreds, perhaps thousands, of other cases. However, as criminal defense lawyers, it is our duty to find out and ensure that any overreaching by the government as has occurred in the past will not occur again.

As criminal defense lawyers, we are uniquely positioned to ensure that the government in fact stays within its appropriate bounds. The constitutionality of the material witness procedures, the current manner in which those procedures are being used by the government, and the secrecy in which the proceedings are being conducted are all areas where challenges can be made through effective motion practice. Indeed, given the relatively infrequent use of the material witness procedures prior to the 9/11 War, there exists very little case authority on the subject. Thus, there is much fertile ground for the creative defense lawyer. Should you receive an appointment in any way related to the 9/11 War, please contact my office for assistance. We have the resources and expertise to assist you in representing your client. There is no need for you to "go it alone" or reinvent the wheel. Not only have we conducted research into this area, but other Federal Defender offices have done so as well. Now more than ever, it is important for us to work together to ensure that not only are the interests of our individual clients served, but also those of society at large.

While I firmly believe that the government should use every legitimate method to protect us against the threat of terrorism, it must do so within the confines of our laws and constitution in a manner open to public examination and scrutiny. To do otherwise is to win the battle but lose the war.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

Do not let us lose the conviction that it is only by supreme and superb exertions, unwearying and indomitable, that we shall save our souls alive. No one can predict, no one can even imagine, how this terrible war against German and Nazi aggression will run its course or how far it will spread or how long it will last. Long, dark months of trials and tribulations lie before us. Not only great dangers, but many more misfortunes, many shortcomings, many mistakes, many disappointments will surely be our lot. Death and sorrow will be the companions of our journey; hardship our garment; constancy and valour our only shield. We must be united, we must be undaunted, we must be inflexible. Our qualities and deeds must burn and glow through the gloom of Europe until they become the veritable beacon of its salvation.

Dictum Du Jour

"It is a good thing for an uneducated man to read books of quotation . . . The quotations when engraved upon the memory give you good thoughts.

"Verify your quotations."

- Winston Churchill

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[L]oyalty is an essential ingredient in any civilized and humane system of morals.

- *Encyclopedia of Philosophy*, 1967

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

- Aristophanes

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"I'm a neurotic man. I'm really basically just like a 260-pound Woody Allen."

- James Gandolfina
a/k/a Toni Soprano
Rolling Stones Magazine

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Peace dies when the framework is ripped apart. When there is no longer a place that is yours in the world. When you know no longer where your friend is to be found.

-Saint-Exupéry
Flight to Arras

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Children grow up to look like the people they live with, and so do bulldogs.

-William Kennedy
Roscoe

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Roscoe nodded, understanding Patsy's reversal of unbearable history. [Emphasis added by editor]. The man could not stand to be wrong. Situational truth. [Emphasis added by editor] Roscoe understood also that Patsy's new version of his Bindy plan downgraded Roscoe's achievement. [Emphasis added by editor] Nice going, Ros. What you did was miraculous, more or less, but not really necessary. Now get offstage and stop making me look stupid.

- William Kennedy
Roscoe

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"To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish."

Parts and Electric Motors v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)

* * * * * * * * * *

But now a substantial relationship between the alleged tort and some traditional maritime activity must be shown. ... That element is missing here, just as it would be if Greenwell were complaining that an employee of Aztar had broken into her house and poisoned her goldfish. ... In any event, neither in the goldfish case nor in our case is there enough of a maritime flavor to warrant trundling out a body of law designed to regulate maritime accidents, which is the distinction (between an adventitious and an organic relation to maritime activity) that explains why the Supreme Court added the "substantial relationship" test for determining whether there is admiralty jurisdiction.

Greenwell v. Aztar Indiana Gaming Co., 268 F.3d 486 (7th Cir. 2001)

* * * * * * * * * *

"[I]t takes two to get indicted."

United States of America v. Vaughn, 267 F.3d 653, 655 (7th Cir. 2001)(defendant-appellant's explanation to the undercover officer of why he would not sell drugs in the presence of a third person).

* * * * * * * * * *

Rule 8, so far as bears on this case, requires that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief and that each averment of [the complaint] shall be simple, concise, and direct." Fed.R.Civ.P. 8(1)(2), (e)(1). Mr. Davis's complaint does not satisfy these requirements (themselves, be it noted, rather repetitious – and is "averment," an archaic word of no clear meaning, simple, concise, and direct?). The complaint is not short, concise, or plain. It is 20 pages long (though in a large typeface – at least 14 point), is highly repetitious, and includes material which, though sometimes charming (as when it states that because of "the large work load that federal judges face . . . , all federal judges should have their pay by law doubled"), is irrelevant (another example is the allegation that Davis is an FBI informant). There are some downright weird touches, such as the repeated assertion that Davis and his alleged harasser are, respectively, a "naturally occurring man" and a "naturally occurring woman," as if Davis were concerned about the standing of clones and transsexuals. ... It nevertheless performs the essential function of a complaint under the civil rules, which is to put the defendant on notice of the plaintiff's claim.

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In our many years of judging, moreover, we cannot recall many complaints that actually met the standard of chaste, Doric simplicity implied by Rule 8 and the model complaints in the Forms Appendix. Many lawyers strongly believe that a complaint should be comprehensive rather than brief and therefor cryptic. They think the more comprehensive pleading assists the judge in understanding the case and provides a firmer basis for settlement negotiations. This judgement by the bar has been accepted to the extent that complaints signed by a lawyer are never dismissed simply because they are not short, concise, and plain.

"Signed by a lawyer ..." But of course Mr. Davis is not a lawyer, and so his complaint violates those commands with a baroque exuberance that sets it apart from lawyers drafting excesses. But the complaint contains everything that Rule 8 requires it to contain, and we cannot see what harm is done anyone by the fact that it contains more.

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To the principle that the mere presence of extraneous matter does not warrant dismissal of a complaint under Rule 8, as to most generalizations about the law, there are exceptions. We can hardly fault the Third Circuit for dismissing the complaint in *In Re Westinghouse Securities Litigation, supra,* 90 F.3d at 703, which contained 600 paragraphs spanning 240 pages. Have a heart!

Davis v. Ruby Foods, Inc., 269 F.3d 818 (7th Cir. 2001).

Basic Expert Advice

By: David Mote
Deputy Chief Federal Defender

As with many other aspects of trial, defense counsel must be more creative, and harder working, than the prosecution in order to limit the damage done by the government's witnesses and get the most out of the opportunity to call their own experts.

Of course, as a starting point, defense counsel should be familiar with the various rules relevant to expert testimony.

Fed. R. Crim. P. 16(a)(1)(D) entitles the defense to "inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments" upon request of the defendant. Fed. R. Crim. P. 16(a)(1)(E) requires the government to "disclose to the defendant a written summary" of the expert testimony the government intends to introduce. The rule says that the summary provided "shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." Thus, the standard disclosure that an officer or agent will testify about methods of drug distribution and distribution amounts "[b]ased on his experience, knowledge and training" is insufficient. United States v. Miller, 199 F.3d 416 (7th Cir. 1999). But, as stated above, these are things you are entitled to on request. Request them! If, as in Miller, despite repeated objections by the defense to the sufficiency of the notice and directions by the trial court to give more specific notice, the prosecution never gets the notice right, the expert testimony may be excluded or stricken.

Title 18 U.S.C. § 3006A(e) allows appointed counsel to request authorization to "obtain investigative, expert or other services necessary." This request can be made by ex parte motion. It is advisable to read subsection (e) carefully before making any request of the court or commitment to retain such services.

Other important rules related to experts are the "700 series" of the Federal Rules of Evidence. It should be noted that Fed. R. Evid. 702, Testimony by Experts, was amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and its

progeny. Daubert discussed four things regarding scientific evidence: 1) whether the technique can be, and has been, tested; 2) whether the technique has been subjected to peer review and publication, 3) the known or potential error rate and the maintenance of standards controlling the techniques operation, and 4) whether the technique is generally accepted as reliable in the relevant scientific community.

Fed. R. Crim. P. 12.2 (requiring the defense to give written notice of an insanity defense or expert testimony of the defendant's mental condition), is obviously important in cases involving an insanity defense.

When preparing for the government's expert witnesses, it should not automatically be assumed that they are legitimate experts. Worse yet, it cannot even be assumed that the witness is honest.

Johnny St. Valentine Brown, Jr., is a perfect example. He is estimated to have testified in 4,000 trials and is at the center of what has been described as "the biggest perjury scandal in the history of the D.C. criminal courts." As a police drug expert, he had additional credibility because he had "been a board-certified pharmacist since 1968." But he had no such degree. His undoing, after thousands of criminal trials, was the result of routine checking by a civil lawyer who, after a deposition in which Brown had asserted that he was familiar with the gang known as the "Rough Riders" – a fictitious gang a lawyer had made up to test Brown's veracity – called Howard University with Brown's name and social security number to verify his degrees. Mr. Brown is now a convicted felon himself, having pled guilty to perjury and been sentenced to two years imprisonment.

Fred Zain worked for the West Virginia State Police where he testified as a forensics expert in hundreds of criminal cases. He became a star, sought after by prosecutors. His success there led to a job as the chief of physical evidence for the medical examiner in Bexar County Texas. After DNA analysis led to freedom for a defendant that Zain had testified had the "identical" blood type as the perpetrator, an investigation of Zain's work was ordered by the West Virginia Supreme Court. The report concluded that the actual guilt of 134 people was substantively in doubt because their convictions were based on Zain reports and/or testimony.

Oklahoma City Police Department Joyce Gilchirst was placed on paid administrative leave while her work is investigated. The FBI retested evidence in six cases where she had testified and found that she had engaged in inaccurate forensic analysis and given false or misleading testimony. Two appellate courts have concluded that Gilchrist gave false testimony. In a case where the defendant was executed, Gilchrist testified that samples from the murder victim's bedroom showed sperm consistent with his blood type. Re-examination of the evidence by another chemist, Laura Schile, resulted in a finding of "spermatozoa is not present." Gilchrist has testified that she did forensic work in 3,000 to 4,000 cases.

