The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 32 Reversible Errors 2003

DEFENDER'S MESSAGE

I am pleased to present another "Reversible Error" issue of *The Back Bencher*. Similar to past "Reversible Error" issues, Alex Bunin, Federal Public Defender for the Districts of Northern New York and Vermont, has graciously provided us with his complete listing of cases finding reversible error, dating as far back as 1995. Given today's legal climate, familiarity with cases finding reversible error is all the more important.

Specifically, on April 30, 2003, President Bush signed into law the AMBER Alert Network Act. While the overall intent of the bill is a good one, *i.e.*, facilitating the speedy rescue of abducted children, the bill unfortunately contains a number of unrelated provisions which drastically change the landscape of federal sentencing in all types of cases. These significant changes, commonly referred to as the "Feeney Amendment," were added to the bill by Congressman Tom Feeney, at the behest of the Department of Justice, with less than 20 minutes of debate in Congress, and without input from judges, lawyers, academics, or the Sentencing Commission.

The most significant of the changes is the virtual repeal of *Koon v. United States*, 518 U.S. 81 (1996), by changing the appellate standard of review from abuse of discretion to *de novo*. As many of you no doubt recall, prior to the decision in *Koon*, appellate courts interpreted a district court's departure authority as being very narrow, prohibiting departure on almost every conceivable basis and resulting in gross injustices--injustices which the Feeney Amendment resurrects. I particularly recall two cases with which I was personally involved where judges were forced to impose unjust sentences because their "hands were tied" by then pre-*Koon* existing law.

In the first of these cases, I represented a community leader and single mother of a wonderful family, but unfortunately also elderly, in ill-health, and morbidly obese. Nevertheless, at her sentencing hearing, the pre-*Koon* interpretation of a court's departure authority prevented the sentencing judge from considering any of these factors when imposing sentence, much to the chagrin of both of us. Indeed, although the sentencing judge tried everything in his power not to send this wonderful woman to prison, he could not legally do so and was forced to send her to prison for five months. These five months proved to be unbearably cruel and unusual punishment for my client who was too large to fit into the prison beds and prison clothes. She endured her miserable five months in prison cold, uncomfortable, and subject to humiliation.

Another former client of mine, a well-known lawyer, received a similarly unjust sentence as a result of pre-*Koon* law. At sentencing, the judge was precluded from considering the facts that my client was in the post-operative stages of colon cancer and had so bravely fought during the Second World War in the Battle of the Bulge that he was awarded a battlefield commission and Bronze Star for bravery and valor. Despite his extraordinary service to his country and ill-health, the judge was forced to sentence him to prison.

These are only two examples from personal experience where grossly unfair sentences were meted out because the judges' "hands were tied" by the existing law--cases where such injustices could have been avoided had they been post-*Koon*. With the Feeney Amendment and the repealing of *Koon*, the Department of Justice has returned us to the days of these injustices.

Unfortunately, the repealing of *Koon* is not the only draconian provision of the Act. Others include: restricting departures in enumerated child-related and sex offenses on the basis of aberrant behavior, family circumstances, diminished capacity, or gambling dependence; prohibiting downward departures on remand based upon newly raised grounds; requiring a government motion before the court may award the additional one-level downward adjustment for timely acceptance of responsibility; prohibiting the Sentencing Commission from adding any new departure grounds for two years; limiting the number of judges on the Sentencing Commission to three; allowing Department of Justice access to Sentencing Commission data identifying each judge's departure practices; and requiring the Department of Justice to report downward departures to the Senate and House Judiciary Committees.

The ultimate purpose of these changes is clearly to remove what little discretion a district court retains under the Sentencing Guidelines and give it to the prosecutors, attempting to turn defendants into little more than sheep to slaughter, defense lawyers into potted plants, and United States district judges into minions of the Department of Justice. We, as defense lawyers, cannot let this happen, and we are not without the tools to challenge the changes wrought by the Feeney Amendment.

As in other cases where our clients are confronted with injustice, we must fight in the arena of the courtroom with creative motions supported by sound legal reasoning and applicable precedents. Indeed, never before in my long career at the bar have I felt more strongly about the importance of motions practice than now--not only because of the Feeney Amendment, but also because of the USA PATRIOT Act and other efforts by the government to curtail due process and the civil liberties of the accused. Constitutional challenges based on the separation of powers doctrine and the Due Process Clause are just a few of the ways which these laws can be attacked. Perhaps we should even resurrect and use *Marbury v. Madison*. We'll see.

To assist you in making these and similar challenges, in addition to this Reversible Errors issue, the next issue of *The Back Bencher* will be a special "Motions Issue" containing sample motions of note and interest used by the lawyers in my office, as well as those used by Defenders across the country. It is my intention through these issues of *The Back Bencher* to provide you with a solid foundation upon which to build your challenges, and it is my hope that we will ultimately be successful in our continuing quest for true justice.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

What is the use of living if it be not to strive for noble causes and to make this muddled world a better place for those who will live in it after we are gone?

Upcoming CJA Seminars

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

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

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

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

Recently Noted Circuit Conflicts

By: Kent V. Anderson
Senior Staff Attorney

Commerce Clause

United States v. *McCoy*, 3__ F.3d ___, 2003 U.S. App. LEXIS 5378 (9th Cir. Mar. 20, 2003)

In a 2-1 decision, the Ninth Circuit held that the portion of the child pornography possession statute (18 U.S.C. §2252(a)(4)(B)) which regulates purely intrastate non-commercial, non-economic possession of child pornography on the basis that the equipment used to produce it traveled in interstate commerce is unconstitutional under *Morrison*.

In this case a mother was prosecuted for possessing an allegedly pornographic picture of herself and her daughter. The defendant's husband was also prosecuted. He went to trial and was acquitted.

The Court concluded the majority opinion by stating that:

"We hold that §2252(a)(4)(B)'s application to the simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution or for economic or commercial use, including the exchange of the prohibited material for other prohibited material, cannot be justified under the Commerce Clause. If punishment for the conduct in which McCoy engaged is desirable and lawful, it is the state that must seek to attain that result, not the federal government. The statute is unconstitutional as applied."

The Court disagreed with pre-*Morrison* cases that held to the contrary. The Court also disagreed with every Circuit that has decided the issue after *Morrison*. The Court found that most of them, including the Seventh Circuit, did not apply the *Morrison* factors and the one that did did so too expansively. *United States* v. *Galo*, 239 F.3d 572 (3d Cir. 2001) (rejecting facial and as applied challenges without mentioning *Morrison*); *United States* v. *Hampton*, 260 F.3d 832 (8th Cir. 2001) (rejecting facial challenge and citing but not discussing *Morrison*); *United States* v. *Hoggard*, 254 F.3d 744 (8th Cir. 2001) (rejecting facial challenge and after mentioning *Morrison* briefly, concluding it is bound by pre-*Morrison* circuit precedent); *United States* v. *Angle*, 234 F.3d 326 (7th Cir. 2000) (rejecting facial challenge and distinguishing *Morrison* in footnote); *United States* v. *Kallestad*, 236 F.3d 225 (5th Cir. 2000).

Fourth Amendment

United States v. *Green*, 3__ F.3d ___, 2003 U.S. App. LEXIS 4157 (5th Cir. Mar. 11, 2003)

The Fifth Circuit reversed a district court's denial of a defendant's motion to suppress a gun that was found in his car after he was arrested. When the officers approached the defendant he had already left his car and was about 25 feet away from it, about to enter his house. When the search took place, the defendant was handcuffed on the ground and surrounded by police about six to ten feet from the car. The Court held that the automobile exception to the warrant requirement in *New York* v. *Belton*, 453 U.S. 454 (1981), did not apply because the defendant had already left his car before the police approached him.

The Court explicitly disagreed with holdings from the Seventh and Tenth Circuits. See *United States* v. *Willis*, 37 F.3d 313, 317-18 (7th Cir. 1994); *United States* v. *Sholola*, 124 F.3d 803, 817 (7th Cir. 1997) (applying *Belton* where the defendant's words and conduct linked him to the car and conveyed that the vehicle was his, or at least under his dominion and control despite the fact that the "defendant was not technically an occupant of the vehicle immediately prior to the search"); *United States* v. *Franco*, 981 F.2d 470, 472-73 (10th Cir. 1992) (applying *Belton* when the defendant was arrested in an undercover agent's car near his automobile based on the fact that he accessed his automobile during the transaction which established that he was in control of the automobile at the time of his arrest). The Fifth Circuit's holding also conflicts with *United States* v. *McLaughlin*, 170 F.3d 889 (9th Cir. 1999) (holding that a search conducted five minutes after an arrestee had been removed from both his car and the scene qualified as a search incident to arrest under *Belton*.) The Fifth Circuit agreed with decisions by the Sixth and D.C. Circuits. See *United States* v. *Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (declining to apply *Belton* when the officer first made contact with the defendant after he had left his automobile and was thirty feet away from his vehicle when arrested); *United States* v. *Fafowara*, 865 F.2d 360, 362-63 (D.C. Cir. 1989) (declining to apply *Belton* to a search of a defendant's automobile when the defendant had parked and was walking in the opposite direction, approximately one car length away, at the time of the arrest).

The Supreme Court recently granted certiorari on this issue in a different case. *Arizona* v. *Gant*, 5__ U.S. ___, 2003 U.S. LEXIS 2947, No.

02-1019 (April 21, 2003).

United States v. *Haywood*, 3__ F.3d ___, 2003 U.S. App. LEXIS 6172 (7th Cir. Mar. 31, 2003)

The Seventh Circuit held that a defendant did not have standing to object to a search of a car that was rented by his girlfriend when he was not an authorized driver. However, the Court did not decide whether an unauthorized driver could ever have standing. So, that is still an open question in this circuit.

The Court noted that:

"Several circuits have examined that issue, though they have failed to reach a consensus. The Fifth and Eighth Circuits have held that an unauthorized driver of a rental car has standing as long as the authorized driver has given him permission to drive the car. See *United States* v. *Best*, 135 F.3d 1223 (8th Cir.1998); *United States* v. *Kye Soo Lee*, 898 F.2d 1034 (5th Cir. 1990). The Fourth, Tenth, and Eleventh Circuits, on the other hand, have looked solely to the rental agreement, holding that a driver who is not authorized by the rental company to operate the car does not have standing. See *United States* v. *Wellons*, 32 F.3d 117 (4th Cir. 1994); *United States* v. *Roper*, 918 F.2d 885 (10th Cir. 1990); *United States* v. *McCulley*, 673 F.2d 346 (11th Cir. 1982). Finding a middle ground, the Sixth Circuit has applied a more fact-based approach. See *United States* v. *Smith*, 263 F.3d 571, 586 (6th Cir. 2001). In *Smith*, the court created a presumption that an unauthorized driver does not have standing but found that the defendant's unique circumstances--he was married to the authorized driver, was a licensed driver, and had paid for the rental car--were enough to overcome that presumption."

The Seventh Circuit did not have to decide the issue in this case because it held that the defendant did not have an objective expectation of privacy in the car since he was unlicensed and could never have been authorized to drive the car.

Fifth Amendment - Miranda

United States v. *Patane*,, 304 F.3d 1013 (10th Cir. 2002)

In this case, which was discussed in the last issue, the 10th Circuit held that the physical fruits of a *Miranda* violation must be suppressed. The Supreme Court has now granted certiorari. *United States* v. *Patane*,, 5__ U.S. ___, 2003 U.S. LEXIS 2948, No. 02-1183 (April 21, 2003).

Fifth Amendment - Double Jeopardy

United States v. *Holloway*, 309 F.3d 649 (9th Cir. 2002)

The Ninth Circuit held that a Hobbs Act prosecution violated the Double Jeopardy Clause because the defendant had already been prosecuted for bank robbery. The Court held that someone could not violate the federal bank robbery statute without also violating the Hobbs Act.

The Second Circuit held that such a prosecution does not violate the Double Jeopardy Clause. *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 982 (2nd Cir. 1990). However, the Ninth Circuit refused to follow that case because the Second Circuit did not acknowledge that every bank robbery violation would also violate the Hobbs Act. Therefore, the Second Circuit's double jeopardy analysis was incomplete.

The Seventh Circuit has not ruled on this issue.

Sixth Amendment - Right to Counsel - *Massiah* violation

United States v. *Danielson*, 3__ F.3d ___, 2003 U.S. App. LEXIS 5570 (9th Cir. Mar. 24, 2003)

In a case involving the obtaining of defense strategy by the government's intrusion into the attorney-client privilege the Ninth Circuit held that the defendant must first make a prima facie showing that a government informant acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information. Then the government must show that there has been no prejudice to the defendant in a procedure like a *Kastigar* hearing.

The Court's holding differed from the holdings of the other two courts that have considered the issue. The First Circuit also has a two part test. The Ninth Circuit adopted the second part of that test. However, the first part of the First Circuit's test only requires a prima facie showing "that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting." *United States v. Mastroianni*, 749 F.2d 900, 907-908 (1st Cir. 1984). The D.C. Circuit adopted a per se rule that a criminal defendant's proof of mere possession of improperly obtained trial strategy information by the prosecution constituted proof of prejudice. See *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983) ("Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant.").

The Ninth Circuit stated that:

"The application of the first step of the *Mastroianni/Kastigar* burden-shifting analysis to the facts of this case is straightforward. Danielson has shown that the government deliberately sent its informant, Sava, to obtain information from Danielson; that Sava affirmatively acted to elicit privileged trial strategy information from Danielson; that the privileged information thereby obtained was told to, and preserved by, members of the prosecution team; that a member of the prosecution team wrote memoranda about this information; that members of the prosecution team listened to and transcribed transcripts containing this information; and that the prosecutor in charge of the case kept much (perhaps all) of this information in his private office. Under these circumstances, Danielson has shown more than enough to shift the burden to the government to show that it did not use this information.

Under the second step of the analysis, the government must introduce evidence and show by a preponderance of that evidence that it did not use this privileged information. Specifically, it must show that all of the evidence it introduced at trial was derived from independent sources, and that all of its pre-trial and trial strategy was based on independent sources. Strategy in this context is a broad term that includes, but is not limited to, such things as decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), about what questions to ask (and in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal."

The Court remanded this case to the district court because it did not apply the second part of the standard.

Sixth Amendment - Right to Cross-Examination

United States v. *Chandler*, 3__ F.3d ___, 2003 U.S. App. LEXIS 7039 (3rd Cir. April 14, 2003)

In a 2-1 decision, the Third Circuit reversed a defendant's drug conspiracy conviction because a district judge unduly restricted her right to cross-examination. The Court held that the defendant was entitled to bring out the magnitude of the benefit that the government witnesses either received or hoped to receive as a result of their cooperation. The Court also stated that:

"The government contends that its asserted interest in restricting Chandler's inquiry—its desire to prevent the jury from inferring the sentence to which *the defendant* could be exposed were she found guilty —warranted the District Court's ruling limiting cross-examination. While we appreciate the government's interest in withholding information that potentially could induce a jury to "nullify" the federal law that Chandler was alleged to have violated, we find that such an interest is outweighed by Chandler's constitutional right to confront [the witnesses]."

"We conclude that, while the government had a valid interest in keeping from the jury information from which it might infer Chandler's prospective sentence were she to be convicted, that interest did not trump Chandler's entitlement under the Confrontation Clause. That interest, like the state's interest in protecting the anonymity of juvenile offenders, had to yield to Chandler's constitutional right to probe the "possible biases, prejudices, or ulterior motives of the witnesses" against her. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). We therefore decline to adopt the reasoning of the cases relied on by the government, see *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995); *United States* v. *Cropp*, 127 F.3d 354, 359 (4th Cir. 1997), insofar as they hold that "information about the precise number of years" a witness believes the [sic] he would have faced absent his cooperation with the government is commonly "outweighed by the potential prejudice [of] having the jury learn what penalties [a] defendant [is] facing." *Luciano-Mosquera*, 63 F.3d at 1153."