Jack Patterson, a State Crime Laboratory analyst in Milwaukee, was charged after it was discovered that he skipped steps in his fingerprint analysis that he thought were unlikely to reveal prints, but reported having done the full examinations. Patterson's misconduct came to light as the result of a random quality-control exam of evidence he had processed. A re-examination of evidence from 210 cases in which he had processed evidence revealed 345 fingerprints, 31 palmprints, and 34 impressions that he missed.

In Illinois, DNA testing resulted in four men convicted for the 1986 rape and murder of Lori Roscetti being freed after DNA tests excluded them as the source of semen recovered from the victim's body and clothing. At trial, Chicago Police Crime Analyst Pamela Fish had testified that semen recovered from Roscetti's body and underwear could have belonged to three of the defendants. More recent DNA testing excluded all four men as the source. DNA expert Dr. Edward Blake labeled Fish's testimony in case as scientific fraud. A judge then ordered additional testing of all of the victim's clothing. An examination found 22 semen stains on the victim's jogging pants and coat. In 1986, Fish purportedly examined the items and reported finding no semen stains.

These cases show that dishonest conduct on the part of government experts, particularly those on the government payroll, is not an isolated occurrence. A check of the case law shows that these cases are not even the tip of the iceberg. There are at least scores of cases where witnesses who testified as government experts have been charged criminally as a result of perjured testimony about what test they performed, what results they obtained, and even their basic credentials. Perhaps as disturbing as the widespread misconduct is the fact that the experts who have been revealed to be the biggest liars were favorite witnesses of the prosecutor's offices and the fact that there were frequently colleagues or superiors who knew of the misconduct and did nothing about it. These problems do not occur in a vacuum. They occur because prosecutors appreciate and use expert witnesses who come up with strong and certain results and

because there is a culture within the law enforcement community that prevents those who know of misconduct by "one of their own" from going public. Honest forensic experts who blow the whistle often pay a heavy price, as happened when the FBI forced out Frederick Whitehurst for speaking up about intentional misconduct within the renowned FBI lab. The FBI later reached a settlement with Whitehurst.

The lesson of the scandals discussed above is that it pays to verify credentials, check on an expert's history and talk to other lawyers who have dealt with the expert. If an expert is incompetent or worse, there is probably a colleague who knows it.

Even if the government's experts don't have the kind of problems discussed above, there are things that you should delve into on cross-examination. One issue is who is paying the expert and whether the expert is really independent. A forensics expert from a law enforcement agency's laboratory who is used as an expert in a criminal case should be viewed the same as an in-house physician for an insurance company in a case against the insurance company; the witness is obviously not independent and the defense needs to point that out. In addition to who is paying the witness, and how much, there is the issue of whether the witness always testifies for the prosecution and the issue of whether the witness's findings have ever been refuted or rejected by a jury or a court.

In general, Daubert has made it somewhat easier to have expert testimony admitted, but at the same time, some time-honored subjects for expert evidence may be subject to attack. In United States v. Plaza, Crim. No. 98-362-10 (E.D. Pa. 01/07/2002), Judge Pollack prohibited the prosecution from eliciting testimony about whether two prints were a "match" because the science of fingerprint examination does not meet the standards of Daubert. Fingerprint examiners often look for "points" on the ridges that the latent prints and the rolled prints have in common. The problem is that there is no standard before a match can be declared. England requires a 16-point minimum to declare a match, Australia requires a 12-point minimum, but the F.B.I. dropped any minimum standard in the 1940s. Judge Pollack also noted that fingerprint experts tend to be "skilled professionals who have learned their craft on the job and without any concomitant advanced academic training." He concluded that "it would thus be a misnomer to call fingerprint examiners a 'scientific community' in the Daubert sense." It should be noted that the Seventh Circuit affirmed a district court's contrary conclusion a year earlier in United States v. Havvard, 260 F.3d 597 (7th Cir. 2001). The district court in Havvard had also acknowledged that fingerprint analysis lacks a unified standard for determining when a latent print is adequate to allow a comparison. Obviously, this kind of information can be very useful in cross-examination even if the evidence is not excluded.

Handwriting, document, hair and fiber analysis are all candidates for the type of challenge that succeeded in Plaza. Police officers and agents tendered as experts on gangs, drugs and other matters have been successfully challenged in some cases. Police officers are often offered as experts based on some on the job experience and less formal training time than required for a single college class. These areas tend to lack clear standards, call for subjective judgments and have little formal training requirements. The "expert credentials" of witnesses on these kind of topics should frequently be challenged.

In addition to challenging the government's experts, the defense can, of course, seek the appointment of its own experts. It is worth thinking about calling experts on scientific matters the prosecution would rather have us ignore. These include experts on the factors that influence the reliability of eyewitness identification and the phenomenon of false confessions. Experts on eyewitness identification can explain to the jury the counterintuitive notion that there is little correlation between the witness's professed certainty in an identification and the reliability of the identification as well as what factors can subconsciously alter the witness's recollection and certainty. Experts on false confessions can educate the jury on the fact that people do confess to things they did not do and the factors that may lead to a false confession. Expert testimony on these topics can be critical in some cases, but it can be a struggle to get such expert testimony admitted.

Sometimes, the defense doesn't really need an expert. The defense could just use some "expert testimony" from an unsuspecting government witness. For example, when an officer or agent testifies that your client, or a cooperating witness, had a drug problem, it may be productive to question him about his familiarity and experience with drug addicts and their reliability, honesty and veracity. This can all be done without ever stating that you are treating the witness as an expert and will seldom draw an objection. Similarly, the officer or agent who was working with a confidential source (CS) who made undercover drug buys can be your best witness on the lack of reliability of such witnesses. After all, they search the CS for both drugs and money both before and after the

purchase and try to observe and control the CS's movements and activities. These are partly to protect the evidence, but most agents also have had experience with CS's stealing money, skimming drugs, using drugs, and lying.

In conclusion, you will serve the interests of your client if you: 1) make the government give you the information you are entitled to regarding their expert; 2) do not make the assumption that the government's experts are truthful or reliable; 3) bring out the biases of their experts; 4) seek your own experts, including experts in areas where the government does not use expert testimony; and 5) squeeze some favorable expert testimony out of the government's witnesses when you have the opportunity.

BAKER'S DOZEN: Tips For The Experienced Advocate - Part II

- By Alan Ellis, Esq., James H. Feldman, Jr., Esq., and Karen L. Landau, Esq.

In Volume 26 of "The Back Bencher", Alan Ellis' column from Criminal Justice, Winter 1997 appeared, entitled "Baker's Dozen: Tips for the Experienced Advocate." which featured a number of practice tips. Here are additional practice tips for the advanced practitioner. [The original article as well as other articles published by Mr. Ellis that have appeared in Criminal Justice magazine can be found at www.alanellis.com.]

1. Acceptance of Responsibility

A defendant who confesses upon arrest, provides complete information regarding his offense and receives a two-level reduction for acceptance of responsibility is entitled to the third level even if he subsequently recants and the government is required to prepare for trial. United States v. Corona-Garcia, 210 F.3d 973, 980-81 (9th Cir. 2000). If the defendant qualifies for the third level on the basis that he timely provided information to the government regarding his offense, he cannot be denied the third level because he does not timely plead guilty. Id. The third level is to be applied if the defendant satisfies the criteria of either U.S.S.C. § 3E1.1(b)(1) or (b)(2). Thus, defense counsel should consider requesting a three-level reduction for acceptance of responsibility in cases in which the defendant has confessed upon arrest or otherwise timely provided information to the authorities concerning his own involvement.

2. Criminal History Score

Often one criminal history point more or less does not alter the Criminal History Category ("CHC") into which a defendant falls. It may nevertheless be important to object to a PSI's addition of a criminal history point, and then to appeal a district court's denial of that objection -- even where the inclusion of the point does not affect the client's CHC. While normally the addition of a criminal history point which does not affect the sentencing range would be considered "harmless error," that is not always the case. In United States v. Vargas 230 F.3d 328 (7th Cir. 2000), the Seventh Circuit remanded for resentencing based on a seemingly inconsequential criminal history point, because the erroneous inclusion of this point "might have affected" the district court's denial of the defendant's motion for downward departure based on the defendant's contention that his criminal history category significantly overrepresented the seriousness of his criminal history. See USSG § 4A1.3 (p.s.).

3. Downward Departure - Acceptance of Responsibility

A defendant may be eligible for a downward departure for acceptance of responsibility, even if he or she goes to trial and denies guilt, and therefore does not qualify for the downward adjustment under § 3E1.1. In United States v. Gee, 226 F.3d 885 (7th Cir. 2000), the Seventh Circuit upheld the district court's two level downward departure on the basis that the defendant demonstrated a "non-heartland" acceptance of responsibility. The defendant demonstrated this acceptance by pre-indictment offers to the government to determine the legality of his business through a civil declaratory judgment action. The defendant also immediately discontinued his business following the verdict against him. Thus, a defendant who does not qualify for acceptance of responsibility may nonetheless receive a downward departure for conduct that exhibits acceptance.

4. Downward Departure - Charitable and Civic Good Works

Downward departures for a defendant's charitable and civic good works or public service are discouraged, but not forbidden by the Guidelines. USSG § 5H1.11 (p.s.). Departures for such works are therefore usually denied. A recent Third Circuit case is significant, because in affirming such a departure in a government appeal, the Court provides a helpful analytical framework for district courts. In United States v. Serafini, 233 F.3d 758 (3d Cir. 2000), the district court departed downward three levels based on the charitable works of the defendant, a state legislator convicted of perjury before a grand jury.