Eighth Amendment - Death Penalty

Banks v. *Horn*, 316 F.3d 228 (3rd Cir. 2003)

On remand from the Supreme Court, the Third Circuit held that *Mills* v. *Maryland*, 486 U.S. 367 (1988), applies retroactively because it did not announce a new rule of constitutional law. In *Mills*, the Supreme Court reversed a death sentence where there was a substantial probability that a reasonable jury could have understood the sentencing instructions and forms to prohibit the consideration of mitigating factors that it did not unanimously agree on. In its initial opinion, the Third Circuit held that it did not need to conduct a *Teague* analysis because the Pennsylvania Supreme Court had considered *Mills*. However, the Supreme Court held that a federal court must conduct a *Teague* analysis whenever it is raised by a state, regardless of what the state courts did. The Court then remanded this case to the Third Circuit to conduct a *Teague* analysis. *Horn* v. *Banks*, 122 S. Ct. 2147, 2148 (2002).

The Third Circuit's decision agrees with the Sixth Circuit's holding in *Gall* v. *Parker*, 231 F.3d 265, 323 (6th Cir. 2000). The Court distinguished the Eighth Circuit's contrary holding in *Miller* v. *Lockhart*, 65 F.3d 676 (8th Cir. 1995), because Miller's conviction became final much earlier than Banks' conviction did. The Court also disagreed with holdings of the Fifth Circuit because none of those opinions contained any reasoning in support of the holdings. See *Woods* v. *Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996); *Nethery* v. *Collins*, 993 F.2d 1154, 1161-62 (5th Cir. 1993); *Wilcher* v. *Hargett*, 978 F.2d 872, 877-78 (5th Cir. 1992); *Cordova* v. *Collins*, 953 F.2d 167, 173 (5th Cir. 1992). The Seventh Circuit has not ruled on this issue.

As a result of this decision, the Third Circuit reinstated the rest of its first opinion at *Banks* v. *Horn*, 271 F.3d 527 (3rd Cir. 2001), in which it ordered the state to give the petitioner a new penalty phase hearing.

Offenses

United States v. *Jennings*, 323 F.3d 263 (4th Cir. 2003)

In a 2-1 decision, the Fourth Circuit held that a person who was convicted of a misdemeanor crime of domestic violence and never lost his civil rights can not possess a gun even though one who was convicted, lost his civil rights, and then had them restored can. In this case, the defendant was convicted, but did not lose his civil rights because he was not sentenced to jail. If he had been sentenced to jail, he would have lost his civil rights, but had them automatically restored upon his release. The Court of Appeals found this to be perfectly rational.

Judge Widener, dissenting, found that people who were convicted in states that never deprive misdemeanants of their civil rights can not possess guns, but people who were convicted in states that deprive some misdemeanants of their civil rights should be allowed to possess guns if they did not lose their civil rights.

The Court's decision furthered a circuit split. It agreed with decisions by the Second, Eighth, Ninth, and D.C. Circuits. *McGrath* v. *United States*, 60 F.3d 1005 (2d Cir. 1995); *United States* v. *Smith*, 171 F.3d 617 (8th Cir. 1999); *United States* v. *Hancock*, 231 F.3d 557 (9th Cir. 2000); *United States* v. *Barnes*, 295 F.3d 1354 (D.C. Cir. 2002). However, the Fourth Circuit disagreed with decisions by the First and Sixth Circuits. *United States* v. *Indelicato*, 97 F.3d 627 (1st Cir. 1996); *United States* v. *Wegrzyn*, 305 F.3d 593 (6th Cir. 2002). The Fourth Circuit also disagreed with dicta in Fifth and Tenth Circuit decisions. *United States* v. *Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994) (noting that, if Congress had intended this result, it "would (and easily could) have been more explicit"); *United States* v. *Thomas*, 991 F.2d 206, 212 (5th Cir. 1993) (characterizing this result as "Wonderland"). The Seventh Circuit has not yet decided this issue.

Sentencing

21 U.S.C. §841(b)(1)

United States v. *Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003) and *United States* v. *Graham*, 317 F.3d 262 (D.C. Cir. 2003)

In *Velasco-Heredia*, a Ninth Circuit majority reversed a five year sentence for a marijuana conspiracy due to *Apprendi* error. The government only proved 17.59 kilograms of marijuana at trial. However, at sentencing the district court found, by a preponderance of the evidence, that Defendant was liable for 285 kilograms. Therefore, the judge imposed a five year mandatory minimum for over 100 kilograms, instead of the lower Guidelines sentence. The government argued that the five year sentence was okay because it was still within the five year statutory maximum for less than 50 kilograms of marijuana. However, the Ninth Circuit disagreed. It focused on the language in the subsection of 841(b)(1) that the various penalties apply "in the case of a violation of subsection (a) involving" a specified quantity of a controlled substance sentence. Accordingly, the Court held that this means that the specified amount must be proven before any part of the applicable sentencing range can apply to the defendant. The Court further held that a district court could not purport to sentence a defendant under the subsection that applies to the amount of drugs that have been proven beyond a reasonable doubt and then borrow a provision from a different subsection by applying the mandatory minimum in that subsection the amount of drugs that the court finds by a preponderance of the evidence. Therefore, there was no mandatory minimum in this case and the Defendant had to be resentenced according the Guidelines.

Velasco-Heredia contains a good analysis of why *Harris* v. *United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), does not apply to sentencing under 21 U.S.C. §841(b)(1). The difference is that the maximum sentence for a violation of 18 U.S.C. §924(c) is always life. Only the mandatory minimum changes in that statute.

In *Graham*, the D.C. Circuit reversed a defendant's term of supervised release, based on *Apprendi*, because the district court appeared to have used the mandatory minimum period of supervised release that is required by 21 U.S.C. §841(b)(1)(A) even though the defendant was only charged and convicted under §841(b)(1)(C). The D.C. Circuit did not analyze the issue as extensively as the Ninth Circuit did in *Velasco-Heredia*. It also did not seem to be aware of that decision, which was issued ten days before *Graham* was decided. It appears that both courts independently came to the same result.

The decisions from the Ninth and D.C. Circuits agree with an Eleventh Circuit decision. *United States* v. *Smith*, 289 F.3d 696, 708 (11th Cir. 2002) (rejecting with minimal discussion the government's argument that a defendant who was convicted under §841(b)(1)(C) was subject to a 30 year mandatory minimum).

On the other hand, the Fifth, Sixth, and Eighth Circuits have all held that *Harris* exempts §841(b)(1) mandatory minimums from the reach of *Apprendi*. *United States* v. *Solis*, 299 F.2d 420, 454 (5th Cir. 2002); *United States* v. *Copeland*, 321 F.3d 582 (6th Cir. 2003); *United States* v. *Titlbach*, 300 F.3d 919, 922 (8th Cir. 2003). The First and Seventh, Circuits held in favor of the government without relying on *Harris*. *United States* v. *Goodine*, 3__ F.3d ___, 2003 U.S. App. LEXIS 6733 (1st Cir. April 9, 2003); *United States* v. *Rodgers*, 245 F.3d 961, 965-967 (7th Cir. 2001). The Second Circuit has stated that the issue is still open in that court. *United States* v. *Doe*, 297 F.3d 76, 89 fn. 16 (2nd Cir. 2002). It appears to be still open in the Third, Fourth, and Tenth Circuits, as well.

18 U.S.C. §2252(b)(2)

United States v. *Rezin*, 322 F.3d 443 (7th Cir. 2003)

The Seventh Circuit held that the enhancement in 18 U.S.C. § 2252(b)(2) for defendants who have previously been convicted of certain enumerated crimes, including abusive sexual conduct involving a minor does not require that the victim's age be an element of the prior crime if that age is shown by uncontested evidence.

This holding conflicts with the Third Circuit's decision in *United States v. Galo*, 239 F.3d 572, 576-84 (3d Cir. 2001), which construed the materially indistinguishable term in 18 U.S.C. §2251(d).

U.S.S.G. §2D1.8

United States v. *Leasure*, 319 F.3d 1092 (9th Cir. 2003)

The Ninth Circuit held that the burden of proof to prove that a defendant who was convicted of maintaining a property for the manufacture of a controlled substance participated in the underlying offense and thus merits a greater sentence under U.S.S.G. §2D1.8 is on the government, not the defendant. The Court disagreed with the Tenth Circuit's view in *United States v. Dickerson*, 195 F.3d 1183, 1189-90 (10th Cir. 1999), that §2D1.8 creates a rebuttable presumption that the defendant participated in the underlying offense. No other court has decided this issue.

U.S.S.G. §§4A1.1 and 4A1.2

United States v. *Harris*, 3__ F.3d ___, 2003 U.S. App. LEXIS 6591 (7th Cir. April 8, 2003)

The Seventh Circuit joined the majority of circuits that have decided the issue and held that a shoplifting offense does count as part of a defendant's criminal history. The Court stated that:

"The judges of the Tenth and Eighth Circuits have held that convictions for petty theft or shoplifting are not similar to any offense listed in §4A1.2(c)(1); only [a] panel majority in the Ninth Circuit has held to the contrary and, ... that opinion was met with a dissent that both the district court and this court find convincing. Compare *United States* v. *Hooks*, 65 F.3d 850, 854-56 (10th Cir. 1995) (finding petty theft not similar to the listed exclusion "local ordinance provisions"); *United States* v. *Waller*, 218 F.3d 856, 857-58 (8th Cir. 2000) (finding petty theft is not on the exclusion list), with *United States* v. *Lopez-Pastrana*, 244 F.3d 1025, 1027-31 (9th Cir. 2001)" (concluding shoplifting and insufficient funds check are similar).

Departures

United States v. *Robertson*, 3__ F.3d ___, 2003 U.S. App. LEXIS 6942 (8th Cir. April 9, 2003)

The 8th Circuit reversed an upward departure for a defendant who was convicted of making a false statement to an agent. (18 USC §1001.) The departure was partially based on the fact the false statement was meant to conceal or mitigate the defendant's underlying criminal conduct. The Court held that this was an impermissible basis for departure. The Court disagreed with the contrary holding in *United States* v. *LeMaster*, 54 F.3d 1224, 1232 (6th Cir. 1995) (rejecting the defendant's contention that the guidelines applicable to violations of §1001 already take into account

circumstances involving lies told to conceal other crimes). It appears that no other court has decided this issue.

Habeas Procedure

In Re Olabode, 3__ F.3d ___, 2003 U.S. App. LEXIS 6900 (3rd Cir. April 10, 2003)

The Third Circuit held that when a petitioner files a habeas petition to reinstate his right to appeal and then files another one after his direct appeal is reinstated and concluded the later one is not a second or successive petition. The Court's holding puts it in the majority of a five-two circuit split. The Fourth, Seventh, Tenth, and Eleventh Circuits have all held that a second petition that is filed in such a situation does not count as a second or successive petition for purposes of AEDPA. *In re Goddard*, 170 F.3d 435 (4th Cir. 1999); *Shepeck* v. *United States*, 150 F.3d 800, 801 (7th Cir. 1998) (per curiam); *United States* v. *Scott*, 124 F.3d 1328, 1330 (10th Cir. 1997); *McIver* v. *United States*, 307 F.3d 1327 (11th Cir. 2002). The First and Fifth Circuits held that such a petition is a second or successive petition. *Pratt* v. *United States*, 129 F.3d 54 (1st Cir. 1997); *United States* v. *Orozco-Ramirez*, 211 F.3d 862 (5th Cir. 2000).

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

COLLATERAL ATTACK

Thomas v. United States, ___ F.3d ___ (7th Cir. 2003); No. 02-3875. Upon consideration of a petitioner's "Petition for Rehearing and/or Rehearing (En Banc)" from the denial of a certificate of appealability, the Court of Appeals concluded that such a petition was appropriate and outlined the procedures to be followed where such a petition is filed. According to the Seventh Circuit's Operating Procedure 1(a)(1), a petition for a certificate of appealability is submitted to two judges, who consider independently whether the petitioner's contentions meet the applicable standards. If both judges conclude that a certificate should not issue, the application is not referred to a third circuit judge. In the present case, after two judges determined that no certificate should issue, the petitioner filed a petition for rehearing and/or rehearing en banc. The Court of Appeals noted that no rule or statute either precludes or explicitly allows reconsideration of a decision not to issue a certificate of appealability. The court nevertheless concluded that so long as the motion for reconsideration is filed within the time allowed by Federal Rule of Appellate Procedure 40(a)(1), such a motion could be considered by the court. Moreover, such a motion should be styled as a "Petition for Rehearing," rather than a "Motion to Reconsider." Additionally, should the petition seek en banc consideration, it will be distributed to all active judges. The question before the full court is not whether any particular active judge would deem a constitutional issue substantial, but whether an important and controlling issue of law requires resolution by the full court--either to maintain uniformity within the court or to resolve a question of exceptional importance, the standard set forth in Federal Rule of Appellate Procedure 35(a). However, unless rehearing en banc is granted, a certificate of appealability will only issue if one of the judges to whom the application was referred under Operating Procedure 1(a)(1) concludes, upon reconsideration, that the statutory criteria for a certificate have been met.

Modrowski v. Mote, 322 F.3d 965 (7th Cir. 2003). Upon consideration of the denial of a 2254 petition as untimely, the Court of Appeals held that the filing deadline for such petitions is not equitably tolled by an attorney's incapacity. The attorney hired by the petitioner filed the petition one day late, but the attorney claimed a series of physical and mental ailments prevented him from working on the petition and filing it on time. The Court of Appeals concluded that an attorney's failure to act as a result of incapacity is analogous to an attorney's failure to act as a result of negligence, for which the court does not permit equitable tolling. Thus, the court affirmed the dismissal of the petition.

Buie v. McAdory, 322 F.3d 980 (7th Cir. 2003). Upon consideration of the government's motion to vacate a certificate of appealability, the Court of Appeals outlined the circumstances under which such a motion will be granted or denied. As an initial matter, the court concluded that despite statutory silence on the matter, courts of appeal have the power to vacate improperly granted certificates of appealability. Such cases are those where the certificate identifies only a statutory or other clearly non-constitutional issue. In such cases where the appeal has not been fully briefed, a motion to vacate the certificate is appropriate because it saves judicial resources. On the opposite extreme, if the government does not move to vacate the certificate until the issue has been fully briefed, such a motion should be denied. In the middle cases, where briefing has not yet begun but the certificate has identified a constitutional issue of dubious substantiality--it being probable but

not certain that the appeal does not present a constitutional issue, it will conserve judicial resources in the long run to allow the case to be briefed rather than to worry about the issue of substantiality.

Cuevas v. United States, 317 F.3d 751 (7th Cir. 2003). Upon appeal of a denial of a § 2255 petition which relied upon evidence obtained from interviews with jurors, the Court of Appeals affirmed the denial based upon the fact that the interviews with the jurors were done in violation of local rules. Specifically, the local rules prohibited questioning jurors after the conclusion of a trial without the prior permission of the court. The petitioner's counsel, however, questioned jurors without such permission, and then used the information obtained to form the basis of the collateral attack. The district court denied the motion because the information was obtained in violation of local rules. In affirming the denial, the court noted that it approved of the requirement for court permission prior to post-verdict interviews of jurors, for the ground rules for this sort of inquiry are best left to a judge, not a hired "investigator" employed by a losing litigant. Thus, the court was within its discretion when refusing to consider the "ill-gotten" evidence.

EVIDENCE

United States v. Thomas, 321 F.3d 627 (7th Cir. 2003). In prosecution for possession of a weapon by a felon, the Court of Appeals reversed the defendant's conviction because the district court abused its discretion when it admitted as evidence a photograph of one of the defendant's tattoos and two of the defendant's prior convictions for gun possession. The defendant's tattoo depicted two revolvers crossed, with blood dripping around them. The court found that the picture of the tattoo was admitted for the purpose of establishing the defendant's propensity to possess guns, *i.e.*, because the defendant tattooed a pair of revolvers on his forearm, he is the kind of person who is likely to possess guns. Likewise, although the government introduced the evidence of the prior convictions to demonstrate the defendant's motive for desiring to hide the gun found on his possession, the court found that the danger of unfair prejudice outweighed any limited probative value the evidence may have.

INDICTMENT

United States v. Smith, 324 F.3d 922 (7th Cir. 2003). In prosecution for being a felon in possession of a firearm, the Court of Appeals rejected the defendant's argument that the indictment should have been dismissed because an unauthorized attorney represented the government in the grand jury proceedings. Specifically, during the grand jury proceedings, the government was represented by a Special Assistant United States Attorney, appointed by the United States Attorney, but paid by the State of Wisconsin in his capacity as an Assistant District Attorney. The defendant contended that 28 U.S.C. § 548 required appointed SAUSAs to receive an annual salary fixed by the federal government. Moreover, as a matter of public policy, he argued it was unwise for attorneys who represent the federal government to receive their salaries from another source. The Court of Appeals, however, rejected these arguments, concluding that the SAUSA's salary was in fact fixed by the federal government--that salary being fixed at $0. Additionally, the Court of Appeals refused to find that the procedure employed in this case was improper as a matter of public policy.

JURY INSTRUCTIONS

United States v. Waagner, 319 F.3d 962 (7th Cir. 2003). In prosecution for possession of a weapon by a felon, the Court of Appeals rejected the defendant's argument that the district court erred by refusing his proffered insanity instruction which would have told the jury he would be committed to a "suitable facility" if he was found not guilty by reason of insanity. The court noted that a jury may be instructed on the automatic commitment requirement of § 4243, but only to counteract inaccurate or misleading information presented to the jury during trial. In the defendant's case, the government did not mislead the jury as to the consequences of a verdict of not guilty by reason of insanity, and thus, according to the Supreme Court's decision in *Shannon v. United States*, 512 U.S. 573 (1994), the district court correctly refused to give the proffered instruction.

MISCELLANEOUS

United States v. Long, 324 F.3d 475 (7th Cir. 2003). The question before the court in this case was whether the defendant, a member of the Menominee Tribe of Wisconsin, could be prosecuted by the United States for the same conduct that was the subject of an earlier tribal prosecution. In resolving the issue, the court noted that if the Menominee prosecution is properly characterized as one flowing from independent sovereign powers, then there is no Double Jeopardy bar to the subsequent federal prosecution. If, on the other hand, the Menominee were acting solely under powers delegated by Congress, then the first prosecution will stand as a bar to the second. After a lengthy analysis of the tribal sovereignty doctrine, the Court of Appeals concluded that in the tribal prosecution, the Tribe was exercising its own sovereign power,

and thus the dual sovereignty exception to the Double Jeopardy Clause authorized the sequential federal and tribal prosecutions.

United States v. National Legal Professional Associates, ___ F.3d ___ (7th Cir. 2003; No. 02-1334). The Court of Appeals affirmed the district court's order imposing monetary sanctions against the National Legal Professional Associates after the court determined that the organization was engaged in the unauthorized practice of law in the Southern District of Illinois. A criminal defendant was represented by counsel when his client insisted that he hire the NLPA to assist him with the case. The attorney refused and filed a motion to withdraw. Upon consideration of the motion, Chief Judge Murphy learned that the NLPA was an Ohio-based firm providing pretrial, sentencing, and post-conviction consulting services. Its director was a disbarred attorney, and no licensed attorneys worked for the firm. The NLPA advertised to clients noting that it was not a law firm and could only comprise part of a defendant's legal team under the supervision of a licensed attorney. Upon learning of the NLPA's attempt to insert itself in the case, Judge Murphy stated: "Well I'll tell you. This is about--there is a group from Cincinnati, and frankly, I've had them before, and they're, at best, dimwits, and they give advice to these defendants, who, God bless them, don't know any better, and they muck up the cases, and they're never here when you need them, and I'm full of it, and I'm going to prepare the necessary orders, and I'm going to have whoever they are in Court for practicing law here in Illinois through the mail. I'm going to have them here, and they're going to be sitting right in front of me, and I'm going to have some questions of them." At subsequent hearings, the court found the organization to be engaged in the unauthorized practice of law in several cases, restricted their activities in the Southern District, and ordered them to return their fees in several cases. In two cases where no one could be identified to return the fees to, the court ordered that the fees be paid over to a charitable community fund. On appeal, the Court of Appeals held that the district court was within its inherent powers to find that the organization was engaged in the unauthorized practice of law. Key among the inherent powers incidental to all courts is the authority to control admission to its bar and to discipline attorneys who appear before it, and a federal court has the inherent power to sanction conduct which abused the judicial process. Moreover, considering the serious threat that the unauthorized practice of law poses both to the integrity of the legal profession and to the effective administration of justice, resort to the inherent powers is an appropriate remedy. Secondly, the district court properly found that the organization was engaged in the unauthorized practice of law. The evidence showed that the organization, rather than acting under the supervision of a licensed attorney, operated without attorney oversight and in some cases acted in contravention of the appointed attorney in the case. Thus, their conduct improperly inverted the attorney-client-paralegal dynamic. The only portion of the district court's judgment with which the court found fault was the payment of the unreturned fees to the charitable organization. The district court did not find that the organization was in contempt of court, and ordering payment for anything other than a return of fees to those who paid the fees was an improper sanction.

United States v. Lard, ___ F.3d ___ (7th Cir. 2003; No. 02-3092). In prosecution for possession of a weapon by a felon, the Court of Appeals affirmed a sentence enhancement for reckless endangerment during flight (§ 3C1.2) where the defendant three a rifle into a briar patch during flight which had a round in the chamber and the safety off. On these facts, a district court could reasonably have inferred that throwing a rifle, which was fully capable of firing, could actually cause the gun to go off when it hit the ground, thus creating a risk of serious injury to pursuing officers.

SEARCH AND SEIZURE

United States v. Haywood, ___ F.3d ___ (7th Cir. 2003; No. 02-2892). In prosecution for drug offenses, the Court of Appeals affirmed the district court's determination that the defendant lacked standing to object to a search of the rental car he was driving. The defendant, who did not have a valid driver's license, was driving a rental car for which he was not authorized to drive by the rental company. When police stopped the car, a search revealed a large quantity of drugs. Although the Court of Appeals found that the defendant demonstrated a subjective expectation of privacy in the rental car, it refused to find that the expectation was one that society recognizes as legitimate and reasonable. In reaching this conclusion, the court relied on the facts that the defendant was both unauthorized by the rental company to drive the car and was an unlicenced driver. Thus, the defendant's expectation of privacy in the car was not reasonable.

United States v. Pitts, 322 F.3d 449 (7th Cir. 2003). In prosecution for drug related offenses, the Court of Appeals affirmed the district court's denial of a motion to suppress on the basis that the defendants, through the use of fictitious names on the

package at issue, abandoned the package and lost their right to object to the government's resultant search. The defendant express mailed a package containing drugs, using fictitious names for both the sender and the receiver of the package. Postal inspectors intercepted the package because it matched their "narcotics package profile." After holding the package for a number of days and subjecting it to drug detecting dogs, a warrant was eventually obtained to search the package. As one ground for affirming the denial of the motion to suppress, the Court of Appeals held that the defendants had abandoned the package through the use of the fictitious names. According to the court, no person can have a reasonable expectation of privacy in an item that he has abandoned. To demonstrate abandonment, the government must prove by a preponderance of the evidence that the defendant's voluntary words or actions would lead a reasonable person in the searching officer's position to believe that the defendant relinquished his property interests in the item to be searched. When applying this test, the court looks solely to the external manifestations of the defendant's intent as judged by a reasonable person possessing the same knowledge available to the government agents involved in the search. Here, although the defendants may have manifested a subjective privacy interest in the package, the fictitious names were external manifestations of abandonment. Thus, their subjective manifestation of a privacy interest was not one which society was prepared to protect.

United States v. Peck, 317 F.3d 754 (7th Cir. 2003). Upon consideration of the district court's denial of a motion to suppress evidence, the Court of Appeals found that there was insufficient evidence to establish probable cause, but affirmed based upon the good faith exception. A deputy sheriff received a phone call from a confidential information alleging that the defendant possessed crack and cannabis. The informant told the officer that she wanted the defendant punished because he was not paying for diapers for their child and that she thought the defendant should be arrested because he was dealing drugs. The CI said she had been inside the defendant's residence within the previous two days and had observed large amounts of substances wrapped in individual packets. She said the defendant admitted the substances were drugs he intended to sell. An affidavit to this effect was prepared and the CI was presented to a judge, where she swore under oath that the statements were true. The Court of Appeals noted that the CI's statement lacked detail and was not corroborated by any independent police investigation. Although the CI claimed she personally observed the drugs, she failed to give specific details about the drugs such as where in the house they were hidden, the total amount of drugs possessed by the defendant, or the frequency with which the defendant sold drugs. Moreover, even though the CI stated that she was the defendant's girlfriend, she was unable to give any information regarding him other than that he was a black male. Nevertheless, although the affidavit was "bare bones," it was not so lacking as to make it facially deficient, for it did contain evidence that the defendant possessed and intended to sell drugs. Moreover, the officer addressed issues of credibility by requiring the CI to come to the police station and sign her statement under oath in front of the issuing judge. Therefore, it was reasonable for the officer to rely on a warrant issued by a neutral and detached officer of the court.

SENTENCING

United States v. Alvarado, ___ F.3d ___ (7th Cir. 2003; No. 02-1899). Upon consideration of the defendant's argument that the district court improperly denied him a downward adjustment pursuant to the safety valve (§ 5C1.2), the Court of Appeals held that a defendant must provide the government complete information about certain aspects of his offense before his sentencing hearing begins. Specifically, the fifth requirement for receipt of the safety valve requires that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The court interpreted this to require full disclosure before the sentencing proceedings actually begin, and a defendant who "comes clean" at the sentencing hearing cannot receive the benefit of the reduction.

United States v. Wallace, ___ F.3d ___ (7th Cir. 2003; No. 02-2037). On appeal after being sentenced as an armed career criminal (18 U.S.C. § 924(e)), the Court of Appeals rejected the defendant's argument that an Illinois conviction for unlawful restraint was not a qualifying "violent felony" under the statute. The court noted that § 924(e) provides that a prior offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" is a qualifying violent felony. Looking to the statutory elements of unlawful restraint, a "potential" for violence exists when one private citizen unlawfully restrains another's liberty against his or her will. Indeed, in many cases, the assailant no doubt actually uses force to restrain the

victim. Even where such force is not actually used, however, there always exists the possibility that the victim may try to escape, thereby prompting the use of force on the part of the assailant. Thus, an Illinois conviction for unlawful restrain is a qualifying violent felony for purposes of the armed career criminal act.

United States v. Purifoy, ___ F.3d ___ (7th Cir. 2003; No. 02-3846). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed a four-level sentence enhancement for possessing the weapon while committing "another felony offense," pursuant to § 2K2.1(b)(5). Specifically, during his arrest, the defendant pointed the weapon at the arresting officers. The court concluded that this conduct was "another felony offense"--to wit, aggravated assault. Specifically, the 922(g) conviction was for mere possession, while the actual use of the gun constituted a separate offense.

United States v. Holm, ___ F.3d ___ (7th Cir. 2003; No. 02-1389). In prosecution for possession of child pornography downloaded using a computer, the Court of Appeals reversed a condition of supervised release which imposed a total ban on Internet use. The court noted that the condition was too broad and did not satisfy the narrow tailoring requirement of § 3583(d)(2). Such a ban "renders modern life--in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website--exceptionally difficult." According to the court, a total ban "is the early 21st century equivalent of forbidding all telephone calls, or all newspapers." The court did note, however, that bans on Internet usage short of the total ban in this case would be appropriate, such limited bans being monitored by software and other techniques available to probation officers.

United States v. Sumner, 325 F.3d 884 (7th Cir. 2003; No. 02-1335). In prosecution for drug dealing, the Court of Appeals held that the government was permitted to present new testimony at a remanded sentencing hearing. Specifically, in a prior appeal, the Court of Appeals, applying the plain error standard, remanded to the district court on the issue of how much crack was involved with the defendant's relevant conduct, because the court failed to make adequate factual findings. On remand, the district court allowed the government to present new evidence on the issue. The defendant, citing *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), argued that the government was precluded from presenting the new evidence. In *Wyss*, the Court of Appeals remanded because the government failed to meet its burden of showing that certain quantities of drugs were meant for distribution, rather than personal consumption. Because the defendant had specifically objected in the district court, the Court of Appeals held that the government could not present new evidence on remand, for it had the opportunity to do so the first time. In the present case, however, the court held that the failure to object at the initial sentencing hearing allowed the government to present new evidence on remand. To do otherwise would require the government to anticipate and present evidence on every conceivable issue that might later be found to constitute plain error on appeal. This, according to the court, would impose an impossible burden on the government.

United States v. Harris, 325 F.3d 865 (7th Cir. 2003). In prosecution for drug dealing, the Court of Appeals held that a prior shoplifting conviction was properly included in the calculation of the defendant's criminal history. The defendant argued that § 4A1.2(c) excludes certain enumerated prior offenses and "offenses similar to them, by whatever name they are known" from the calculation of criminal history. One such excluded offense is a conviction for "insufficient funds check." The defendant argued that the similarities between her Indiana shoplifting conviction and Indiana's conversion and check deception statute required exclusion of the shoplifting offense. The Court of Appeals noted, however, that although shoplifting and passing a bad check are essentially theft offenses, there is a substantial difference in the manner in which the crimes are perpetrated, this difference being that shoplifting requires the "trespassory taking of another," where passing a bad check does not. Moreover, shoplifting is one of the most common of all misdemeanors, and it is therefore unlikely that the Sentencing Commission specifically omitted the offense from the list inadvertently.

United States v. Alvarenga-Silva, 324 F.3d 884 (7th Cir. 2003). The Court of Appeals held that a prior conviction for domestic battery qualifies as a "crime of violence" under recently amended U.S.S.G. § 2L1.2, which applies to illegal reentrants. Although the Sentencing Commission's explanation for its amendment suggested an intention to narrow the definition of crimes of violence to exclude offenses like domestic battery, the Court concluded that the plain language of the definition nevertheless compelled it to concluded that domestic battery did qualify as a "crime of violence"

under § 2L1.2.

United States v. Esterman, 324 F.3d 565 (7th Cir. 2003). In prosecution for various fraud offenses, the Court of Appeals reversed the district court's sentencing enhancement for vulnerable victim, which was based solely on the victim's limited command of the English language. The court noted that the district court looked at this fact in isolation, neglecting to consider the fact that the victim in the case was a sophisticated business man, had used an interpreter to communicate, and displayed a familiarity with the American legal system. Moreover, his access and use of an interpreter eliminated most, if not all, of the effects of the language barrier.