5. Downward Departure - Diminished Capacity

Several circuits have held that psychological conditions which affected a defendant's volitional control may justify a departure for reduced mental capacity where the diminished capacity was directly responsible for the offense conduct. See, e.g., United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). Now, the United States Court of Appeals for the Sixth Circuit has taken that theory a step further by affirming a departure for a compulsive gambling disorder which merely motivated the offense conduct. In United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000), the defendant embezzled approximately $30,000 from his employer to pay off gambling debts. The district court found that the defendant lacked the ability to control his behavior and therefore satisfied the requirements for a departure based on diminished capacity. The Sixth Circuit affirmed, noting that the guideline for a diminished capacity departure had been expanded by the amendment effective November 1, 1998. The Court also concluded that § 5K2.13 lacks a strict causality requirement, and therefore the fact that a defendant was motivated to engage in the criminal conduct because of a compulsive disorder constituted a sufficient link to support the departure. The government had argued that the defendant's compulsive gambling did not contribute to his commission of the offense because he did not commit a gambling offense. The Sixth Circuit rejected that argument, ruling that the fact that the defendant's disorder motivated him to embezzle, provided a sufficient causal connection. The Court noted that under the government's argument, a defendant suffering from an eating disorder who steals food would be eligible for the departure, while a similar defendant who steals money to buy food, would not. It is also significant that the factual determination that the defendant suffered from a gambling disorder was based solely on lay testimony. Of course, it is generally better practice to use a mental health professional to establish the existence of diminished capacity.

6. Downward Departure - Sentencing Entrapment

The Sentencing Guidelines recognize one form of sentencing entrapment as a basis for downward departure. Application Note 15 to § 2D1.1 provides that in reverse sting operations, a downward departure may be appropriate where government agents sell drugs to unwary defendants at lower than market prices, thus enticing them to purchase more drugs than they might otherwise buy, and raising their offense levels. More broadly speaking, sentencing entrapment occurs whenever a defendant who is predisposed to commit a particular type of illegal activity (thus eliminating entrapment as a defense at trial) is nevertheless persuaded by government agents to engage in relevant conduct in which he would otherwise not have been predisposed to engage, or to a greater extent than he might otherwise, exposing him to harsher punishment. Some Circuits have limited sentencing entrapment by implying that only "outrageous" government conduct may justify the departure. See, e.g., United States v. Bala, 2000 WL 1877041 *4 (2d Cir. Dec. 28, 2000) ("We have suggested that ... sentencing entrapment ... would likely require a showing of 'outrageous' government conduct'"); United States v. Barth, 990 F.2d 422, 424 (8th Cir. 1993) ("Sentencing entrapment has been described by this court as 'outrageous official conduct [which] overcomes the will of the individual"). The Eighth Circuit has now made it clear that no such limitation applies to sentencing entrapment departures. In United States v. Searcy, 233 F.3d 1096 (8th Cir. 2000), the Court held that a defendant need not demonstrate outrageous government conduct to prove sentencing entrapment. All that must be shown is that, but for certain government conduct, a defendant would not have been predisposed to commit certain relevant conduct. Of course, there is not any predetermined checklist of criteria which must be demonstrated before a defendant is eligible for downward departure on this or any other basis not described by the Commission in a Chapter 5H or 5K policy statement. The question is not whether a defendant meets the criteria of being entrapped for sentencing, but whether the facts of the case present a "mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission." USSG § 5K2.0 (p.s.) (quoting 18 U.S.C. § 3553(b)); see Koon v. United States, 518 U.S. 81 (1996).

7. Drug Quantity

In drug cases, the weight of drugs which are "relevant conduct" for sentencing is the most important factor in determining the applicable offense level. Where that weight is near the upper limit provided by a particular offense level, a minor miscalculation can mean years more imprisonment. In recognition of this, the Ninth Circuit in United States v. Scheele, 231 F.3d 492 (9th Cir. 2000), held that in approximating drug quantity, courts must err on the side of caution. The court reversed the district court's estimate of quantity, and specifically ruled that when a district court's estimate falls near the border of a cutoff point under the drug quantity table, the court must consider the margin of error before fixing the

amount attributable to the defendant. 231 F.3d at 499. The court held that "If taking the margin of error into account and erring on the side of caution would reduce the defendant's base offense level to the next lowest level, then the court must do so." Id.

In drug conspiracy cases, particular quantities of drugs are "relevant" to sentencing if they are "reasonably foreseeable" to the defendant and are part of his "jointly undertaken criminal activity." §1B1.3(a)(1)(B). While sentencing courts are to determine this quantity by the "preponderance of the evidence" (i.e., the quantity that more likely than not meets these criteria), it is rare for a Court of Appeals to reverse a sentence based on insufficient factual findings. That is what makes United States v. Seesing, 234 F.3d 456 (9th Cir. 2000), so special. In that case, the district court found 4.049 kilograms of methamphetamine "relevant conduct" based solely on the PSI's report that the co-conspirators transferred $70,000 between themselves and that they purchased methamphetamine for $8,500 a pound. The district court made no finding that the defendant reasonably foresaw all of the transactions related to the $70,000 transfers; nor did it state whether it was even convinced by the PSI's findings. The Court of Appeals found that because of this, the district court's findings were not supported by the preponderance of the evidence, and remanded for resentencing.

8. Fraud

In fraud cases, the Guideline offense level is determined in large part by the loss suffered by victims. See USSG § 2F1.1. Correctly valuing loss is therefore of critical importance. "Loss," however, is not always simply the value of the money or goods taken. Where an "intended" loss is greater than the "actual" loss, the application notes explain that the higher figure is to be used. Appl. Note 8. In fraudulent loan cases, defendants often obtain loans for which they are not qualified (because of bad credit, for example). Even though these defendants fully intend to repay their loans, intervening circumstances (such as job loss) often prevent them from doing so. When they default, the fraud is discovered, and they are prosecuted. That is what happened in United States v. Nichols, 229 F.3d 975 (10th Cir. 2000). In that case, the district court held that the defendant intended to deprive the lender victim of the full value of a home loan, even though the loan was fully secured. The district court found that the defendant intended to defraud the lender of the full value, because the defendant had used a false name and social security number when he applied for the loan. The Court of Appeals held this finding of fact to be clearly erroneous, and reversed.

The Court of Appeals noted that it is possible for someone to intend to defraud a lender of the full value of a loan secured by a movable asset, such as an automobile (which could be hidden from the lender), but found that such intent was less likely where the collateral was a home whose location was never in question. The Court also found it significant that although the defendant in that case lied about his name and social security number, he provided the lender with an accurate address and phone number, and made payments on the loan until he filed for Chapter 13 bankruptcy. The purpose of that bankruptcy was to permit him to pay off his arrearages and resume monthly payments so he could keep his home. Although the prosecution had argued that the defendant intended to sell the house and place it beyond the reach of his creditors, the Court rejected this argument, calling it "sheer speculation."

In addition to obtaining a home loan, the defendant also used his false Social Security number to obtain a credit card. Although the defendant gave the victim a $1,000 security deposit to obtain the card, the district court refused to lower the loss by this amount. The Court of Appeals held that this was error as well.

9. Prison - Drug and Alcohol Treatment Sentence Reduction

18 U.S.C. § 3621(e) provides a basis for what, in effect, is a reduction in clients' sentences of up to twelve months for successful completion of the Bureau of Prisons' 500-hour, comprehensive, residential drug abuse program (RDAP). The possibility of the time reduction under § 3621(e) is an important factor in plea negotiations and sentencing. Charge bargaining can result in a better chance at RDAP eligibility (for example, by ensuring that the defendant is not convicted of a crime -- such as a violent felony -- which would make him or her ineligible for sentence reduction). Contesting a "gun bump," USSG § 2D1.1(b)(1), or the existence of a prior conviction for certain offenses can also increase a defendant's chances of receiving a sentence reduction for participating in RDAP. The Supreme Court recently approved the BOP's exercise of discretion to deny early release to defendants with prior convictions for certain offenses as well as to defendants who received an enhancement for possessing a gun. Lopez v. Davis, 121 S.Ct. 714 (2001).

Judicial recommendations for RDAP and documentation of substance abuse in the Presentence Report help establish eligibility for treatment. The BOP has recently

been requiring that the inmate's substance abuse problem (including alcoholism) be substantiated in the presentence report - even to participate in residential treatment. A clear indication of a substance abuse problem in the presentence report and a sentencing court's recommendation that the defendant participate in residential treatment will help avoid problems of eligibility for early release.

10. Prison - Halfway House in Lieu of Federal Prison Camp

A defendant receiving a short sentence (generally, a year and a day or less), who is otherwise eligible for a minimum security facility, i.e., a federal prison camp, can be designated by the BOP to serve his sentence in a community correction center (halfway house) if so recommended by the sentencing judge. This also applies to individuals receiving a split sentence under U.S.S.G. § 5C1.1(d)(2). Program Statement 7300.08.

11. Statutory Maximums

When a defendant is convicted by general verdict of a conspiracy to commit offenses with different statutory maximums, Courts of Appeals have held that it is plain error for a court to impose a sentence greater than the statutory maximum applicable to the substantive offense which is the least serious object of the conspiracy. See, e.g., United States v. Dale, 178 F.3d 429 (6th Cir. 1999) (where defendant failed to request special verdict, case remanded either for imposition of sentence within lower statutory maximum or retrial, at the government's option). Courts of Appeals use the "plain error" standard of review for issues not raised below. Defendants suffer in two ways when their trial counsel fail to raise legal issues in the district court. One way is that reversals are more difficult to achieve under the "plain error" standard. The other way is that the relief granted under "plain error" may not be as favorable to defendants. This second principle is illustrated by the recent case of United States v. Randolph, 230 F.3d 243 (6th Cir. 2000). Randolph, like Dale, involved a multiple object conspiracy. As in Dale, the district court failed to give the jury a special verdict form. The difference between the two cases is that unlike in Dale, defense counsel in Randolph requested a special verdict form, which the district court denied. Under these circumstances, the Court refused to give the government a second "bite at the apple" and remanded with instructions to the district court to impose sentence within the lower statutory maximum.

The Tenth Circuit recently ordered similar relief in an untimely direct appeal which it construed as a motion pursuant to 28 U.S.C. § 2255 to vacate sentence. United States v. Nicholson, 231 F.3d 445, 454 (10th Cir. 2000), was a case in which one of the defendants was charged with substantive and conspiracy counts which each involved both marijuana and cocaine. Since the verdict did not make it clear with respect to which drug the government had met its burden, the Court held that under Apprendi v. New Jersey, 530 U.S. 466 (2000), the defendant's sentences on each count could not exceed the five-year statutory maximum applicable to cases involving an unspecified amount of marijuana. The Court remanded for resentencing.

12. AEDPA Statute of Limitations

The Antiterrorism and Effective Death Penalty Act's amendment to 28 U.S.C. § 2255 created a one-year statute of limitations for filing motions to vacate sentence. The one-year period runs from the latest of several triggering events, the most common of which is "the date on which the judgment of conviction becomes final." Exactly when that occurs has been the subject of much litigation. Four circuits have held that when a defendant files a direct appeal, but does not petition the Supreme Court for a writ of certiorari, the "conviction becomes final" on the last day the defendant could petition for certiorari, whether or not such a petition is actually filed. See United States v. Garcia, 210 F.3d 1058 (9th Cir. 2000); United States v. Gamble, 208 F.3d 536 (5th Cir. 2000); United States v. Burch, 202 F.3d 1274 (10th Cir. 2000); Kapral v. United States, 166 F.3d 565 (3d Cir. 1999). Other circuits have held that where the defendant fails to petition for cert, the "conviction becomes final" when the Court of Appeals issues its mandate. United States v. Torres, 211 F.3d 836 (4th Cir. 2000); Gendron v. United States, 154 F.3d 672 (7th Cir. 1998). Until the Supreme Court settles this split in the circuits, counsel for defendants in circuits which have not decided this issue should play it safe and file motions to vacate within one year of the date on which the Court of Appeals decided the direct appeal. Filing by the anniversary of the date of decision protects clients in the event that the controlling Circuit or the Supreme Court eventually takes an even more restrictive view with respect to when a "conviction becomes final."

13. 2255 Motions

To demonstrate ineffective assistance of counsel, a defendant must prove not only that his attorney's representation fell below an objective standard of reasonableness, but that he was

prejudiced by the deficient representation. Strickland v. Washington, 466 U.S. 668 (1984). While this standard has always been a difficult one to meet, in 1993 the Seventh Circuit held in Durrive v. United States, 4 F.3d 548, that only "significant prejudice" at sentencing could meet that standard. Following Durrive, the Appeals Court held in United States v. Glover, 182 F.3d 921 (1999) (table), that a defendant whose sentence was increased by 9-12 months due to attorney error had suffered no prejudice. The Supreme Court has now rejected that gloss on Strickland. In Glover v. United States, 121 S.Ct. 696 (2001), a unanimous Court in an opinion by Justice Kennedy held that any additional prison time meets the prejudice requirement of Strickland.

Alan Ellis is a former president of the NACDL and has offices in both San Francisco and Philadelphia. He is a nationally recognized expert on sentencing issues and specializes and consults with other lawyers throughout the United States in the area of federal sentencing. He has graciously allowed us to reproduce articles he has written for his quarterly federal sentencing column for the ABA's Criminal Justice magazine.

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

CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender
Appellate Division Chief

APPRENDI

U.S. v. Bjorkman, 270 F.3d 482, No. 99-3302 (7th Cir. 10/30/01). In a multi-defendant prosecution for conspiracy to possess with intent to distribute and to distribute marijuana, the Court of Appeals affirmed the defendants' convictions and sentences, roundly rejecting their *Apprendi* challenges. Drug quantity was neither pled in the indictment nor determined by the jury. On appeal, the defendants argued that, given *Apprendi*, drug quantity was an "element" of the offense charged, and given the omission of the element from the charge, the district court lacked jurisdiction and their convictions should be reversed. According to the defendants, an indictment that does not mention an element of the offense does not confer subject matter jurisdiction on the district court. In rejecting this claim, the court noted that district judges always have subject-matter jurisdiction based on any indictment purporting to charge a violation of federal criminal law. This conclusion is supported by the fact that a conviction may be affirmed on plain-error analysis (Johnson v. United States, 520 U.S. 461 (1997)) if the charge omits an element and the defendants do not object before or at trial or under a harmless error standard of review if the defendants do object (Neder v. United States, 527 U.S. 1 (1999)). If the omission deprived the court of jurisdiction, affirmance under any standard of review would be impossible. Moreover, the court went on to noted that it was not persuaded that *Apprendi* required a declaration that the quantity of drugs is an element of the offense under § 841. Although *Apprendi* stated that the Due Process Clause entitles a defendant to a decision by the trier of fact, on the reasonable-doubt standard, of any fact (other than a prior conviction) that increases the statutory maximum penalty, *Apprendi* arose out of a state prosecution and did not specifically address the "elements" of 841 or any other federal offense. All that *Apprendi* holds, according to the court, is that the Due Process Clause requires the trier of fact to apply the reasonable doubt standard--*Apprendi* does not rewrite or change the elements of any federal offense. Attempting to square this conclusion with the language in other cases from the circuit referring to drug quantity as an "element," the court posited that the other panels were using the term "element" loosely, using the term to actually mean only that drug quantity and type must be marked as a subject for the trier of fact under a reasonable doubt standard. In sum, the court stated its holding as follows: "A post-*Apprendi* indictment *should* specify, and the trier of fact *must* be instructed to determine, not only the elements of the *offense*, which appear in § 841(a), but also the events listed in § 841(b) on which the prosecutor relies to establish the maximum sentence."

CONFESSIONS

U.S. v. Walker, 272 F.3d 407, No. 00-3052 (7th Cir. 11/09/01). In prosecution for bank robbery, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress, finding that the defendant's confession was voluntary. After being arrested and held overnight, the defendant awoke, sick with diarrhea, vomiting, and stomach pain as the result of heroin withdrawal. Authorities took him to an emergency room where he was treated and released. The discharging physician noted that the defendant's condition upon discharge was "good" and that he was "alert and oriented." A few hours later, police began interrogating the defendant and eventually secured his confession. The defendant argued in the district court and on appeal that, due to his physical condition, his confession was involuntary. The Court of

Appeals rejected the argument, relying heavily upon the discharging physician's characterization of the defendant's condition. However, the court noted that it was a close call, and the government should have waited until the most painful aspects of withdrawal were completed before beginning the interrogation. Indeed, the court noted that there could be a case in which a suspect's vulnerable physical condition rendered anything he said involuntary. But, a suspect's physical pain or drug use does not make a confession involuntary as a matter of law.

EVIDENCE

U.S. v. Reed, ___ F.3d. ___, No. 00-2694 (7th Cir. 11/30/01). In prosecution for manufacture of methamphetamine, the Court of Appeals affirmed the district court's determination that the defendant had breached his immunity agreement with the government, thereby allowing the government to introduce his statements made under that agreement at trial. The defendant initially entered into an immunity agreement with the government wherein he agreed to provide "complete and truthful" information to the government. The defendant thereafter made a number of statements inculpating himself. In subsequent statements, however, the defendant contradicted the previous statements, and denied his involvement with the offense charged. The government argued that the defendant had breached the agreement, and therefore introduced the defendant's inculpatory statements at the subsequent trial. The Court of Appeals affirmed the introduction of these statements, noting that the district court did not clearly err in finding that the defendant's contradictory statements constituted a material breach of the contract. Indeed, the court found that the breach was material because the agreement was intended to secure information that would aid in the identification and prosecution of other methamphetamine traffickers. The defendant's refusal to provide this information went to the heart of the agreement.

U.S. v. Duvall, 272 F.3d 825, No. 00-3977 (7th Cir. 11/14/01). In prosecution for distribution of methamphetamine, the defendant argued that the government's pretrial notice of its expert testimony was inadequate under Federal Rule of Criminal Procedure 16(a)(1)(E). The government provided the following notice regarding its expert witness: "Detective Erk will identify code language, the manner in which methamphetamine is distributed, tools of the trade in the distribution of methamphetamine, street prices of methamphetamine and the manner in which 'cut' is added to methamphetamine to increase the amount of profit in the methamphetamine business. Detective Erk will also testify concerning amounts of methamphetamine an individual might have for distribution, as opposed to personal use." The Court of Appeals found this statement to inadequately summarize the expert's testimony. The Rule, according to the court, requires a summary of expected testimony, not a list of topics. Although the government's notice provided a list of the general subject matters to be covered, it did not identify what opinion the expert would offer on those subjects. However, notwithstanding the error, the court affirmed, finding the error harmless. The purpose of the expert testimony was to help the jury evaluate the government's claim that the amount of drugs seized indicated that the drugs were intended for distribution rather than personal use. However, the defendant admitted at trial that he intended to distribute the drugs, thereby eliminating the importance of the expert testimony.

U.S. v. Elem, 269 F.3d 877, No. 00-2495 (7th Cir. 10/23/01). In prosecution for bank robbery, the Court of Appeals affirmed the defendant's convictions, despite his argument that the government's failure to turn over a cooperating co-defendant's grand jury testimony violated Brady v. Maryland and the Jenks Act. The Court of Appeals rejected the defendant's argument, considering only whether the absence of the grand jury testimony denied the defendant a fair trial and undermined the court's confidence in the verdict. The court first noted that the purpose of the witness's testimony at trial was only to identify the defendant and other accomplices. The minor inconsistencies between the trial testimony and the undisclosed grand jury testimony did nothing to undermine the impact of the testimony. Accordingly, the court concluded that the withholding of the information could have had no conceivable effect on the verdict.