United States v. Randle, 324 F.3d 550 (7th Cir. 2003). In prosecution for bankruptcy fraud, the Court of Appeals reversed the district court's order of restitution which included amounts related to mail fraud counts which were dismissed pursuant to a plea agreement. Although the defendant was originally charged with three counts of mail fraud and one count of bankruptcy fraud, the defendant entered into a plea agreement where the government agreed to dismiss the mail fraud counts. Although the defendant agreed to an amount of loss which included amounts related to the mail fraud counts, he did not agree to pay any particular amount of restitution to any particular victim. Nevertheless, at sentencing and without objection by the defendant, the district court imposed restitution to victims related solely to the dismissed counts. Using the plain error standard of review, the Court of Appeals reversed. The Court noted that restitution related to anything other than the actual offense of conviction is only permissible where the defendant either agrees to make such payment in his plea agreement or his offense of conviction involves a scheme, conspiracy, or course of conduct which encompasses the restitution which does not stem directly from the offense of conviction. Because bankruptcy fraud did not have any of these factors as an element and the defendant did not agree to pay restitution on the dismissed counts in his plea agreement, the district court was without authority to order the restitution.

United States v. Bahena-Guifarro, 324 F.3d 560 (7th Cir. 2003). In a case of first impression, the Court of Appeals held that a district court is not required to group two counts of illegal re-entry. The defendant pled guilty to two counts of illegal re-entry, which he committed at different times. At sentencing, the district court refused to group the two counts, finding that the two separate acts after two separate deportations did not fall under the grouping guideline. That section (§ 3D1.2) provides that all counts involving substantially the same harm shall be grouped together into a singe Group. Counts which involve substantially the same harm within the meaning of the rule are counts which involve the same victim and two or more acts or transactions connected by a common criminal objective. The defendant argued that the United States was the victim in both offenses, and the common criminal objective for both offenses was entry into the United States. The court, however, noted that the two offenses did not constitute one composite harm, for the United States incurred the cost of processing and deporting him each time he illegally entered. Secondly, on the issue of a common criminal objective, the court held that the defendant failed to present evidence regarding his reasons for returning to the United States each time. Thus, he demonstrated nothing more than conduct that "constitutes single episodes of criminal behavior, each satisfying an individual--albeit identical--goal."

United States v. Curtis, 324 F.3d 501 (7th Cir. 2003). The Court of Appeals affirmed convictions on various drug counts and two charges of 18 U.S.C. § 924(j), making it an offense to kill a person in the course of a crime prohibited by 18 U.S.C. § 924(c). Both 924(j) charges had the same predicate drug offense, and the defendants argued that the multiple convictions based upon the same predicate offense violated the double jeopardy clause. Although the Court of Appeals noted that the use of several guns in the course of a single drug trafficking offense cannot support multiple 924(c) convictions, the situation presented by 924(j) was significantly different. Applying the *Blockburger* test, the Court noted that each 924(j) offense required proof of an element that the other did not. Specifically, each 924(j) conviction required proof of a different element: in one instance, the prosecution had to prove the conspirators murdered one victim, and in the other, the government had to prove the murder of another. Moreover, to hold otherwise would lead to a conclusion that in a drug conspiracy, all but the first killing committed in the course of the conspiracy would not be covered by the statute. The Court refused to presume Congress intended such an outcome without far more explicit statutory language.

United States v. Cruz, 317 F.3d 763 (7th Cir. 2003). In prosecution for bank fraud, the Court of Appeals affirmed the district court's application of an abuse of a position of trust enhancement. The defendant, an office manager, was convicted of bank fraud after her employer discovered she had forged company checks and used the

company credit card for her own financial gain. Although the district court found that she had abused a position of trust, the defendant argued that she did not occupy a position of trust in relation to the "victim" of her crime. Specifically, she argued that for the purpose of the guideline section, the relevant position of trust was her relationship to the drawee banks, which were direct victims of her charged bank fraud conduct, and not her employer. Since she neither actually nor constructively stood in a position of trust to the defrauded banks, she argued she was ineligible for the enhancement. The Court of Appeals disagreed, holding that the enhancement may be applied even if the defendant did not occupy a position of trust in relation to the victim of the offense of conviction; it is enough if the defendant also harmed the person whose trust she did abuse. In the present case, her check forgery and deceptive bookkeeping were relevant conduct to the bank fraud offense, thus bringing this conduct within the enhancement's reach.

United States v. Hernandez, 325 F.3d 811 (7th Cir. 2003). In prosecution for possessing and concealing counterfeit obligations of the United States (18 U.S.C. § 472), the Court of Appeals reversed the district court's refusal to apply a 2-level enhancement for committing part of the offense outside of the United States. It was undisputed that the defendant obtained her counterfeit bills outside the United States and then passed one of them in the United States. For a § 472 offense, guideline section 2B5.1 is to be applied. This guideline section is also to be applied for offenses in violation of 18 U.S.C. § 470, which punishes counterfeit acts committed outside of the United States. At sentencing, the district court refused to apply a 2-level specific offense characteristic enhancement for committing any part of the offense outside of the United States, finding that this particular enhancement was meant only to apply to § 472 offenses, rather than the § 470 offense that the defendant committed. On appeal by the government, the Court of Appeals reversed. The Court of Appeals noted that although Congress indicated that the amendment was intended to address conduct related to § 472 offenses, the Sentencing Commission, when implementing the amendment which added the 2-level enhancement, did not so limit its reach. Moreover, the Commission has authority to give such an amendment broader reach than intended by Congress, and the Court concluded that such was the case here.

United States v. Lane, 323 F.3d 568 (7th Cir. 2003). In prosecution for bank fraud, the Court of appeals held that the amount of actual loss for guideline purposes is not to be reduced by the amount of any restitution obtained by the victim from a third party. The Court noted that the sentencing guidelines do not contemplate the attribution of third-party guarantees to the actual loss calculation. Rather, the sentencing guidelines stipulate that in fraud cases "as in theft cases, loss is the value of the money, property or services unlawfully taken." U.S.S.G. § 2F1.1, application note 8. The court also noted that this exclusion in the loss calculation is different from the determination of restitution, which does allow for a reduction in the amount of restitution which accounts for third-party payments. This is so because restitution tracks the recovery to which the victim would have been entitled in a civil suit against the defendant.

United States v. Sromalski, 318 F.3d 748 (7th Cir. 2003). In prosecution for possession of child pornography, the defendant challenged the district court's cross-reference from U.S.S.G. § 2G2.4(c)(2) to § 2G2.2, a more severe offense category. The district court made this cross-reference because if found the defendant's relevant conduct included a separate event of receipt and possession of child pornography that was not charged in the information. The defendant contended, however, that application of the cross-reference was error because the prior conduct should not have been factored into his sentence. The court noted that § 2G2.4(c)(2) governed possession, while § 2G2.2 covered "receipt with intent to traffic." While all possession involves "receipt" of some type, the court refused to find that "receipt" was synonymous with "receipt with intent to traffic." Because there was no evidence that the defendant intended to "traffic" the images he possessed, the cross-reference was inappropriate. However, the court noted that this analysis applies only to a charge of simple possession in violation of § 2255(a)(2). Where the government has charged and proven receipt as described in § 2255(a)(2), the Guidelines themselves dictate that the cross-reference to § 2G2.2 is appropriate.

United States v. Scott, 316 F.3d 733 (7th Cir. 2003). In prosecution for fraud, the court of appeals reversed the following condition of supervised release: "The defendant shall be prohibited from access to any Internet Services without prior approval of the probation officer." The rationale for the condition was that a few images of child pornography were found on the defendant's computer during the fraud investigation. The court noted that if the defendant had used the

Internet extensively to commit the crime of conviction, then perhaps the total ban might have been justified. However, such was not the case here, and the images of child pornography were not even relevant conduct to the offense of conviction. Given the uniqueness of the condition, the Court first held that notice of the possibility of the imposition of the condition was required prior to sentencing. The court noted that making supervised release significantly more onerous than the norm adds to the severity of punishment and thus may be seen as a back-door form of an upward departure, requiring notice in advance of sentencing. The court also noted that in fashioning terms of supervised release, terms should be established by judges *ex ante*, not probation officers acting under broad delegations and subject to loose judicial review *ex post*. Indeed, courts should do what they can to eliminate open-ended delegations, which create opportunities for arbitrary action--opportunities that are especially worrisome when the subject concerns what people may read. Finally, the court noted that a total ban on internet access prevents use of email, an increasingly widely used form of communication, and other commonplace computer uses such as getting a weather forecast or reading a newspaper online. There is no need to cut off access to email or benign internet usage when a more focused restriction can be enforced by unannounced inspection of material stored on a defendant's hard drive or removable disks.

SPECIFIC OFFENSES

United States v. Esterman, 324 F.3d 565 (7th Cir. 2003). In prosecution for money laundering, the Court of Appeals held that the evidence was insufficient to support the defendant's conviction because he did nothing to conceal the source of the ill-gotten funds. The Defendant was charged under 18 U.S.C. § 1956(a)(1)(B)(i), which provides that whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of the specified unlawful activity--knowing that the transaction is designed in whole or in part--to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity shall be subject to not more than twenty years imprisonment. The Defendant had opened a joint bank account for business purposes with another individual, but when funds were deposited into the account, the defendant withdrew them and either deposited the funds into accounts he personally controlled or spent the funds for personal use. Given the nature of the transactions, the court concluded that the government failed to prove the requisite element of "concealment." Specifically, the defendant made no effort to disguise or conceal either his withdrawals from the account or the destination of the funds. There was nothing complicated about his disposition of the funds: to the contrary, he simply made deposits into other bank accounts that were correctly identified and he engaged in some retail transactions. Although there was an underlying fraud, the statute calls for another transaction that is designed to "conceal or disguise" what is happening to the original proceeds. That simply did not happen in this case.

United States v. Wei Min Shi, 317 F.3d 715 (7th Cir. 2003). In prosecution for conspiracy to transfer a false identification document that appears to have been issued under the authority of the U.S. government (18 U.S.C. § 1028(f)), the court of appeals reversed the defendant's conviction. The defendant attempted to assist another individual in obtaining a state identification card by creating a false "I-94" form, required by an alien to receive a nonimmigrant visa. The court noted that although there was no question the defendant violated the substantive provisions of the statute, he did not engage in a conspiracy. Specifically, the defendant was engaged in the business of possessing and selling phony documentation and the other individual involved in the transaction was his customer. The prohibition of possessing and transferring the phony documents is symmetrical with the prohibition of possessing and selling illegal drugs, and an illegal sale of drugs, though made pursuant to an agreement express or implied, is not a conspiracy to make a sale. According to the court, a seller and a buyer do not compose a "group" in the sense of relevant conspiracy law, because they do not have a common aim; they act at arm's length rather than cooperatively, each trying to get the better of the deal. In the present case, the defendant's aim was to obtain money for furnishing the forged document, and the buyer's aim was to use the document to obtain a state ID card. They did not seek joint possession, or have any other common object, without which there is no conspiracy.

REVERSIBLE ERRORS 2003

The following is a project of the Office of the Federal Public Defender for the Districts of Northern New York & Vermont. The cases listed are those in which a criminal defendant received relief from an United States Court of

Appeals or the United States Supreme Court. The precedents were reviewed shortly before this publication was released to assure they had not be overruled.

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

These materials may be duplicated for any lawyer providing legal services to indigent defendants. The editor encourages duplication. It saves us time and money. These materials may be reprinted by other free publications or free on-line providers serving the criminal defense bar. Attribution to this office is requested.

Release

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

United States v. Porotsky, 105 F.3d 69 (2d Cir. 1997) (Court denied travel request based on conclusions made by probation).

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

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

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

Counsel

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

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

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

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

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

Delguidice v. Singletary, 84 F.3d 1359 (11th Cir. 1996) (Psychological testing of a defendant without notice to counsel violated the Sixth Amendment).

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

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

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

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

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

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

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

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

*United States v. Mills, 138 F.3d 928 (11th Cir.), modified, 152 F.3d 937, cert. denied, 525 U.S. 1003 (1998) (Defendant could not be made to share codefendant counsel's cross-examination of government witness).

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

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

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

*United States v. Iasiello, 166 F.3d 212 (3rd Cir. 1999) (Indigent defendant had right to appointed counsel at hearing).

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

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

*United States v. Hernandez, 203 F.3d 614 (9th Cir. 2000) (Defendant was denied self-representation at plea).

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

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

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

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

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

*Fisher v. Roe, 263 F.3d 906 (9th Cir. 2001) (Defendant had right to counsel during reading of testimony).

United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001) (Court abused discretion denying substitution of counsel).

United States v. Davis, 269 F.3d 514 (5th Cir. 2001) (Judge must warn defendant of effects of hybrid counsel).

Moore v. Puckett, 275 F.3d 685 (8th Cir. 2001) (Court prevented lawyer and client from speaking during trial).

United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (Actual conflict between counsel and one defendant).

Discovery

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

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

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

*United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995) (Prosecutor should have learned of *Brady* material even if it was not in her possession).

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

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

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

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

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

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

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

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

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

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

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

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

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

Nuckols v. Gibson, 233 F.3d 1261

(10th Cir. 2000) (Government failed to disclose criminal allegations against key prosecution witness).

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

Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001) (Withholding exculpatory evidence that could have affected sentence).

Boss v. Pierce, 263 F.3d 734 (7th Cir. 2001) (Witness's statement may not be available to defendant through due diligence).

McCambridge v. Hall, 266 F.3d 12 (1st Cir. 2001) (Objection not required to preserve *Brady* violation).

Dilosa v. Cain, 279 F.3d 259 (5th Cir. 2002) (Failed to disclose hair sample on victim that was not defendant).

Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (Prosecutor suppressed exculpatory evidence affecting witness's veracity).

Arrests

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

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

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

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

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

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

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

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

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

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

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

United States v. Salzano, 158 F.3d 1107 (10th Cir. 1999) (Cross country trip, nervousness, nor scent of evergreen, justified warrantless detention).

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

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

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

United States v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001) (Illegal arrest tainted later fingerprint evidence).

Northrop v. Trippett, 265 F.3d 372 (6th Cir. 2001) (Anonymous tip of two black males wearing brand clothing and selling drugs did not justify detention).

Sparing v. Village of Olympia Fields, 266 F.3d 684 (7th Cir. 2001) (Entering screen door without consent was an arrest).

Search of Persons

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

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

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

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

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

Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001) (Claim of sexual harassment by officer was allegation of illegal search).

United States v. Hatcher, 275 F.3d 689 (8th Cir. 2001) (A second pat-down was held illegal).

Search of Private Vehicles

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

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

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

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

*United States v. Duguay, 93 F.3d 346 (7th Cir.), cert. denied, 526 U.S. 1029 (1999) (Car could not be impounded for a later search unless the arrestee could not provide for its removal).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Caro, 260 F.3d 1209 (10th Cir. 2001) (Officer needed probable cause to look for VIN number inside door).

United States v. Nee, 261 F.3d 79 (1st Cir. 2001) (Suppression upheld when officer's were found not to be credible about stop).

United States v. Smith, 263 F.3d571 (6th Cir. 2001) (No reasonable suspicion for continued detention).

United States v. Bishop, 264 F.3d 919 (9th Cir. 2001) (Admitting evidence from illeagl stop was not harmless).

United States v. Jones, 269 F.3d 919 (8th Cir. 2001) (Committing traffic violation after seeing police did not create probable cause to search vehicle).

United States v. Valdez, 267 F.3d 395 (5th Cir. 2001) (After computer check completed motorist should have been allowed to leave).

United States v. Gomez, 276 F.3d 694 (5th Cir. 2001) (Homeowner

had expectation of privacy to vehicle of third party parked in driveway).

United States v. Chavez-Valenzuela, 279 F.3d 1062 (9th Cir. 2002) (Nervousness alone did not justify continued detention).

United States v. Sigmond-Ballesteros, 285 F.3d 1117 (9th Cir. 2001) (Lacked reasonable suspicion to search car for undocumented aliens).