GUILTY PLEAS

U.S. v. Hare, 269 F.3d 859, No. 00-3002 (7th Cir. 10/22/01). After pleading guilty pursuant to a plea agreement containing a waiver of the defendant's right to appeal his sentence, the Court of Appeals held that the waiver of the defendant's right to appeal his sentence was valid and the defendant breached the plea agreement by appealing. The court initially rejected arguments advanced to other courts concerning the unenforceability of appeal waivers. Specifically, the court noted that defendants may waive a myriad of rights, and the right to appeal is no different. Secondly, the court rejected the argument that the waiver was not supported by consideration because the government did not waive its right to appeal the sentence. The court noted that contract law does not require consideration to be broken

down clause by clause. It is enough that the agreement as a whole was supported by consideration. Finally, the court noted that the defendant's appeal breached the agreement. Accordingly, given the breach, the court gave the government 14 days to notify the Court of Appeals if it desired to re-instate the charges it had dismissed as part of the plea agreement.

HABEAS CORPUS/2255

Carter v. Litscher, ___ F.3d ___, No. 01-2628 (7th Cir. 12/28/01). Upon consideration of petition for habeas corpus arising from the petitioner's state murder conviction, the Court of Appeals held that the time during which a properly filed application for state post-conviction relief is pending does not count toward any period of limitations under 28 U.S.C. § 2244(d), even where the state court petition raises no issues similar to those raised in the federal habeas application. In reaching this conclusion, the court looked to the plain language of 28 U.S.C. § 2244(d)(2), which states that time is suspended while a "properly filed" state collateral attack "with respect to the pertinent judgment or claim is pending." This statutory language does not require that the same claim be presented in the state collateral proceedings and the federal habeas proceeding. As a policy matter, the court also noted that such a procedure is sensible. Although it is usually preferable to raise the federal question as soon as possible, which means at trial and on direct appeal, this does not imply that state prisoners must proceed immediately from their direct appeals to federal collateral attacks. A state collateral proceeding based solely on state-law issues may avoid the need for federal relief, and a tolling rule permits prisoners to pursue such theories in state court without jeopardizing their ability to raise the federal constitutional issues later in federal court.

IMMIGRATION

Guillermo Hoyte-Mesa v. Ashcroft, ___ F.3d ___, No. 01-1726 (7th Cir. 12/03/01). Upon petition for a writ of habeas corpus filed under 28 U.S.C. § 2241, the petitioner, an excludable alien and citizen of Cuba, alleged that indefinite detention since 1996 violated his due process rights as articulated by the United States Supreme Court in Zaduydas v. Davis, 121 S.Ct. 2491 (2001). The petitioner committed numerous offenses while in the United States, ultimately served his sentence, and had been denied immigration parole annually since 1996. The Court of Appeals held that, because the petitioner was an "excludable alien," the decision in Zaduydas did not apply to him. Specifically, in Zaduydas, the Supreme Court noted that its decision applied to resident aliens awaiting deportation. The Court specifically noted that aliens who have not yet gained initial admission to this country would present a very different question. Thus, because the petitioner was never granted admission to the United States prior to his exclusion, the Fifth Amendment does not offer him the same protections as resident aliens who are subsequently ordered removed. Moreover, because the petitioner has access to annual immigration parole reviews, this administrative review satisfied due process. Accordingly, the district court refused to issue a writ.

JURY

U.S. v. Bishawi, 272 F.3d 458, No. 01-1110 (7th Cir. 11/14/01). After learning that the district judge engaged in *ex parte* contacts with the jury during deliberations, *i.e.,* answering juror questions without notice to the parties and speaking with the jury during its deliberations, three defendants were granted new trials by a different district judge, that judge failing to hold a hearing or oral argument on the matter. On appeal by the government, the Court of Appeals reversed. First, the court noted that the mere occurrence of an *ex parte* contact between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense, according to the court, has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication. Rather, the constitutional right to presence, which derives from the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment, exists where there is a reasonably substantial relation to the fullness of opportunity to defend against the charge and to the extent that a fair and just hearing would be thwarted by the defendant's absence. Moreover, the broader procedural right afforded by Fed. R. Crim. P. 43 alleviates the presence requirement when the proceeding involves only a conference or hearing upon a question of law. Given these considerations, once a defendant has established the existence of an *ex parte* contact, whether the contact violates either the defendant's constitutional or procedural rights is subject to harmless error review. In other words, a defendant is entitled to a new trial only if the contact likely affected the jury's verdict. Thus, a hearing is necessary to determine whether *ex parte* contacts were prejudicial. A court faced with a post-verdict question of jury prejudice is obligated to ascertain and examine whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. To make such a determination, a hearing is required.

OFFENSE ELEMENTS

U.S. v. Rogers, 270 F.3d 1076, No. 01-2097 (7th Cir. 10/25/01). In prosecution for possessing an unregistered silencer, the Court of Appeals clarified whether an argument that a crime does not fall within Congress' Commerce Clause power is a jurisdictional challenge to the indictment which can be raised at any time. The Court of Appeals noted that courts sometimes call the link between a statute and a source of national authority a "jurisdictional" requirement, but arguments along these lines must be raised in the district court as objections to the indictment. Only limits on the adjudicatory power of the court are open to challenge at any time. Proof of an interstate transaction is no different from proof of any other element of a federal crime. The nexus with interstate commerce, which courts frequently call the "jurisdictional element," is simply one of the essential elements of the offense. The use of the term "jurisdictional" in this context is only the shorthand sense that without that nexus, there can be no federal crime. It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction. Thus, even if the government fails to establish the connection to interstate commerce, the district court is not deprived of jurisdiction to hear the case.

U. S. v. Lane, 267 F.3d 715, No. 00-4180 (7th Cir. 10/03/01). In prosecution for possession of a weapon by a felon, the Court of Appeals held that momentarily handling a weapon satisfies the "possession" element of the offense. In this case, the defendant bought the weapon in question for another person, he handling the weapon only momentarily. The Court of Appeals held that this was sufficient to establish possession. According to the court, physical control over a gun is remarkably easy to effect. Once a gun is in a persons hand, he need only pull the trigger, an act which can be completed in a split second and which is controlled and influenced by nothing more than the possessor's whim. However, the court noted that it did not consider the issue of whether "touching" a gun as opposed to holding a gun mandates the same result.

SEARCH & SEIZURE

U.S. v. Felix-Felix, ___ F.3d ___, No. 00-2828 (7th Cir. 12/27/01). In prosecution for conspiracy to distribute cocaine, the defendant challenged the district court's denial of his motion to suppress. After receiving a tip regarding the distribution of drugs from the defendant's residence, and after observing suspicious activities, the police surveilled the defendant's residence. When the defendant arrived in his car and observed the agents, he did not stop at the home, but instead sped away. The officers took chase, cornered the vehicle, and eventually stopped him. The defendant argued that the cornering of his vehicle constituted a full-blown arrest, requiring probable cause rather than reasonable suspicion. The Court of Appeals disagreed. Specifically, the court concluded that the circumstances surrounding the stop were largely of the defendant's own making. A *Terry* stop is a brief involuntary detention, and one of the ways the police might ensure compliance with their request for a person to stop is to cut off other avenues of escape. Once the police have the reasonable suspicion to justify an investigatory stop, they may use reasonable means to effectuate that stop. The stop in this case was necessitated by the defendant's attempts to evade the agents. Moreover, when considering whether an investigatory stop has transformed into an arrest, the court considers whether the subject's own actions in resisting legitimate efforts of police to stop and question him played a role in bringing about the challenged police conduct. Given these considerations, the *Terry* stop was not transformed into an arrest.

SENTENCING

U.S. v. Lopez-Flores, ___ F.3d ___, No. 01-1834 (7th Cir. 12/28/01). After defendant's conviction for illegal re-entry, the Court of Appeals clarified the meaning of "found in" the United States as defined in 8 U.S.C. § 1326(a). Specifically, at sentencing, the defendant received a longer sentence because he committed his offense while on parole and within 10 years of a previous conviction. However, when the INS found the defendant in the United States, more than 10 years had elapsed from his prior conviction and he was not on parole. But, at the time he illegally re-entered the United States, these factors were present. The Court of Appeals concluded that the relevant time for purposes of determining when the "found in" offense began is when the defendant actually re-enters the United States, rather than when the INS actually finds him. The court stated that "found in" must have the force of "present in" rather than "discovered by the INS to be in." The court noted that the date of discovery has no significance so far as culpability is concerned, although it may bear on the running of the statute of limitations.

U.S. v. Cravens, ___ F.3d ___, No. 01-2409 (7th Cir. 12/27/01). In prosecution for bank robbery, the defendant challenged the district court's refusal to allow the appointment of an expert to assist the defendant in establishing that he was entitled to a downward departure based on diminished capacity. In refusing to appoint the expert, the district court noted that,

even if an expert could establish that the defendant suffered from a reduced mental capacity, he still would not be entitled to a downward departure based on the language contained in guideline sections 5K2.13(1)-(3). These sections provide that a court may not depart downward based upon diminished capacity if any one of three factors exists: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicates a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The district court found all three factors to be present, and therefore concluded that the appointment of the expert would be useless. The Court of Appeals agreed. First, regarding the first factor, the Court of Appeals did note that the appointment of an expert may be necessary to determine if in fact this factor was present, for although a lay person may readily observe a drug or alcohol problem, the causation of a mental disease or defect is a more technical medical determination such that a court would find expert testimony particularly useful to its ultimate decision. However, regardless of whether an expert would be necessary to determine if this factor was present, no such expert analysis is necessary to determine if the other two factors are present. Specifically, the violent nature of the offense and the defendant's criminal history are ascertainable by the judge without expert opinion. In the present case, the threatening manner in which the robberies were carried out and the defendant's criminal history both support a conclusion that a downward departure based on diminished capacity was precluded. Accordingly, the district court did not err in refusing to appoint an expert.

U.S. v. Wisch, ___ F.3d ___, No. 01-1675 (7th Cir. 12/26/01). In prosecution for violations of the Brady Handgun Violence Prevention Act, the Court of Appeals held that a motion to correct a sentence filed under Federal Rule of Criminal Procedure 35(c) must be ruled upon by the district court within seven days, not merely filed within seven days, of the entry of judgment. Rule 35(c) provides that a district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of an arithmetical, technical, or other clear error." As the plain language of the Rule indicates, it is not enough that a motion be filed within 7 days. The rules requires the district court to "act" within 7 days. If a motion is filed within 7 days, but the district judge fails to rule on it within 7 days of the entry of judgment, the failure is considered to be the functional equivalent to an outright denial on the merits. Moreover, the court re-affirmed its prior holding that "imposition of sentence" means that date judgment is entered, rather than orally pronounced.

U.S. v. Huusko, ___ F.3d ___, No. 01-3101 (7th Cir. 12/21/01). Upon revocation of defendant's supervised release, the Court of Appeals held that the defendant's sentence was not plainly unreasonable. As a condition of supervised release, the defendant was prohibited from committing any state offenses. However, due to the defendant's conviction for armed robbery, the district court revoked his supervised release and ordered him to serve 24 months in prison, consecutive to his state sentence for armed robbery. The defendant argued that because the revocation was based upon the same conduct as the armed robbery conviction, the sentence on the revocation should have been concurrent with, rather than consecutive to, the state armed robbery conviction. The Court of Appeals disagreed, noting that section 7B1.2(f) of the Sentencing Guidelines recommends that "any term of imprisonment imposed upon the revocation of . . . supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release." Accordingly, given this clear directive in the guidelines, the consecutive sentence was appropriate.

U.S. v. Shutic, ___ F.3d ___, No. 01-1673 (7th Cir. 12/11/01). In prosecution for transportation of child pornography, the defendant challenged the district court's refusal to group two counts pursuant to U.S.S.G. § 3D1.2. Section 3D1.2 allows grouping when counts involve the same victim. Moreover, where the victim is society at large, counts are generally grouped. In the present case, the photographs constituting the basis for the two counts in question depicted different minors. The district court held that each minor depicted was a "victim." Therefore, because the counts involved different victims, rather than society at large, the counts were not groupable. The Court of Appeals agreed, noting that the primary victims in child pornography cases are the children depicted, rather than society at large, thereby reaffirming the court's recent decision in U.S. v. Sherman, No. 00-2961, 2001 WL 1205378 (7th Cir. Oct. 11, 2001).

U.S. v. Brown, ___ F.3d ___, No. 00-3521 (7th Cir. 12/07/01). In prosecution for being a felon in possession of a weapon, the Court of Appeals, upon the government's cross-appeal, reversed the district

court's determination that the defendant did not qualify for sentencing as an armed career criminal. The question in the case was whether one of the defendant's prior convictions under the Illinois pandering statute, 720 ILCS § 5/11-16, constituted a "violent felony," such that the crime "otherwise involves conduct that presents a serious potential risk of physical injury to another" 18 U.S.C. § 924(e)(2)(B)(ii). The Court of Appeals noted that in Illinois, there are two types of panderers: those who arrange a situation in which one may act as a prostitute and those who compel persons to become prostitutes. The defendant was charged with the latter. The Court held that, as a matter of law, conviction for compelling someone to become a prostitute is a "violent felony" for purposes of the Armed Career Criminal Act. Specifically, pandering by compulsion always involves coerced sex, tantamount, the court thought, to a form of rape. Thus, the offense is a violent felony because the compelled sex act itself causes a physical injury to the prostitute acting, at least in part, not on her own.

U.S. v. Taylor, ___ F.3d ___, No. 00-2230 (7th Cir. 12/03/01). In prosecution for being a user of a controlled substance in possession of a firearm (18 U.S.C. § 922(g)(3)) and escape (18 U.S.C. § 751(a)), the Court of Appeals reversed the defendant's sentence, finding that the district court improperly cross-referenced the attempted murder guideline section. Specifically, the defendant was originally arrested for possession of a firearm while being a user of a controlled substance, but he escaped from custody. While "on the lam," the government argued that the defendant committed attempted murder. At sentencing, the district court first referenced the guideline for the firearms offense. However, because the district court found that the defendant attempted the commission of murder, it cross-referenced the attempt guideline (U.S.S.G. § 2X1.1). That section, in turn, provides that if an attempt is expressly covered by another guideline, the latter guideline should be applied according to its terms. Thus, the court concluded that the attempted murder guideline, U.S.S.G. § 2A2.1, should be used to sentence the defendant. The government, on appeal, argued that this section was appropriately used, because the attempted murder was relevant conduct. Specifically, the escape was relevant conduct to the firearms violation because it was an attempt to avoid responsibility for the firearms offense. Next, the shooting was relevant conduct to the escape, for it was committed while the defendant was an escapee. The Court of Appeals rejected this logic, noting that the concept of relevant conduct had been stretched too far. Although noting that escape is a continuing offense, every crime committed during the time a person is on escape status does not automatically become relevant conduct to a crime committed before the escape. In the present case, the firearm to which the defendant pled was seized by the government prior to the shooting, so the actual firearm provided no connection to the shooting. Moreover, the shooting itself had no relation to the escape. The shooting occurred because the defendant wished to harm someone wh injured his girlfriend; it was not committed as part of a scheme to avoid detection. Indeed, if anything, the shooting called attention to himself. Accordingly, the court remanded for re-sentencing under the firearms guideline.

U.S. v. Siegler, ___ F.3d ___, No. 01-2471 (7th Cir. 11/30/01). In prosecution for mailing a threatening communication, the Court of Appeals affirmed the district court's 6-level sentencing enhancement for "conduct evidencing an intent to carry out a threat" under U.S.S.G. § 2A6.1(b)(1). The defendant, while incarcerated, sent a letter along with discovery, requesting that an associate of his retaliate against the witness who testified against him. Based on the contents of the letter, some phone calls between the defendant and the associate, and the detailed discovery information regarding the informant, the district court concluded that the defendant intended to carry out the threat. On appeal, the court concluded that the evidence supported the enhancement, for the defendant's prior conduct of sending detailed discovery information to his associate tended to show an intent to carry out the threat. Likewise, the threat itself contained the victim's address and physical description, again evidencing intent. Finally, the defendant's phone calls to his associate asking whether he had "taken care of it" formed a clear basis for the enhancement.

U.S. v. Hunt, ___ F.3d ___, No. 00-2321 (7th Cir. 11/29/01). In prosecution for conspiracy to distribute cocaine and crack cocaine and money laundering, the Court of Appeals reversed the district court's determination that the defendant was not eligible for an offense level reduction for being a minor participant in the conspiracy. The defendant was charged in a multi-defendant drug conspiracy, although his only conduct consisted of counting and laundering money. In determining the defendant's base offense level, the district court used the drug guideline (U.S.S.G. § 2D1.1), converting the amount of money the defendant laundered and counted into the quantity of drugs sold at wholesale which would have produced that amount of money. Because the district court did not attribute any additional drug quantities to the defendant, it concluded that he was not eligible

for a "minor participant" reduction, he being held responsible only for those amount with which he was directly involved. The Court of Appeals, however, noted that by converting the amount of money laundered into a corresponding drug amount, the district court in fact held the defendant accountable for conduct committed by his co-conspirators, rather than himself directly. Specifically, because the defendant never distributed drugs, but only laundered money, using the drug guideline instead of the money laundering guideline held him accountable for at least some of his co-conspirators' conduct. While the district court could properly make such an attribution, it may not deny the minor participant adjustment under such circumstances. Moreover, the court noted that the district court may have erred in converting the amount of drugs distributed for the amount of money laundered. Specifically, the district court assumed that the money was produced through wholesale distribution of kilogram quantities. However, it is possible that the money laundered was produced through retail sales of smaller quantities, thereby resulting in the generation of more money, and corresponding to a smaller quantity of drugs. Given these errors, the Court of Appeals remanded for re-sentencing.

U.S. v. Kosmel, ___ F.3d ___, No. 00-4294 (7th Cir. 11/29/01). In prosecution for money laundering and other offenses related to the harboring of illegal aliens, the Court of Appeals reversed the district court's obstruction of justice sentencing enhancement. Prior to sentencing, the probation department recommended an obstruction of justice enhancement, alleging that the defendant had lied to the probation officer during a presentence report interview concerning the amount of money earned by the defendant as a result of his illegal scheme. However, due to a snow storm and the probation officer's late-term pregnancy, she was unable to testify at the sentencing hearing. Instead, another probation officer testified. She could not, however, testify as to the exact question asked of the defendant during the interview, although she surmised that the defendant probably was not asked about some of his alleged earnings at the time of the interview, for the probation department was unaware of some activities at the time. The Court of Appeals noted that in order to receive the enhancement for providing a false statement to the probation department, the misleading statement must be "wilful." Here, because it was unclear as to exactly what was asked of the defendant, the record did not support a finding of wilfulness. Accordingly, the Court of Appeals remanded the case for reconsideration of the obstruction of justice issue.

U.S. v. Atwater, ___ F.3d ___, No. 01-1353 (7th Cir. 11/29/01). In prosecution for bank robbery, the Court of Appeals reversed a 5-level sentencing enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(C), for reasonably foreseeing the use of a gun during the robbery. The defendant drove the getaway car while his associate robbed the bank with a gun. The defendant, however, claimed that he did not know his associate intended to use a gun, but his associate testified that the defendant in fact planned the robbery and knew a gun would be used. Notwithstanding this conflicting testimony, the district court gave the defendant a reduction for acceptance of responsibility. However, he enhanced the defendant's sentence for reasonably foreseeing that a gun would be used, finding only that "I have never heard of a bank robbery without a firearm." The Court of Appeals reversed, finding that the district court's statement was unsupported. First, the court noted that Department of Justice statistics indicated that only a third of all bank robberies are committed with a gun. Therefore, from a purely statistical point of view, the district court's statement was wrong. Moreover, the district court's reasoning was unclear, for he gave the defendant acceptance of responsibility, thereby indicating its belief that the defendant in fact did not know that a gun would be used. Given this contradiction between the grant of a reduction for acceptance of responsibility and the enhancement for the gun, the court remanded to the district court for re-sentencing.