United States v. Mariscal, 285 F.3d 1127 (9th Cir. 2002) (No reasonable suspicion of traffic violation).

Search of Commercial Vehicles

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

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

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

Bond v. United States, 529 U.S. 334 (2000) (Manipulation of bag found on bus was illegal search).

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

Search of Packages

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

*United States v. Ali, 68 F.3d 1468, modified, 130 F.3d 33 (2d Cir. 1995) (Checking whether the defendant had a valid export license was not a proper ground for seizure).

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

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

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

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

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

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

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

United Staes v. Runyan, 275 F.3d 449 (5th Cir. 2001) (Police could not open closed container discovered by previous private search).

United States v. Hernandez, 279 F.3d 302 (5th Cir. 2002) (Manipulation of luggage tainted consent to search).

Search of Private Property

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

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

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

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

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

J.B. Manning Corp. v. United States, 86 F. 3d 926 (9th Cir. 1996) (Good faith exception to the warrant requirement does not affect motions to return property).

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

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

United States v. Ivy, 165 F.3d 397

(6th Cir. 1999) (Consent to enter home was not shown to be voluntary).

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

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

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

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

United States v. Vega, 221 F.3d 789 (5th Cir.), cert. den. 531 1155 (2000) (The police cannot create exigency for search of leased home).

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

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

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

United States v. Santa, 236 F.3d 662 (6th Cir. 2001) (Search of apartment lacked exigent circumstances).

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

United States v. Heath, 259 F.3d 522 (6th Cir. 2001) (Allowing officer to examine keys was not consent to open and enter apartment).

United States v. Limares, 269 F.3d 794 (7th Cir. 2001) (Failure to arrest suspect outside did not create exigency upon entry to home).

United States v. Diehl, 276 F.3d 32 (1st Cir. 2002) (Curtilage need not have obvious boundary).

United States v. Jones, 286 F.3d 1146 (9th Cir. 2002) (Subpoena did not give authority to illegally enter premises, even for exigent circumstances).

Warrants

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Ford, 184 F.3d 566 (6th Cir.), cert. denied, 528 U.S. 1161 (2000) (Search warrant authorized broader search than reasonable).

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

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

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

Leveto v. Lapina, 258 F.3d 156 (3rd Cir. 2001) (Search warrant for home did not justify pat-down of owner).

United States v. Blackmon, 273 F.3d 1204 (9th Cir. 2001) (Police may not borrow information from previous wiretap warrant in another case).

Knock and Announce

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

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

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

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

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

Statements

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

United States v. Tenorio, 69 F. 3d 1103 (11th Cir. 1995) (Post-*Miranda* statements were improperly admitted).

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

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

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

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

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

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

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

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

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

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

Dickerson v. United States, 530 U.S. 428 (2000) (*Miranda* warnings are required by Fifth Amendment).

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

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

United States v. Pedroza, 269 F.3d 821 (7th Cir. 2001) (Agreement to speak to officer was not consent to later questioning).

United States v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001) (Post-arrest. pre-*Miranda* silence cannot be used to show demeanor).

United States v. Green, 272 F.3d 748 (5th Cir. 2001) (Defendant's actions in response to custodial interrogation were testimonial in nature).

Ghent v. Woodford, 279 F.3d 1121 (9th Cir. 2002) (*Miranda* applies to statements offered at capital sentencing).

Recusal

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

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

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

United States v. Scarfo, 263 F.3d 80

(3rd Cir. 2001) (Judge should have recused himself if he felt prejudiced by news article).

Indictments

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

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

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

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

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

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

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

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

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

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

United States v. Olson, 262 F.3d 795 (8th Cir. 2001) (Bank robbery indictment failed to allege a taking by force or intimidation).

United States v. Thompson, 287 F.3d 1244 (10th Cir. 2002) (Indictment dismissed when improper sealing caused defendant to innocently destroy documents necessary to his defense).

Limitation of Actions

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

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

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

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

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

Venue

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

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

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

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

*United States v. Hernandez, 189 F.3d 785 (9th Cir.), cert. denied, 529 U.S. 1028 (1999) (Venue was improper for undocumented alien discovered in one district and tried in another).

United States v. Williams, 274 F.3d 1079 (6th Cir. 2001) (Sale to government informant did not bring the conspiracy within district's venue).

United States v. Perez, 280 F.3d 318 (3d Cir. 2002) (Venue should be decided by jury when challenged by defendant).

Pretrial Procedure

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

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

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

motion for dismissal should have been granted).

*United States v. Young, 86 F.3d 944 (9th Cir. 1996) (Court improperly denied a hearing on a motion to compel the government to immunize a witness).

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

United States v. Durham, 287 F.3d 1297 (11th Cir. 2002) (Defendant was forced to wear "stun belt" during trial).

Severance

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

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

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

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

Conflicts

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

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

United States v. Malpiedi, 62 F.3d 465 (2d Cir. 1995) (Conflict for counsel representing witness who gave damaging evidence against his defendant).

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

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

*Perrillo v. Johnson, 205 F.3d 775 (5th Cir. 2000) (Actual conflict existed in successive prosecutions of co-defendants).

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

Competency / Sanity

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

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

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

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

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

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

Privilege

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

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

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

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

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

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

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

*United States v. Glass, 133 F.3d 1356 (10th Cir. 1998) (Defendant's

psychotherapist-patient privilege was violated).

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

United States v. Millard, 139 F.3d 1200 (8th Cir.), cert. denied, 525 U.S. 949 (1998) (Statements during plea discussions were erroneously admitted).

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

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

Jeopardy / Estoppel

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

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

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

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

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

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

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

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

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

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

United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997) (1. Second drug conspiracy prosecution was barred by double jeopardy; 2. Collateral estoppel barred false statement conviction, based upon drug ownership for which defendant had been previously acquitted).

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

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

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

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

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

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

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

Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001) (Jeopardy attaches at unconditional acceptance of guilty plea).

Plea Agreements

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

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

*United States v. Washman, 66 F.3d 210 (9th Cir. 1995) (Defendant could have withdrawn his plea up until the time the court accepted the plea agreement).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Johnson, 241 F.3d 1049 (8th Cir. 2001) (Government breached plea agreement by failing to file departure motion before sentencing).

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

Gunn v. Ignacio, 263 F.3d 965 (9th Cir. 2001) (Prosecutor breached agreement by opposing concurrent sentence).

United States v. Fitch, 282 F.3d 364

(6th Cir. 2002) (A material ambiguity should have been construed to defendant's benefit).

United States v. Lukse, 286 F.3d 906 (6th Cir. 2002) (Plea agreement for substantial assistance enforced when government failed to even assess defendant's level of cooperation).

Guilty Pleas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Blackwell, 172 F.3d 129 (2d Cir.), *superceded, 199 F.3d 623* (1999) (Omissions during colloquy voided plea).

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

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

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

United States v. Barrios-Gutierrez, 255 F.3d 1024 (9th Cir.), cert. denied, 122 S.Ct. 567 (2001) (Defendant was not informed of statutory maximum).

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

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

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

United States v. Markin, 263 F.3d 491 (6th Cir. 2001) (Judge cannot participate in negotiations once guilty plea is entered).

United States v. Lujano-Perez, 274 F.3d 219 (5th Cir. 2001) (Court must explain nature of the charges).

United States v. Stubbs, 281 F.3d 109 (3d Cir. 2002) (Waiver of counsel was insufficient).

United States v. Yu, 285F.3d 192 (2d Cir. 2002) (Allocution must settle drug quantity to satisfy *Apprendi*).

Timely Prosecution

United States v. Verderame, 51 F.3d 249 (11th Cir.), cert. denied, 516 U.S. 954 (1995) (Trial court denied repeated, unopposed motions for continuance in drug conspiracy case, with only 34 days to prepare).

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

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

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

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

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

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

United States v. Graham, 128 F.3d 372 (6th Cir. 1997) (Eight-year delay between indictment and trial violated the Sixth Amendment).

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

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

United States v. Hall, 181 F.3d 1057 (9th Cir. 1999) (Continuances for co-defendants violated Speedy Trial Act).

United States v. Moss, 217 F.3d 426 (6th Cir. 2000) (Unnecessary delay while motion was pending required dismissal with prejudice).

*United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) (Failure to make "ends of justice" findings for speedy trial exclusion).

United States v. Hardemann, 249 F.3d 826 (9th Cir. 2001) (Delay to arraign co-defendant violated speedy trial).

United States v. Nguyen, 262 F.3d 998 (9th Cir. 2001) (Court did not explain denial of continuance when defendant asked for new counsel).

United States v. Novation, 271 F.3d 968 (11th Cir. 2001) (Four-day mid-trial continuance for co-defendant's medical condition violated defendant's rights).

United States v. Bergfeld, 280 F.3d 486 (5th Cir. 2002) (Five-year government delay in filing prosecution justified presumption of prejudice).

Jury Selection

Cochran v. Herring, 43 F.3d 1404

(11th Cir.), cert. denied, 516 U.S. 1073 (1996) (*Batson* claim should have been granted).

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

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

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

Turner v. Marshall, 121 F.3d 1248 (9th Cir.), cert. denied, 522 U.S. 1153 (1998) (Prosecutor's stated reason for striking a black juror was pretextual).

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

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

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

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

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

Dyer v. Calderon, 151 F.3d 970 (9th Cir.), cert. denied, 523 U.S. 1033 (1998) (Juror's lies raised presumption of bias).

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

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

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

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

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

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

United States v. Nelson, 277 F.3d 164 (2d Cir. 2002) (Defendant cannot be forced to trade for consent to seat biased juror).

Fernandez v. Roe, 286 F.3d 1073 (9th Cir. 2001) (Statistical disparities in use of strikes are prima facie evidence of racial discrimination).

Closure

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

*Okonkwo v. Lacy, 104 F.3d 21 (2d Cir.), cert. denied, 524 U.S. 958 (1998) (Record did not support closure of proceedings during testimony of undercover officer).

*Pearson v. James, 105 F.3d 828 (2d Cir.), cert. denied, 524 U.S. 958 (1998) (Closure of courtroom denied the right to a public trial).

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

Jury Trial

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

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

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

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

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

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

United States v. Mortimer, 161 F.3d

240 (3rd Cir. 1998) (Trial judge was absent during defense closing).

United States v. Weston, 206 F.3d 9 (D.C. Cir. 2000) (Use of anti-psychotic medication was not supported by evidence of danger to defendant or others).

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

Confrontation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Saenz, 179 F.3d 686 (9th Cir. 1999) (Defendant was entitled to show his knowledge of victim's prior acts of violence to support self-defense).

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

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

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

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

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

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

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

Agnew v. Leibach, 250 F.3d 1308 (7th Cir. 2001) (Bailiff was improperly called to testify about defendant's confession).

United States v. Wells, 262 F.3d 455 (5th Cir. 2001) (Witness could not testify to contents of destroyed business records).

Brumley v. Wingard, 269 F.3d 629 (6th Cir. 2001) (Videotape should not have been admitted without showing witness was unavailable).

Impeachment

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

United States v. Acker, 52 F.3d 509 (4th Cir. 1995) (Prior consistent statements were not admissible

because they were made prior to the witness having a motive to fabricate).

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Howell, 285 F.3d 1263 (10th Cir. 2002) (Court barred introduction of witnesses' prior felonies without first finding prejudice).

United States v. Adamson, 291 F.3d 606 (9th Cir. 2002) (Restricting cross-examination of key witness was error).

Co-Defendant's Statements

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

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

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

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

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

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

United States v. Reynolds, 268 F.3d 572 (8th Cir. 2001) (Evidence against co-defendant was inadmissible when he admitted underlying crime).

Stapleton v. Wolfe, 288 F.3d 863 (6th Cir. 2002) (Accomplice statements had no indicia of reliability).

Misconduct

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

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

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

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

*United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (Prosecutor's reference to black defendants, who were not from North Dakota, as

"bad people," was not harmless).

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

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

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

United States v. Wilson, 135 F.3d 291 (4th Cir.), cert. denied, 523 U.S. 1143 (1998) (Prosecutor's argument that defendant was a murderer prejudiced drug case).

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

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

Agard v. Portuondo, 159 F.3d 1198 (2d Cir.), cert. denied, 526 U.S. 1016 (1999) (Prosecutor claimed that defendant was less credible without arguing any facts in support).

United States v. Rodrigues, 159 F.3d 439 (D.C. Cir. 1999) (Improper closing by prosecutor).

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

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

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

*Smith v. Groose, 205 F.3d 1045 (8th Cir.), cert. denied, 531 U.S. 985 (2000) (Prosecution argued contradictory facts in two different but related trials).

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

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

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

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

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

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

United States v. Rodriguez, 260 F.3d 416 (5th Cir. 2001) (Prosecutor argued jury could infer guilt from post-arrest silence).

Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002) (Reliance on perjury in argument).

Extraneous Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Haywood, 280 F.3d 7159 (6th Cir. 2002) (Evidence of previous possession had no bearing on alleged sale).

Garceau v. Woodford, 281 F.3d 919 (9th Cir. 2001) (Jury instruction drew attention to prior unrelated crimes).

Identification

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

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

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

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

Expert Testimony

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

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

United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (Per se rule

prohibiting polygraph evidence was abolished by *Daubert*).

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

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

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

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

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

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

*Lindh v. Murphy, 124 F.3d 899 (7th Cir.), cert. denied, 522 U.S. 1069 (1998) (Defendant was not allowed to examine the state's psychiatrist about allegations of sexual improprieties with patients).

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

United States v. Dixon, 185 F.3d 393 (5th Cir. 1999) (Court improperly refused instruction on insanity based upon expert testimony).

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

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

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

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

*United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) (Exclusion of defense experts regarding defendant's ability to communicate in English).

United States v. Watson, 260 F.3d 301 (3rd Cir. 2001) (Drug agents could not give opinion about defendant's intent).

United States v. McGowan, 274 F.3d 1251 (9th Cir. 2001) (Testimony about nature of drug trafficking organizations was inadmissible).

United States v. Varela-Rivera, 279 F.3d 1174 (9th Cir. 2002) (Erroneous admission of testimony about general operation of drug trafficking).

United States v. Pineda-Torres, 287 F.3d 860 (9th Cir. 2002) (Error to allow expert testimony on structure of drug organizations).

Entrapment

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

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

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

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

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

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

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

United States v. Poehlman, 217 F.3d 692 (9th Cir. 2000) (Defendant was entrapped as matter of law).

*United States v. Brooks, 215 F.3d 842 (8th Cir. 2000) (Drug defendant was entrapped as matter of law).

Defenses

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

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

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

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

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

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

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

United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (Court failed to instruct upon defendant's theory of the case).

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

Chia v. Cambra, 281 F.3d 1032 (9th Cir. 2002) (Statements made by alleged co-conspirator were crucial to defense).

Jury Instructions

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

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

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

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

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

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

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

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

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

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

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

Jenkins v. Huchinson, 221 F.3d 679 (4th Cir. 2000) (Reasonable doubt instruction improperly indicated it was only advisory).

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

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

United States v. Brown, 287 F.3d 965 (10th Cir. 2002) (Defendant should have been given instruction on lesser included offense).

Deliberations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Lloyd, 269 F.3d 228 (3rd Cir. 2001) (Court overstepped authority to inquire into juror's decision).

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

Variance

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

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

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

*United States v. Mohrbacher, 182 F.3d 1041 (9th Cir. 1999) (Variance between charge of transporting child pornography and proof of mere receipt).

United States v. Ramirez, 182 F.3d 544 (7th Cir. 1999) (Variance between charge and proof in firearm case).