U.S. v. Seward, 272 F.3d 831, No. 00-1241 (7th Cir. 11/15/01). In prosecution for bank fraud and money laundering, the Court of Appeals reversed the district court's obstruction of justice enhancement (U.S.S.G. § 3C1.1). At the defendant's initial sentencing hearing, the district court stated that it found the defendant's testimony at trial to be "incredible" and "obviously peppered with untruths." However, the court indicated that it intended to give the defendant the "benefit of the doubt," and opined that perhaps the defendant thought he was telling the truth. The district court therefore continued the sentencing hearing and gave the defendant an opportunity to file a written version of the offense. In that written version, the defendant asserted his innocence. Thus, at the second sentencing hearing, the district court decided to apply the obstruction of justice enhancement. Specifically, the court noted that because the defendant persisted in his version of the offense, the court found that the defendant had in fact been untruthful. According to the Court of Appeals, this finding was insufficient to satisfy the standards

set forth in United States v. Dunnigan, 507 U.S. 87 (1993). Dunnigan requires that, where a defendant's sentence is enhanced for perjury at trial, the district court must making a finding of obstruction of justice that encompasses all of the factual predicates for a finding of perjury: false testimony, materiality, and willful intent. Although the district court's statement could arguable support a finding on false statement and wilfulness, the court gave no indication that it considered the defendant's testimony to be material to any issues before the court. Moreover, the district court failed to specifically identify particular statements it believed were false. Without such a finding, appellate review was nearly impossible, and a remand was required. The court did note, however, that it appeared that the record would support the enhancement on remand; the problem was that the district court failed to state its reasons adequately on the record.

U.S. v. Seward, 272 F.3d 831, No. 00-1241 (7th Cir. 11/15/01). In prosecution for bank fraud and money laundering where the defendant emptied the accounts of his deceased roommate and forged his will in an effort to obtain his estate, the Court of Appeals held that the district court improperly included in the order of restitution $130,000 in attorneys fees expended by the victim's estate in its effort to challenge the bogus will. The Court of Appeals noted that although a district court should include in the calculation of restitution all direct damages, consequential or incidental damages may not be included. Attorneys fees incurred in fighting a fraudulent scheme, according to the court, are properly classified as consequential, not direct, damages. Thus, they may not be recovered in an order of restitution.

U.S. v. Seward, 272 F.3d 831, No. 00-1241 (7th Cir. 11/15/01). In prosecution for bank fraud and money laundering where the defendant emptied the accounts of his deceased roommate and forged his will in an effort to obtain his estate, the Court of Appeals held that the deceased victim could not form the basis for a "vulnerable victim" enhancement pursuant to U.S.S.G. § 3A1.1(b). The district court concluded that the deceased victim was vulnerable because the defendant's presentation of the fraudulent will interfered with the victim's wishes for disposition of his estate, and the victim, being dead, was unable to do anything to discover or thwart the fraud. The Court of Appeals rejected outright the notion that a deceased victim could support the enhancement. However, the court nevertheless affirmed the enhancement, finding that the true beneficiaries of the will, three elderly sisters located far from the deceased domicile, were vulnerable victims. Given these factors, they were particularly unlikely to detect or thwart the defendant's crime.

U.S. v. Maro, 272 F.3d 817, No. 00-4208 (7th Cir. 11/08/01). In prosecution for multiple bank robberies, the Court of Appeals rejected the defendant's argument that the district court erred in upwardly departing. At sentencing, the district court upwardly departed, finding that the defendant's criminal history category was inadequate and that his offense level did not reflect the seriousness of his crimes. However, the judge also concluded that the defendant was not a career offender. The defendant appealed, but the government did not cross-appeal. Notwithstanding its failure to cross-appeal the district court's refusal to classify the defendant as a career offender, the government nevertheless argued on appeal that regardless of the correctness of the departure, the defendant was in fact a career offender. As such, he was sentenced within the guideline range for career offenders, thereby making any error in departing irrelevant. The Court of Appeals initially noted that, ordinarily, a cross-appeal would be required for the government to challenge the district court's career offender determination. Nevertheless, the Court of Appeals stated that "we think it best not to require a formal cross-appeal in order for us to consider the issue." Having made this conclusion, the Court of Appeals did not address the defendant's issue raised on appeal, but rather considered only the government's argument that the district court should have sentenced the defendant as a career offender. After examining the facts, the court concluded that the defendant was a career offender, and it therefore affirmed the sentence, noting that the district court imposed the right sentence for the wrong reason.

U.S. v. Trotter, 270 F.3d 1150, No. 00-4185 (7th Cir. 11/6/01). Upon consideration of the district court's revocation of supervised release for the defendant's positive tests for marijuana use, the Court of Appeals resolved a number of apparent intra-circuit conflicts in this area of the law. First, the court considered whether a challenge to the term of imprisonment upon revocation of supervised release is moot where the defendant has already served his entire term of imprisonment. The court initially noted that United States v. Ross, 77 F.3d 1525 (7th Cir. 1996) holds that completion of a prison sentence while an appeal is pending does moot an appeal, despite ongoing supervised release. Specifically, Ross held that the appeal is moot when it is legally impossible to shorten the term of supervised release, even if the prison sentence should have been shorter. An example of such a situation would be where the

defendant was sentenced to a mandatory minimum term of supervised release. In such a situation, regardless of whether the prison sentence was too long, a post hoc decision that the term of imprisonment was too long could not shorten the length of supervised release. However, in a situation such as the present case, where the defendant was not sentenced to a statutory minimum term of supervised release, a district court, upon remand, *could* shorten the term of supervised release to account for the incorrectly determined term of incarceration. Thus, under such a circumstance, the appeal is not moot. Next, the court considered whether use of marijuana supports an inference of possession, for while use is a Grade C violation, possession is a criminal offense potentially supporting a Grade B violation. The court concluded that use *may* support an inference of possession. Thus, if a defendant, such as in the present case, tests positive several times and refuses to submit to tests on other occasions, these facts support a conclusion of possession, rather than simply use. In reaching this conclusion, the court specifically disavowed language in United States v. Wright, 92 F.3d 502 (7th Cir. 1996), where the court stated just the opposite. Finally, the court considered the question of whether the district court may consider the defendant's criminal history when determining whether conduct constitutes "any other federal, state, or local offense punishable by a term of imprisonment exceeding one year" within the meaning of U.S.S.G. § 7B1.1(a)(2). Possession of personal-use quantities of marijuana is a civil offense punishable by a fine, a Grade C violation. However, for persons with a prior drug conviction, the offense is punishable by up to two years' imprisonment, raising the offense to a Grade B violation. The court concluded that, when determining the grade of the offense, the district court may consider the defendant's criminal history in determining the grade of violation. Again, the court disavowed language from a case standing for the contrary proposition, United States v. Lee, 78 F.3d 1236 (7th Cir. 1996).

U.S. v. Monteiro, 270 F.3d 465, No. 01-1564 (7th Cir. 10/26/01). In prosecution for access device fraud, the Court of Appeals reversed a condition of the defendant's supervised release. The district court imposed as a condition of supervised release that the defendant's "person, residence, and vehicle shall be subject to search and seizure upon demand by any law enforcement officer." The court affirmed the search portion of the order, noting that the possibility of search at any time worked to deter the defendant from resorting to fraud upon release from incarceration. Indeed, given the defendant's lifetime of fraudulent behavior, the provision was clearly warranted. However, with respect to the seizure aspect of the order, the Court of Appeals concluded that there was an inadequate reasons for the district court to require such broad authority to seize to ensure that the ends of rehabilitation and protection of the public were met. Under the plain language of the court's order, any law enforcement officer could seize the defendant's person or property for any reason or no reason at all. Even the government acknowledged at oral argument that it did not believe the district court had foreseen such a result at the time the condition was imposed. Accordingly, the court remanded the case for a more carefully stated condition.

United States v. Danser, 270 F.3d 451, No. 99-4251 (7th Cir. 10/25/01). In prosecution for three counts of improper sexual conduct with the defendant's minor daughter, the Court of Appeals reversed the district court's imposition of consecutive terms of supervised release. At sentencing, the district court ordered that the defendant's 3-year term of supervised release on each count run consecutively. The Court of Appeals, in reversing the portion of the judgment, noted that the Sentencing Guidelines do not permit the imposition of consecutive terms of supervised release.

U.S. v. Shepard, 269 F.3d 884, No. 01-1569 (7th Cir. 10/23/01). In prosecution for mail fraud and money laundering, the Court of Appeals reversed the district court's restitution order. The defendant was hired by a hospital as a social worker, and in this capacity, she gained the trust of an elderly patient at the hospital. The defendant and her relatives eventually moved in with the victim, and emptied $92,000 out of her bank account. Rather than order the return of this amount in restitution, the district court ordered that $165,000 in restitution be paid, on the theory that the hospital, who settled a civil suit in this amount, was also a victim. The Court of Appeals rejected this theory of restitution. The court noted that if the hospital was negligent in failing to properly check the defendant's credentials, the hospital was a tortfeasor rather than a victim. While the hospital may have been a victim of the defendant's fraud with respect to her employment information, it was not a victim of the fraud committed against the elderly patient. Accordingly, the settlement amount paid by the hospital was not a "direct loss" and could not be included in the restitution order.