United States v. Shipsey, 190 F.3d 1081 (9th Cir. 1999) (Court's instruction to jury constructively amended indictment).

United States v. Pigee, 197 F.3d 879 (7th Cir. 1999) (Jury instruction constructively amended indictment).

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

Speech / Assembly

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

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

United States v. Frandsen, 212 F.3d 1231 (11th Cir. 2000) (Requiring permit to make public expression of views was illegal prior restraint).

United States v. Poocha, 259 F.3d 1077 (9th Cir. 2001) (Use of profanity to a park ranger was not disturbing the peace).

United States v. Scarfo, 263 F.3d 80 (3d Cir. 2001) (Prohibiting counsel's extrajudicial statements violated free speech).

McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002) (Gang members statements to one another were protected by First Amendment).

Interstate Commerce

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

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

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

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

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

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

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

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

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

United States v. Wilson, 182 F.3d 737 (10th Cir. 1999) (Insufficient evidence of child pornography shipped in interstate commerce).

*United States v. Spinner, 180 F.3d 514 (3rd Cir. 1999) (Indictment failed to allege element of interstate commerce).

United States v. Causey, 185 F.3d 407 (5th Cir.), cert. denied, 530 U.S. 1277 (2000) (No federal nexus shown regarding communication).

Jones v. United States, 529 U.S. 848 (2000) (Residence that was not used for commercial purpose did not involve interstate commerce in arson case).

*United States v. Wang, 222 F.3d 234 (6th Cir. 2000) (Robbery of cash did not have sufficient impact on interstate commerce).

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

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

United States v. Johnson, 246 F.3d 749 (5th Cir. 2001) (Plea lacked factual basis for connection to interstate commerce).

United States v. Carr, 271 F.3d 172 (4th Cir. 2001) (Admission to arson of mobile home that served as a church did not satisfy interstate commerce prong).

United States v. Turner, 272 F.3d 380 (6th Cir. 2001) (Robbery of individual who ran illegal lottery did not affect interstate commerce).

United States v. Lynch, 282 F.3d 1049 (9th Cir. 2001) (Robbery of an individual did not affect interstate commerce).

Conspiracy

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Thomas, 150 F.3d

743 (7th Cir. 1998) (Defendant was entitled to instruction that buyer/seller relationship is not itself a conspiracy).

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

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

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

United States v. Meyer, 157 F.3d 1067 (7th Cir.), cert. denied, 526 U.S. 1070 (1999) (Court should have instructed that mere buyer/seller relationship did not establish conspiracy).

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

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

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

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

United States v. Torres-Ramirez, 213 F.3d 978 (7th Cir. 2000) (Purchase of drugs and knowledge of conspiracy did not make defendant a co-conspirator).

*United States v. Estrada-Macias, 218 F.3d 1064 (9th Cir. 2000) (Mere presence and knowledge of a conspiracy were insufficient to convict).

*United States v. Fuchs, 218 F.3d 957 (9th Cir. 2000) (No instruction that conspiracy must have occurred during statute of limitations).

United States v. Rivera, 273 F.3d 751 (7th Cir. 2001) (Mere buyer/seller relationship was not conspiracy).

United States v. Garcia-Torres, 280 F.3d 1 (1st Cir. 2002) (Defendant involved in kidnapping and murder did not know he was aiding drug conspiracy).

United States v. Thomas, 284 F.3d 746 (7th Cir. 2002) (Two sales did not prove membership in conspiracy).

United States v. Cruz, 285 F.3d 692 (8th Cir. 2002) (Insufficient evidence of conspiracy to distribute methamphetamine).

Firearms

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

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

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

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

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

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

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

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

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

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

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

*United States v. Casterline, 103 F.3d 76 (9th Cir.), cert. denied, 522 U.S. 835 (1997) (Felon in possession charge may not proven solely by ownership).

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Gilliam, 167 F.3d 628 (D.C.), cert. denied, 526 U.S. (1999) (Failed to prove prior conviction in felon in possession).

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

*United States v. Meza-Corrales, 183 F.3d 1116 (9th Cir. 1999) (Felon had civil rights restored and could possess firearms).

United States v. Martin, 180 F.3d 965 (8th Cir. 1999) (Insufficient evidence of constructive possession of a firearm).

United States v. Fowler, 198 F.3d 808 (11th Cir. 1999) (Restoration of rights by state allowed firearms possession).

United States v. Howard, 214 F. 3d 361 (2d Cir. 2000) (Jury could not infer defendant knew firearm was stolen merely because he was felon, or that firearm was found next to one with obliterated serial number).

*United States v. Adams, 214 F.3d 724 (6th Cir. 2000) (Simultaneous possession of firearm and ammunition may result in only one conviction).

United States v. Coleman, 208 F.3d 786 (9th Cir. 2000) (Insufficient evidence that defendant knew co-defendant had a firearm for armed bank robbery conviction).

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

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

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

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

United States v. Atkins, 276 F.3d 1141 (9th Cir. 2001) (Evidence was insufficient that defendant had validly waived counsel to domestic violence charge that was basis for federal firearms offense).

United States v. Laskie, 258 F.3d 1047 (9th Cir. 2001) ("Honorable discharge" of drug offense in Nevada counts as a set aside of the prior conviction).

United States v. Osborne, 262 F.3d 486 (5th Cir. 2001) (Civil rights were restored even though state law was later changed).

United States v. Fix, 264 F.3d 532 (5th Cir. 2001) (Granting new trial for state conviction removed disability to possess firearm).

Extortion

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

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

extortion).

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

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

United States v. Allen, 127 F.3d 260 (2d Cir. 1997) (Insufficient evidence of extortionate credit when terms of loan were consensual).

United States v. Houston, 217 F.3d 1204 (9th Cir. 2000) (No specific finding of express threat of death).

Drugs

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

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

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

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

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

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

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

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

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

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

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

*United States v. Applewhite, 72 F.3d 140 (D.C. Cir.), cert. denied, 517 U.S. 1227 (1996) (Government failed to prove distribution within a 1000 feet of a school).

United States v. Derose, 74 F.3d 1177 (11th Cir. 1996) (Insufficient evidence that the defendant took possession of marijuana when he did not have key to car where drugs were stored).

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

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

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

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

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

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

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

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

United States v. Delagarza-Villarreal, 141 F.3d 133 (5th Cir. 1997) (Insufficient evidence of possession of marijuana where defendant never took control).

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

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

United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1999)

(Passenger was not linked to contraband in vehicle).

United States v. Edwards, 166 F.3d 1362 (11th Cir. 1999) (Insufficient evidence of drug possession where defendant merely picked up package).

United States v. Orduno-Aguilera, 183 F.3d 1138 (9th Cir. 1999) (Insufficient evidence that substance was illegal steroid).

United States v. Monger, 185 F.3d 574 (9th Cir. 1999) (Court should have instructed on lesser offense of simple possession).

United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (Drug quantities not supported by evidence where defendant did not agree to sell from specific location).

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000) (Insufficient evidence where defendant did not arrange for distribution).

United States v. Bryce, 208 F.3d 346 (2d Cir. 2000) (Uncorroborated admissions were insufficient to establish possession or distribution).

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

United States v. Huerto-Orozco, 272 F.3d 561 (8th Cir. 2001) (Insufficient evidence that defendant possessed drugs in bag found in cab).

United States v. Bennafield, 287 F.3d 320 (4th Cir. 2002) (Simultaneous possession of multiple packages was a single crime).

CCE / RICO

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

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

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

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

United States v. Polanco, 145 F.3d 536 (2d Cir.), cert. denied, 529 U.S. 1071 (1999) (Insufficient evidence that defendant murdered victim to maintain position in CCE).

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

United States v. Frega, 179 F.3d 793 (9th Cir.), cert. denied, 528 U.S. 1191 (2000) (Court's instruction failed to identify potential predicate acts in RICO case).

United States v. Glover, 179 F.3d 1300 (11th Cir. 1999) (Role as organizer or leader must be based on managing persons, not merely assets).

United States v. McSwain, 197 F.3d 472 (10th Cir. 1999) (Conspiracy to manufacture and distribute are lesser offenses of CCE).

United States v. Brown, 202 F.3d 691 (4th Cir. 2000) (Omission of instruction requiring unanimity on specific violations reversed CCE conviction).

United States v. Desena, 260 F.3d 150 (2d Cir. 2001) (Talk of "war" and "grabbing shirts" did not support CCE).

Fraud / Theft

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

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

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

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

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

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

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

*United States v. Campbell, 64 F.3d 967 (5th Cir. 1995) (Bank officers

did not cause a loss to the bank).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*United States v. Shotts, 145 F.3d 1289 (11th Cir.), cert. denied, 525 U.S. 1177 (1999) (Bail bond license was not property within meaning of mail fraud statute).

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

*United States v. Evans, 148 F.3d 477 (5th Cir.), cert. denied, 525 U.S. 1112 (1999) (No evidence that mailings advanced fraudulent scheme).

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

United States v. Silkman, 156 F.3d 833 (8th Cir. 1998) (Administrative tax assessment was not conclusive proof of tax deficiency).

United States v. Adkinson, 158 F.3d 1147 (11th Cir. 1998) (Insufficient evidence of fraud).

United States v. Rodrigues, 159 F.3d 439 (9th Cir. 1998) (Insufficient evidence of fraud and theft).

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

United States v. Laljie, 184 F.3d 180 (2d Cir. 1999) (No evidence that checks were altered, that signatures were not genuine, or that they were intended to victimize bank).

United States v. Lindsay, 184 F.3d 1138 (10th Cir. 1999) (Insufficient evidence that bank was FDIC insured).

United States v. Hartel, 199 F.3d 812 (6th Cir. 1999) (Receipt of mailed bank statements was not a fraudulent use of mails).

United States v. Principe, 203 F.3d 849 (5th Cir. 2000) (Possession of counterfeit document should not have been sentenced under trafficking guidelines).

United States v. Tucker, 217 F.3d 960 (8th Cir. 2000) (Loss to IRS occurred when taxes were due, not when conspiracy began).

Cleveland v. United States, 531 U.S. 12 (2000) (Victim must actually receive the item for there to be mail fraud).

United States v. Gee, 226 F.3d 885 (7th Cir. 2000) (Insufficient evidence of mail and wire fraud where defendant did not conceal material facts).

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

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

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

United States v. Ali, 266 F.3d 1242 (9th Cir. 2001) (FDIC insurance at time of trail did not prove bank was insured at time of fraud).

United States v. La Mata, 266 F.3d 1275 (11th Cir. 2001) (Ex post facto application of bank fraud statute).

*United States v. Maung, 267 F.3d 1113 (11th Cir. 2001) (Defendant was not in the business of selling stolen property).

Money Laundering

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

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

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

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

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

*United States v. Wynn, 61 F.3d 921 (D.C. Cir.), cert. denied, 516 U.S. 1015 (1995) (Insufficient evidence that the defendant knew his structuring was unlawful).

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

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

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

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

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

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

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

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

*United States v. Shoff, 151 F.3d

889 (8th Cir. 1998) (Purchase with proceeds of fraud was not money laundering).

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

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

*United States v. Brown, 186 F.3d 661 (5th Cir. 1999) (Insufficient evidence of money laundering when no proof checks were connected to fraud).

United States v. Anderson, 189 F.3d 1201 (10th Cir. 1999) (Titling vehicle in mother's name did not prove money laundering).

*United States v. Messer, 197 F.3d 330 (9th Cir. 1999) (Coded language did not support money laundering conviction).

United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999) (Ex post facto application of money laundering conspiracy statute)

United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999) (Purchase of computers for personal use was not money laundering).

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

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

United States v. Braxton-Brown-Smith, 278 F.3d 1348 (D.C .Cir.2002) (No presumption that money drawn from commingled funds is unclean).

Aiding and Abetting

United States v. de la Cruz-Paulino, 61 F.3d 986 (1st Cir. 1995) (Moving packages of contraband and statements about police was not aiding and abetting).

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

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

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

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

United States v. Stewart, 145 F.3d 273 (5th Cir. 1998) (Insufficient evidence that passenger aided and abetted drug possession without intent to distribute).

United States v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1999) (Insufficient evidence of aiding and abetting when no money found on defendant and was not present at sale).

United States v. Wilson, 160 F.3d 732 (D.C. Cir.), cert. denied, 528 U.S. 828 (1999) (Insufficient evidence of aiding and abetting murder or retaliation where defendant only told shooter of victim's location).

United States v. Barnett, 197 F.3d 138 (5th Cir. 1999) (Insufficient evidence of conspiring or aiding and abetting murder for hire when defendant did not share intent with principal).

Perjury

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

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

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

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

False Statements

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

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

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

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

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

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

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

United States v. Hodge, 150 F.3d 1148 (9th Cir. 1998) (Insufficient evidence of false statements when no certification made on documents).

United States v. Sorenson, 179 F.3d 823 (9th Cir. 1999) (Defendant's false statements were contained in an unsigned loan application).

United States v. Walker, 191 F.3d 326 (2d Cir. 1999) (Insufficient proof that defendant was responsible for more than 100 false immigration documents).

Contempt

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

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

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

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

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

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

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

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

Immigration

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

United States v. Dieguimde, 119 F.3d 933 (11th Cir. 1997) (Order of deportation did not consider defendant's request for political asylum).

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

*United States v. Pacheco-Medina, 212 F.3d 1162 (9th Cir. 2000) (Defendant who was captured a few yards from border did not enter United States).

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

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

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

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

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

United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001) (Prior California DUI was not aggravated felony).

Pornography

*United States v. Hilton, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999) (Whether defendant believed pornographic actors were over 18 years old was a jury question).

United States v. McKelvey, 203 F.3d 66 (1st Cir. 2000) (Single film strip with three images was not "3 or more matters" under child porn statute).

United States v. Henriques, 234 F.3d 263 (5th Cir. 2000) (At least three

images must travel in interstate commerce for child pornography conviction).

United States v. Runyan, 290 F.3d 223 (5th Cir. 2002) (Insufficient evidence that some of the images were tied to Internet).

Violent Crimes

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

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

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

United States v. Spruill, 118 F.3d 221 (4th Cir. 1997) (Insufficient evidence that a threat would be carried out by fire or explosive).

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

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

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

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

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

United States v. Wood, 207 F.3d 1222 (10th Cir. 2000) (Doctor's injection of drug to treat patient did not prove premeditated murder).

United States v. Shumpert, 210 F.3d 660 (6th Cir. 2000) (Assault without verbal threat was minor rather than aggravated).

United States v. Baker, 262 F.3d 124 (2d Cir. 2001) (Instruction allowed conviction without proving ll elements of murder with intent to obstruct justice).

United States v. Peters, 277 F.3d 963 (7th Cir. 2002) (Victim's intoxication and disdain for the defendant did not prove lack of consent to sexual act).

Assimilative Crimes

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

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

United States v. Waites, 198 F.3d 1123 (9th Cir. 2000) (Conduct that was regulated federally should not have been prosecuted under Assimilative Crimes Act).

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

United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001) (Parties cannot stipulate victim was Indian when they were not).

United States v. Martinez, 274 F.3d 897 (5th Cir. 2001) (Federal sentence that was three times longer was not like state sentence).

Miscellaneous Crimes

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

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

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

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

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

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

*United States v. Valenzeno, 123 F.3d 365 (6th Cir. 1997) (Obtaining a credit report without permission was not a crime).

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

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

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

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

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

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

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

United States v. Davis, 183 F.3d 231 (3rd Cir. 1999) *amended* 197 F.3d 662 (same). (Insufficient evidence of obstruction of justice and conspiracy without proof of knowledge of pending proceeding).

United States v. Bad Wound, 203 F.3d 1072 (8th Cir. 2000) (Defendant not liable for acts of coconspirators prior to entering conspiracy).

United States v. Naiman, 211 F.3d 40 (2d Cir. 2000) (Receipt of the funds is a jurisdictional element of commercial bribery).

*United States v. Giles, 213 F.3d 1247 (10th Cir. 2000) (Counterfeit labels were not goods within meaning of statute).

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

United States v. Ortlieb, 274 F.3d 871 (5th Cir. 2001) (Obstruction of justice requires wrongful intent).

United States v. Leveque, 283 F.3d 1098 (9th Cir. 2002) (Lacey Act requires defendant know taking game was illegal).

United States v. Mulero–Joubert, 289 F.3d 168 (1st Cir. 2002) (For trespassing, government must prove defendant had actual or constructive notice that presence was illegal).

Juveniles

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

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995) (Unadjudicated juvenile could not be sentenced to supervised release).

United States v. Juvenile Male PWM, 121 F.3d 382 (8th Cir. 1997) (Court imposed sentence beyond comparable guideline for adults).

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

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

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

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

Sentencing - General

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

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

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

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

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

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

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

its complaint).

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

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

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

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

United States v. Farnsworth, 92 F.3d 1001 (10th Cir.), cert. denied, 519 U.S. 1034 (1996) (Adoption of the presentence report did not resolve disputed matters).

*United States v. Romero, 122 F.3d 1334 (10th Cir.), cert. denied, 523 U.S. 1025 (1998) (Court may not resolve factual disputes by merely adopting the presentence report).

United States v. Ross, 131 F.3d 970 (11th Cir. 1997) (When defendant is convicted of a conspiracy count with multiple objects, the court must find beyond a reasonable doubt that a particular object was proven before applying that guideline section).

United States v. Renteria, 138 F.3d 1328 (10th Cir. 1998) (Lying at suppression hearing invoked accessory after fact guideline, not perjury).

United States v. Washington, 146 F.3d 219 (4th Cir. 1998) (Court should not have relied upon statements made pursuant to plea agreement).

*United States v. Myers, 150 F.3d 459 (5th Cir. 1998) (Defendant was denied right of allocution).

*United States v. Davenport, 151 F.3d 1325 (11th Cir. 1998) (Defendant did not waive right to review presentence report by absconding).

United States v. Glover, 154 F.3d 1291 (11th Cir. 1998) (Time credited toward a sentence did not lengthen total sentence).

United States v. Casey, 158 F.3d 993 (8th Cir. 1999) (Court must use guideline of charged offense).

United States v. Partlow, 159 F.3d 1218 (9th Cir. 1999) (Specific offense characteristics must be applied in the order listed).

United States v. Weaver, 161 F.3d 528 (8th Cir. 1999) (Typo on PSR recommending wrong base level was plain error).

*United States v. Allard, 164 F.3d 1146 (8th Cir. 1999) (Offense characteristic for one offense could not be used for another).

*United States v. Robinson, 164 F.3d 1068 (7th Cir.), cert. denied, 528 U.S. 848 (1999) (Hearsay statements used at sentencing were unreliable).

United States v. Mueller, 168 F.3d 186 (5th Cir. 1999) (Failure to disclose addendum to presentence report).

United States v. Jones, 168 F.3d 1217 (10th Cir. 1999) (If the court allows an oral objection at sentencing then a finding on that objection must be made).

United States v. Navarro, 169 F.3d 228 (5th Cir. 1999) (Cannot have sentencing via video conference over defendant's objection).

United States v. Mitchell, 187 F.3d 331 (3rd Cir. 1999) (Court may not draw adverse inference from silence at sentencing).

*United States v. Swiney, 203 F.3d 397 (6th Cir.), cert. denied, 530 U.S. 1238 (2000) (Application of mandatory minimum is controlled by guidelines definition of relevant conduct, not *Pinkerton* doctrine).

*United States v. Kent, 209 F.3d 1073 (8th Cir. 2000) (Sentence with mental health counseling was improper when there was no history of mental condition).

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

Shafer v. South Carolina, 532 U.S. 36 (2001) (Whenever future dangerousness is at issue in a capital case, the jury must be informed about life sentence without possibility of parole).

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

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

United States v. Velasquez, 246 F.3d 204 (2d Cir. 2001) (Sentence exceeded statutory maximum without proof of death or serious bodily injury).

United States v. Thomas, 246 F.3d 438 (8th Cir. 2001) (Sentence exceeded statutory maximum without proof of drug quantities).

United States v. Knight, 266 F.3d 203 (3rd Cir. 2001) (It is plain error to apply wrong guideline section).

United States v. Sumner, 265 F.3d 532 (7th Cir. 2001) (Court must make specific findings to include uncharged conduct).

United States v. Stapleton, 268 F.3d 597 (8th Cir. 2001) (Court cannot adopt PSR when facts are disputed).

*United States v. Martinez, 274 F.3d 897 (5th Cir. 2001) (Federal sentence under Assimilative Crimes Act was three times state sentence for same conduct).

United States v. Taylor, 277 F.3d 721 (5th Cir. 2001) (Court must be assured information in report was not from defendant's immunized statements).

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001) (Court could not penalize defendant for failure to cooperate in unrelated investigation).

United States v. Whitlow, 287 F.3d 638 (7th Cir. 2002) (Guidelines in effect on date sentence announced are proper, not date hearing began).

United States v. Cross, 289 F.3d 476 (7th Cir. 2002) (Judge, who wanted to impose longest possible sentence, abused discretion, by inflating calculations).

Grouping

United States v. DiDomenico, 78 F.3d 294 (7th Cir.), cert. denied, 519 U.S. 1006 (1996) (Unadjudicated crimes could not be used to determine a combined offense level).

*United States v. Wilson, 98 F.3d 281 (7th Cir. 1996) (Money laundering and mail fraud should have been grouped together).

*United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (Mail fraud and tax fraud counts should have been grouped).

*United States v. Emerson, 128 F.3d 557 (7th Cir. 1997) (Money laundering and mail fraud should have been grouped).

United States v. Kennedy, 133 F.3d 53 (D.C. Cir.), cert. denied, 525 U.S. 911 (1998) (Court cannot refuse to group counts in order to give defendant a higher sentence).

United States v. Marmolejos, 140 F.3d 488 (3rd Cir. 1998) (Clarifying amendment to grouping section justified post-sentence relief).

*United States v. Thomas, 155 F.3d 833 (7th Cir.), cert. denied, 525 U.S. 1048 (1998) (Court failed to group counts when threats were made to same victim).

*United States v. Martinez-Martinez, 156 F.3d 936 (9th Cir. 1999) (Reduction for non-drug conspiracy was mandated when object crime was not substantially complete).

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1999) (Offenses outside United States were not relevant conduct).

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

United States v. Nedd, 262 F.3d 85 (1st Cir. 2001) (Grouping determined by sets of victims, not individuals).

United States v. Smith, 267 F.3d 1154 (D.C. Cir. 2001) (Predicate offense of conspiracy must be found beyond a reasonable doubt).

United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002) (Where conspiracy involved multiple controlled substances defendant may only be sentenced regarding drug with lowest statutory maximum).

Consecutive/ Concurrent

United States v. Greer, 91 F.3d 996 (7th Cir. 1996) (Sentences at two proceedings on the same day were presumed concurrent).

*United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997) (Federal sentence which calculated a state sentence into the base offense level must be concurrent to the state sentence).

*United States v. Corona, 108 F.3d 565 (5th Cir. 1997) (Duplicitous sentences were not purely concurrent where each received a separate special assessment).

United States v. Kikuyama, 109 F.3d 536 (9th Cir. 1997) (Court cannot rely on need for mental health treatment in fashioning a consecutive sentence).

*United States v. Nash, 115 F.3d 1431 (9th Cir.), cert. denied, 522 U.S. 1117 (1998) (Multiplicious counts must be sentenced concurrently and may not receive separate special assessments).

*United States v. Mendez, 117 F.3d 480 (11th Cir. 1997) (Simultaneous acts of possessing stolen mail and assaulting a mail carrier with intent to steal mail, could not receive

cumulative punishments).

*McCarthy v. Doe, 146 F.3d 118 (2d Cir. 1998) (BOP could designate state institution in order to implement presumptively concurrent sentence).

*United States v. Quintero, 157 F.3d 1038 (6th Cir. 1999) (Federal sentence could not be imposed consecutively to not yet imposed state sentence).

United States v. Dorsey, 166 F.3d 558 (3rd Cir. 1999) (Court had authority to reduce a sentence in order to make it effectively concurrent to a previously imposed state sentence).

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

Retroactivity

*United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995) (Case remanded to determine retroactive effect of favorable guideline, that became effective after sentencing).

*United States v. Felix, 87 F.3d 1057 (9th Cir. 1996) (Amendment to the guidelines, which required a sentence based on a lower, negotiated quantity of drugs, was retroactive).

United States v. Etherton, 101 F.3d 80 (9th Cir. 1996) (Retroactive amendment could be used to reduce supervised release).

*United States v. Ortland, 109 F.3d 539 (9th Cir.), cert. denied, 522 U.S. 851 (1997) (Since mail fraud is not a continuing offense, an act committed after the date of an increase to guidelines did not require all counts to receive increased guidelines).

United States v. Zagari, 111 F.3d 307 (2d Cir. 1997) (Use of guidelines effective after conduct violated Ex Post Facto Clause).

United States v. Armstead, 114 F.3d 504 (5th Cir.), cert. denied, 522 U.S. 922 (1997) (Ex post facto application of a guideline provision).

*United States v. Aguilar-Ayala, 120 F.3d 176 (9th Cir. 1997) (Defendant was entitled to sentence reduction to mandatory minimum because of retroactive guideline amendment, regardless of whether safety valve applied).

United States v. Bowen, 127 F.3d 9 (1st Cir. 1997) (Amendment defining hashish oil was applied ex post facto).

*United States v. Mussari, 152 F.3d 1156 (9th Cir. 1998) (Ex post facto application of criminal penalties to failure to pay child support).

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998) (Using guideline effective after commission of offense violated ex post facto where amendment increased punishment).

United States v. Schulte, 264 F.3d 656 (6th Cir. 2001) (Act was committed prior to effective date of statute).

Sentencing - Marijuana

*United States v. Foree, 43 F.3d 1572 (11th Cir. 1995) (Seedlings and cuttings did not count as marijuana plants).

*United States v. Smith, 51 F.3d 980 (11th Cir. 1995) (Weight of wet marijuana was improperly counted).

United States v. Caldwell, 88 F.3d 522 (8th Cir.), cert. denied, 519 U.S. 1048 (1996) (Extrapolation of drug quantities was error).

*United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996) (Counting seedlings as marijuana plants to calculate the base offense level was plain error).

United States v. Agis-Meza, 99 F.3d 1052 (11th Cir. 1996) (Court had an insufficient basis to calculate a quantity of marijuana based upon cash and money wrappers seized).

*United States v. Carter, 110 F.3d 759 (11th Cir. 1997) (Court abused its discretion in denying a motion for a reduction of a sentence over weight of wet marijuana).

*United States v. Mankiewicz, 122 F.3d 399 (7th Cir. 1997) (Marijuana that was rejected by defendants should not have been counted).

United States v. Perulena, 146 F.3d 1332 (11th Cir. 1998) (Defendant was not responsible for marijuana imported before he joined conspiracy).

*United States v. Wyss, 147 F.3d 631 (7th Cir. 1998) (Drugs for personal use could not be counted toward distribution quantity).

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

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

Sentencing - Meth.

*United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995) (Improperly sentenced for D-methamphetamine rather than "L").

United States v. Hamilton, 81 F.3d 652 (6th Cir. 1996) (To be culpable for manufacturing a quantity of drugs, the defendant must have been personally able to make that quantity).

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996) (Judge could not determine the type of methamphetamine based upon the judge's experience, the price, or where the drugs came from).

United States v. Gutierrez-Hernandez, 94 F.3d 582 (9th Cir. 1996) (There was no presumption that three drug manufacturers were equally culpable).

United States v. Cole, 125 F.3d 654 (8th Cir. 1997) (Defendant's testimony about his ability to manufacture was relevant).

United States v. O'Bryant, 136 F.3d 980 (5th Cir. 1998) (Government has burden of proving more serious form of methamphetamine).

*United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (Later drug sales were not foreseeable to defendant).

United States v. Asch, 207 F.3d 1238 (10th Cir. 2000) (Drugs for personal use could not be used to calculate range for distribution).

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

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

United States v. Munoz, 233 F.3d 410 (6th Cir. 2000) (Court could not count meth that defendant was incapable of delivering).

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

United States v. Smotherman, 285 F.3d 1115 (8th Cir. 2002) (Court inaccurately converted pounds to grams).

Sentencing - Heroin

*United States v. Jinadu, 98 F.3d 239 (6th Cir.), cert. denied, 520 U.S. 1179 (1997) (Court could not rely on drug quantities alleged in indictment to determine a mandatory minimum).

*United States v. Shonubi, 103 F.3d 1085 (2d Cir. 1997) (Multiplying quantity of seized drugs by number of previous trips was an inadequate measure).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997) (Insufficient evidence of drug quantities).

United States v. Gore, 154 F.3d 34 (2d Cir. 1998) (Possession and distribution of the same drugs may only be punished once).

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Guevara, 277 F.3d 111 (2d Cir), *amended* 298 F.3d 124 (2002) (When quantity of heroin was not pled or proven to jury, defendant is subject to range for heroin proven, not higher statutory maximum).

Sentencing - Cocaine

United States v. Reese, 67 F.3d 902 (11th Cir.), cert. denied, 517 U.S. 1228 (1996) (Drugs were not reasonably foreseeable to the defendant, nor within scope of agreed joint criminal activity).

*United States v. Howard, 80 F.3d 1194 (7th Cir. 1996) (District court could not rely upon the probation officer's estimates of drug quantities without corroborating evidence).

United States v. Acosta, 85 F.3d 275 (7th Cir. 1996) (Drug quantity finding was insufficient).

United States v. Nesbitt, 90 F.3d 164 (6th Cir. 1996) (Court failed to resolve whether amounts of drugs were attributable during the time of the conspiracy).

United States v. Hernandez-Santiago, 92 F.3d 97 (2d Cir. 1996) (Court failed to make a finding as to the scope of the defendant's agreement).

*United States v. Chalarca, 95 F.3d 239 (2d Cir. 1996) (When negotiated drug amount was not foreseeable, the court should use the lowest possible quantity).

In Re Sealed Case, 108 F.3d 372 (D.C. Cir. 1997) (Court failed to make findings attributing all drugs to the defendant).

*United States v. Milledge, 109 F.3d 312 (6th Cir. 1997) (Evidence did not justify drug quantity finding).

*United States v. Jackson, 115 F.3d 843 (11th Cir. 1997) (Package containing 1% cocaine and 99% sugar was not a mixture under the guidelines).

*United States v. Granados, 117 F.3d 1089 (8th Cir. 1997) (The court failed to make specific drug quantity findings).

*United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (Evidence was insufficient that seized money could support cocaine quantities).

United States v. Bacallao, 149 F.3d 717 (7th Cir. 1998) (No showing prior cocaine transactions were relevant conduct).

United States v. Flowal, 163 F.3d 956 (6th Cir.), cert. denied, 119 S.Ct. 1509 (1999) (Drug quantity was arbitrarily chosen).

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

Sentencing - Crack

United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995) (Could not simply multiply sales outside of crackhouse times days defendant was in conspiracy).

*United States v. Hansley, 54 F.3d 709 (11th Cir.), cert. denied, 516 U.S. 998 (1995) (Individual findings were needed to hold defendant responsible for all drugs in conspiracy).