U.S. v. Sherman, 268 F.3d 539, No. 00-2961 (7th Cir. 10/11/01). In prosecution for receiving child pornography, the Court of Appeals held that multiple counts based on depictions of different minors were

not groupable under the Guidelines. According to the court, the possession, receipt, and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding disclosure of personal matters. Children also suffer profound emotional repercussions from a fear of exposure, and the tension of keeping the abuse secret. Therefore, because the children depicted in child pornography suffer direct and primary emotional harm when another person possesses, receives, or distributes the material, the court concluded that multiple counts based on different victims should not be grouped under U.S.S.G. § 3D1.2.

SPEEDY TRIAL

U.S. v. Pedroza, 269 F.3d 761, No. 00-3762 (7th Cir. 10/11/01). In prosecution for conspiracy to distribute cocaine, the Court of Appeals affirmed the defendants' convictions over their Speedy Trial Act violation argument. The delay in question arose because the district court did not rule on the defendants' motions to suppress until 121 days after the last document necessary to decide the motions was filed. Because only the first 30 days after the suppression motions were taken under advisement were excludable, the defendants argued that the district court missed the 70-day deadline by 21 days. The Court of Appeals noted that although the Act allows only 30 days of excludable time after the last brief on a motion is filed if only a single pre-trial motion is pending, when a district court must contend with multiple motions, the 30-day period can be extended as long as the court resolves all pending motions with "reasonable promptness." While this standard is not susceptible to mathematically precise definition, the court has in the past found that trial courts have acted with reasonable promptness when they have taken 42 day to decide 7 motions, 68 days to decide 8 motions, and 50 days to decide 24 motions. In the present case, the court was considering a total of 4 different suppression motions brought by two different defendants. At least 51 of those days was excludable time under these circumstances, and, accordingly, enough to satisfy the Speedy Trial Act. Thus, the court avoided considering whether the entire 121 days was too long.

SUFFICIENCY OF THE EVIDENCE

U.S. v. Rivera, ___ F.3d ___, No. 00-4160 (7th Cir. 12/10/01). In prosecution for conspiracy to distribute cocaine, the Court of Appeals reversed the defendant's conviction, holding that the government failed to establish anything more than a mere buyer-seller relationship. The evidence at trial established that the defendant purchased large quantities of cocaine from a supplier on four separate occasions over the course of three months. Based on this evidence, the jury convicted the defendant of conspiracy to distribute. On appeal, the defendant argued that the evidence established only a buyer-seller arrangement, and the Court of Appeals agreed. The court noted that to determine whether a conspiracy exists between a buyer and seller of illegal narcotics, the court looks to the following factors: (1) length of relationship; (2) established method of payment (for example, fronting); (3) the extent to which transactions were standardized; and (4) the level of mutual trust between buyer and seller. None of these factors is dispositive, but if enough of the factors are present and point to a concrete, interlocking interest beyond individual buy-sell transactions, the facts will support an inference that a buyer-seller relationship developed into a cooperative venture. In the present case, although the defendant engaged in four transactions over three months, repeat transactions, without more, simply do not place the participants' actions into the realm of conspiracy. That "something more" was not present in this case. All the evidence showed was a "series of spot dealings at arm's length between dealers who have no interest in the success of each other's enterprise." Specifically, there was no evidence of fronting (indeed, the supplier explicitly refused to do so), no established method of payment; no standardization (the transactions involved different people, prices, locations, and methods of payment and delivery; and no showing of a level of trust between buyer and seller. Although the evidence amply showed that the defendant distributed cocaine, he was charged only with conspiracy. Accordingly, the Court of Appeals reversed his conviction. Moreover, the court also noted that the district court's jury instruction was erroneous. Specifically, the instruction noted that an agreement could be inferred from "fronting" or when a dealer participates in multiple transactions. This was erroneous, for none of the factors noted above can, standing alone, support a conspiracy conviction. The instruction allowed the jury to find an agreement based solely on the number of transactions, such practice being specifically precluded by circuit precedent.

Supreme Court Update

(as of January 9, 2002)

The following Supreme Court Update was compiled by Fran Pratt of the Defender Services Training Division in Washington, D.C. Her update is a valuable tool for keeping current with Supreme Court

decisions, and we are pleased to share this with you.

Recent Decisions

Dusenbery v. United States, 122 S. Ct. ____ (Jan. 8, 2002) (when government proposes to forfeit property in which prisoner may have interest, Fifth Amendment's Due Process Clause does not require that government provide actual notice of pending forfeiture; notice sent by certified mail to prison with procedures for delivering mail to inmates is sufficient) (5-4 decision).

Kelly v. South Carolina, 122 S. Ct. ____ (Jan. 9, 2002) (in capital case where future dangerousness is at issue, due process requires that court instruct jury that life imprisonment means life without parole even without jury question as to parole eligibility) (5-4 decision).

United States v. Knights, 122 S. Ct. 587 (where there was blanket permission to search as condition of probation, and there was reasonable suspicion to conduct search, search of probationer's home was reasonable and did not violate Fourth Amendment) (9-0 decision). Counsel was Hilary Fox, an AFPD in Oakland, CA.

CASES AWAITING DECISION

Ashcroft v. American Civil Liberties Union, No. 00-1293, 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, 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)).

Kansas v. Crane, No. 00-957, 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)).

Lee v. Kemna, No. 00-6933, 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)).

McKune v. Lile, No. 00-1187, 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, 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 were Rob Wagner, an AFPD in Richmond, VA, and Mark Olive, Habeas Assistance Training (HAT) counsel, Tallahassee, FL.

United States v. Arvizu, No. 00-1519, 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 was Vicki Brambl, an AFPD in Tucson, AZ.

United States v. Vonn, No. 00-973, 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 was Monica Knox, a DFPD in Los Angeles, CA.

CASES AWAITING ARGUMENT

Alabama v. Shelton, No. 00-1214, to be argued Feb. 19, 2002 (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)).

Atkins v. Virginia, No. 00-8452, to be argued Feb. 20, 2002 (whether execution of mentally retarded individuals convicted of capital crimes violates Eighth Amendment) (case below: 534 S.E.2d 312 (Va. 2000)).

Bell v. Cone, 01-400, certiorari granted Dec. 10, 2001 ((1) whether appellate court's application of de novo standard of review to capital habeas petitioner's claim of ineffectiveness assistance of counsel conflicts with *Williams v. Taylor*, which sets standard of review under 28 U.S.C. § 2254(d)(1) for granting habeas relief to state prisoners on claims that have been previous adjudicated on merits in state court; (2) whether federal court of appeals may bypass prejudice prong of *Strickland v. Washington* and presume prejudice under *United States v. Cronic* to find violation of Sixth Amendment right to counsel) (case below: 243 F.3d 961 (6th Cir. 2001)). Counsel are Paul Bottei, an AFPD in Nashville, TN, and Robert Hutton of Memphis, TN.

Board. of Education of Independent School District No. 92 of Pottawatomie County, Okla. v. Earls, No. 01-332, certiorari granted Nov. 8, 2001 (whether board of education can implement suspicionless drug-testing policy covering students who voluntarily engage in interscholastic competition without first identifying actual drug users among students to be tested).

Harris v. United States, No. 00-10666, certiorari granted Dec. 10, 2001 (whether fact of "brandishing," as term is used in 18 U.S.C. § 924(c)(1)(A), must be alleged in indictment and proved beyond a reasonable doubt where finding of "brandishing" results in increased mandatory minimum sentence) (case below: 243 F.3d 806 (4th Cir. 2001)). Counsel is Bill Ingram, an AFPD in Greensboro, NC.

Newland v. Saffold, No. 01-301, to be argued Feb. 27, 2002 (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 member in Davis, CA.

Oakland Housing Auth. v. Rucker, No. 00-1781, to be argued Feb. 19, 2002 (whether "innocent tenant defense" is available under public housing tenant eviction provisions of 1998 Anti-Drug Abuse Act, 42 U.S.C. § 1437d(*l*)(6)) (case below: 237 F.3d 1113 (9th Cir. 2001) (en banc)).

Stewart v. Smith, No. 01-339, certiorari granted Dec. 12, 2001 (whether state superior court's procedural ruling was independent of merits of respondent's claims of ineffective assistance of trial and appellate counsel; certifying predicate question to Arizona Supreme Court for resolution) (case below: 241 F.3d 1191 (9th Cir. 2001)). Counsel are Bob Hirsh and Jon Young, CJA panel members in Tucson, AZ.

United States v. Cotton, No. 01-687, certiorari granted Jan. 4, 2002 (whether omission from federal indictment of fact that enhances statutory maximum sentence requires automatic vacation of enhanced sentence, notwithstanding that defendant did not object to sentence in district court, government introduced overwhelming proof of fact supporting enhanced sentence, and defendant had notice that fact could be used to seek enhanced sentence) (case below: 261 F.3d 397 (4th Cir. 2001)). Counsel are Tim Sullivan, a CJA panel member in College Park, MD, and Tom Saunders and Art Cheslock, CJA panel members in Baltimore, MD.

United States v. Drayton, No. 01-631, certiorari granted Jan. 4, 2002 (whether officer who informs bus passenger that officer is conducting drug and illegal weapons interdiction and asks passenger for consent to search, while another officer stays at front of bus without blocking exit, has effected a "seizure" of passenger within the meaning of Fourth Amendment and *Florida v. Bostick*) (case below: 231 F.3d 787 (11th Cir. 2000)). Counsel are Gwen Spivey, an AFPD in Tallahassee, FL, and Steven Seliger, a CJA panel member in Quincy, FL.

United States v. Ruiz, No. 01-595, certiorari granted Jan. 4, 2002 (whether before pleading guilty, criminal defendant has constitutional right to obtain exculpatory information, including impeachment material, from government, and if so, whether that right may be waived through plea agreement) (case below: 241 F.3d 1157 (9th Cir. 2001)). Counsel is Steve Hubachek, an AFPD in San Diego, CA.

The Back Bencher

Published by: The Federal Public Defender's Office for the

Central District of Illinois

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