*United States v. Lee, 68 F.3d 1267 (11th Cir. 1995) (There were inadequate findings to support drug quantities. Crack abusers' credibility was questioned).

United States v. Chisholm, 73 F.3d 304 (11th Cir. 1996) (No factual basis that the defendant knew powder would be converted to crack).

*United States v. James, 78 F.3d 851 (3rd Cir.), cert. denied, 519 U.S. 844 (1996) (No proof that the cocaine base was crack for enhanced penalties to apply).

*United States v. Hill, 79 F.3d 1477 (6th Cir.), cert.denied, 519 U.S. 858 (1996) (Different transactions almost two years apart, with the sole similarity being the type of drug, were not relevant conduct).

United States v. Graham, 83 F.3d 1466 (D.C. Cir.), cert. denied, 519 U.S. 1132 (1997) (Court failed to make individualized findings of drug quantities).

United States v. Frazier, 89 F.3d 1501 (11th Cir.), cert.denied, 520 U.S. 1222 (1997) (Sentencing findings did not support drug quantities attributed to the defendant).

United States v. Byrne, 83 F.3d 984 (8th Cir. 1996) (Drugs seized after the defendant was in custody could not be counted toward sentence).

*United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) (Court did not make individualized findings as to each defendant in a drug conspiracy).

United States v. Randolph, 101 F.3d 607 (8th Cir. 1996) (Trial court inadequately explained its drug quantity findings).

United States v. Brown, 156 F.3d 813 (8th Cir. 1999) (Court should have only based sentence on drug quantity proven by government).

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Gomez, 164 F.3d 1354 (11th Cir. 1999) (Unrelated drug sales were not relevant conduct to conspiracy).

United States v. Moore, 212 F.3d 441 (8th Cir. 2000) (Defendant's responsibility for drugs limited to jointly undertaken activity).

United States v. Jackson, 240 F.3d 1245 (10th Cir.), cert. denied, 122 S.Ct. 112 (2001) (Failure to plead drug quantities required reversal).

United States v. Williams, 247 F.3d 353 (2d Cir. 2001) (Drugs meant for personal use were not to be counted toward distribution conspiracy).

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

United States v. Baptiste, 264 F.3d 578 (5th Cir.), *modified* 309 F.3d274 (2002) (Failure to allege drug quantity is plain error when defendant sentenced above lowest statutory maximum).

United States v. Dinnell, 269 F.3d 418 (4th Cir. 2001) (Sentence over statutory maximum).

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (Failure to plead and prove amount of crack limits punishment to lowest statutory maximum).

United States v. Henry, 282 F.3d 242 (3d Cir. 2002) (Drug quantity raising statutory maximum must be pleaded and proven to jury).

United States v. Davis, 290 F.3d 1239 (10th Cir. 2002) (Court could not look outside of record to determine amount of crack produced).

Sentencing -

Firearms

United States v. Bernardine, 73 F.3d 1078 (11th Cir. 1996) (Government failed to prove the defendant was a marijuana user, and thus he was not a prohibited person).

United States v. Mendoza-Alvarez, 79 F.3d 96 (8th Cir. 1996) (Simply carrying a firearm in one's car was not otherwise unlawful use).

*United States v. Barton, 100 F.3d 43 (6th Cir. 1996) (Enhancement relating to prior convictions covered only those before the instant offense).

United States v. Moit, 100 F.3d 605 (8th Cir. 1996) (Possession of shotguns and hunting rifles qualified for "sporting or collection" reduction).

*United States v. Willis, 106 F.3d 966 (11th Cir. 1997) (Defendant who previously pleaded nolo contendere in a Florida state court was not convicted for purposes of being a felon in possession of a firearm).

*United States v. Cooper, 111 F.3d 845 (11th Cir. 1997) (Firearm that was not possessed at the site of drug offense did not justify enhancement).

United States v. Zelaya, 114 F.3d 869 (9th Cir. 1997) (Express threat of death was not foreseeable to the accomplice-defendant).

*United States v. Knobloch, 131 F.3d 366 (3rd Cir. 1997) (Court could not impose an increase for a firearm when there was a consecutive gun count).

United States v. Ahmad, 202 F.3d 588 (2d Cir. 2000) (Firearms that were not prohibited cannot be counted toward specific offense characteristic).

United States v. Hill, 210 F.3d 881 (8th Cir. 2000) (Defendant who had already pled guilty was not "under indictment" when he received firearm).

United States v. Pena-Lora, 225 F.3d 17 (1st Cir. 2000) (Identity of hostage taken was not proven to award enhancement).

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

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

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001) (Co-defendant's brandishing firearm did not support enhancement for defendant).

United States v. O'Malley, 265 F.3d 353 (6th Cir. 2001) (During conspiracy to steal firearms, it was not foreseeable that one of the firearms would be illegal).

Sentencing - Money Laundering

United States v. Jenkins, 58 F.3d 611 (11th Cir. 1995) ("Rule of lenity" precluded counting money laundering transactions under $10,000).

*United States v. Allen, 76 F.3d 1348 (5th Cir.), cert. denied, 519 U.S. 841 (1996) (Money laundering guidelines should have been based on the amount of money laundered, not the loss in a related fraud).

United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996) (Robberies and burglaries were not relevant conduct in a money laundering case).

United States v. Morales, 108 F.3d 1213 (10th Cir. 1997) (Drug mandatory minimum did not apply to money laundering offense).

United States v. Hunt, 272 F.3d 488 (7th Cir. 2001) (Court cannot substitute drug quantities for money laundered).

United States v. Orlando, 281 F.3d 586 (6th Cir. 2002) (Court failed to make findings about amount laundered).

Sentencing - Pornography

United States v. Cole, 61 F.3d 24 (11th Cir.), cert. denied, 516 U.S. 1163 (1996) (Insufficient evidence of child pornography depicting minors under twelve).

*United States v. Ketcham, 80 F.3d 789 (3rd Cir. 1996) (Enhancement for exploitation of a minor was reversed in a child pornography case for insufficient evidence).

*United States v. Surratt, 87 F.3d 814 (6th Cir. 1996) (Defendant's sexual abuse, unrelated to receiving child pornography did not prove a pattern of activity to increase the offense level).

*United States v. Kemmish, 120 F.3d 937 (9th Cir.), cert. denied, 522 U.S. 1132 (1998) (The defendant did not engage in a pattern of exploitation).

United States v. Fowler, 216 F.3d 459 (5th Cir. 2000) (Child porn was not "distributed" for guideline enhancement).

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

Sentencing - Fraud / Theft

*United States v. Maurello, 76 F.3d 1304 (3rd Cir. 1996) (Loss to a fraud victim was mitigated by the value received by the defendant's actions).

*United States v. Millar, 79 F.3d 338 (2d Cir. 1996) (Adjustment for affecting a financial institution was limited to money received by the defendant).

United States v. Eyoum, 84 F.3d 1004 (7th Cir.), cert. denied, 519 U.S. 941 (1996) (Fair market value, rather than the smuggler's price, should have been used to calculate the value of illegally smuggled wildlife).

United States v. Strevel, 85 F.3d 501 (11th Cir. 1996) (In determining the amount of loss, the court could not rely solely on stipulated amounts).

United States v. King, 87 F.3d 1255 (11th Cir. 1996) (Without proof the defendant committed the burglary, other stolen items, not found in his possession, could not be calculated toward loss).

United States v. Sung, 87 F.3d 194 (7th Cir. 1996) (Findings did not establish reasonable certainty that the defendant intended to sell the base level quantity of counterfeit goods).

United States v. Allen, 88 F.3d 765 (9th Cir.), cert. denied, 520 U.S. 1202 (1997) (Collateral recovered to secure a loan, and the interest paid, was not subtracted from loss in a fraud case).

United States v. Cowart, 90 F.3d 154 (6th Cir. 1996) (Common modus operandi alone, did not make robberies part of a common scheme).

United States v. Krenning, 93 F.3d 1257 (4th Cir. 1996) (Value of rented assets bore no reasonable relationship to the victim's loss).

United States v. Comer, 93 F.3d 1271 (6th Cir. 1996) (Acquitted theft was not sufficiently proven to include in loss calculations).

United States v. Coffman, 94 F.3d 330 (7th Cir.), cert. denied, 520 U.S. 1165 (1997) (Previous fraud using the same worthless stock was not relevant conduct).

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996) (Adoption of PSI was not a finding of tax loss).

*United States v. Peterson, 101 F.3d 375 (5th Cir.), cert. denied, 520 U.S. 1161 (Violation of fiduciary duty alone was not relevant conduct).

*United States v. Kohli, 110 F.3d 1475 (9th Cir. 1997) (There was insufficient evidence of the quantity of fraud attributed).

*United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) (Evidence did not support the alleged volume of unauthorized calls).

*United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) (That defendant's business was "permeated with fraud" was too indefinite a finding).

United States v. Arnous, 122 F.3d 321 (6th Cir. 1997) (Food stamp fraud should have been valued by lost profits, not the face value of the stamps).

United States v. Sublett, 124 F.3d 693 (5th Cir. 1997) (Loss during contract fraud did not include legitimate services actually provided).

*United States v. McIntosh, 124 F.3d 1330 (10th Cir. 1997) (Failure to disclose his interest in a residence that the defendant did not own was not bankruptcy fraud).

United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997) (Services that were satisfactorily performed should have been subtracted from loss).

United States v. Monus 128 F.3d 376 (6th Cir. 1997) (Court did not adequately explain loss findings).

United States v. Cain, 128 F.3d 1249 (8th Cir. 1997) (Sales made before defendant was hired were not relevant conduct toward fraud).

*United States v. Word, 129 F.3d 1209 (11th Cir. 1997) (Fraud, before defendant joined conspiracy, was not relevant conduct).

United States v. Melton, 131 F.3d 1400 (10th Cir. 1997) (Unforeseeable acts of fraud could not be attributed to defendant).

United States v. Desantis, 134 F.3d 760 (6th Cir. 1998) (Neither defendant's business failure, nor state administrative findings, were relevant to fraud case).

*United States v. Cihak, 137 F.3d 252 (5th Cir.), cert. denied, 525 U.S. 847 (1998) (Fraud of coconspirators must be foreseeable to defendant to be relevant conduct).

United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998) (Application note governing fraudulent contract

procurement should have been applied rather than theft guideline).

*United States v. Phath, 144 F.3d 146 (1st Cir. 1998) (Depositing counterfeit checks and withdrawing money did not require more than minimal planning).

United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1999) (Calculation of benefits from bribes did not support findings).

*United States v. Ponec, 163 F.3d 486 (8th Cir. 1999) (No showing that money withdrawn from defendant's account came from employer).

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

United States v. Titchell, 261 F.3d 348 (3rd Cir. 2001) (Court must make detailed analysis of potential loss and intended loss).

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001) (Government must present evidence to support amount of loss when defendant objects to amount).

United States v. Gonzalez-Alvarez, 277 F.3d 73 (1st Cir. 2002) (Illegal product had no value for calculation).

United States v. Schaefer, 291 F.3d 932 (7th Cir. 2002) (Relevant conduct was limited to criminal activity).

Enhancements-General

United States v. Tapia, 59 F.3d 1137 (11th Cir.), cert. denied, 516 U.S. 953 (1995) (Using phone to call codefendant was not more than minimal planning).

*United States v. Miller, 77 F.3d 71 (4th Cir. 1996) (Enhancement for manufacturing counterfeit notes did not apply to those so obviously counterfeit that they are unlikely to be accepted).

United States v. Torres, 81 F.3d 900 (9th Cir. 1996) (Government must prove sentencing enhancements by a preponderance of evidence).

United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996) (Insufficient evidence that the defendant employed sophisticated means).

United States v. Brazel, 102 F.3d 1120 (11th Cir.), cert. denied, 522 U.S. 822 (1997) (Sentence could not be enhanced with convictions that were not final).

United States v. Eshkol, 108 F.3d 1025 (9th Cir.), cert. denied, 522 U.S. 841 (1997) (Only existing counterfeit bills could be counted toward upward adjustment).

*United States v. DeMartino, 112 F.3d 75 (2d Cir. 1997) (Court was without authority to increase a sentence that was not mere clerical error).

*United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997) (No proof that a defendant violated a judicial order during a course of fraud).

*United States v. Calozza, 125 F.3d 687 (9th Cir. 1997) (Identical enhancements for separately grouped counts was double-counting).

*United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (Enhancement for sophisticated means could not be based on acquitted conduct).

Enhancements-

Drug Crimes

United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996) (Court failed to inquire whether the defendant had notice of the government's intent to seek an enhanced sentence with a prior drug conviction).

*United States v. Ekinci, 101 F.3d 838 (2d Cir. 1996) (Unlawful dispensing of drugs by a doctor was not subject to an enhancement for proximity to a school).

United States v. Mikell, 102 F.3d 470 (11th Cir.), cert. denied, 520 U.S. 1181 (1997) (Defendant who was subject to an enhanced sentence under 21 U.S.C. §841, could collaterally attack a prior conviction).

*United States v. Chandler, 125 F.3d 892 (5th Cir. 1997) (Enhancement for drug sale near school only applied when it was charged by indictment).

*United States v. Hudson, 129 F.3d 994 (8th Cir. 1997) (Firearm enhancement was not proven).

United States v. Sanchez, 138 F.3d 1410 (11th Cir. 1998) (Court must hold a hearing if defendant challenges validity of a prior drug conviction used for statutory enhancement).

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998) (Defendant could not receive increase for selling drugs near school unless so charged).

United States v. Hass, 150 F.3d 443 (5th Cir. 1998) (Nonfinal state conviction could not be basis for statutory enhancement of drug sentence).

United States v. Schmalzried, 152

F.3d 354 (5th Cir. 1998) (Government failed to connect firearm to drug offense).

United States v. Rettelle, 165 F.3d 489 (6th Cir. 1999) (Mandatory minimum controlled by drugs associated with conviction only).

United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) (Domestic abuse was irrelevant to drug conspiracy).

United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999) (Proximity to school must be charged in order for enhancement to apply).

*United States v. Garrett, 189 F.3d 610 (7th Cir. 1999) (Guilty plea colloquy was not admission to crack, as opposed to powder, for sentencing purposes).

*United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999) (Improper enhancement for use of private plane in drug case).

United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000) (Enhancement for drug crime in protected area must be pleaded and proven before a finding of guilt).

United States v. Smith, 210 F.3d 760 (7th Cir. 2000) (Tossing drugs out window during chase was not reckless endangerment).

*United States v. Szakacs, 212 F.3d 344 (7th Cir. 2000) (Possession of firearm had no connection to drugs).

Watterson v. United States, 219 F.3d 232 (3rd Cir. 2000) (No enhancement for drugs in proximity to school unless charged under that statute).

United States v. Highsmith, 268 F.3d 1141 (9th Cir. 2001) (No enhancement when defendant had access to firearm, but no knowledge that it was there).

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001) (Firearm neither found near drugs nor used in connection to drug activities).

Enhancements-Violence

United States v. Murray, 82 F.3d 361 (10th Cir. 1996) (In assault case, an enhancement for discharging a firearm did not apply to shots fired after the assault).

*United States v. Alexander, 88 F.3d 427 (6th Cir. 1996) (Note indicating the presence of a bomb, and a request to cooperate to prevent harm, during a bank robbery, was not an express threat of death).

United States v. Shenberg, 89 F.3d 1461 (11th Cir.), cert. denied, 519 U.S. 1117 (1997) (More than minimal planning increase did not apply to plan to assault a fictitious informant).

United States v. Tavares, 93 F.3d 10 (1st Cir.), cert. denied, 519 U.S. 955 (1996) (Finding that an aggravated assault occurred was inconsistent with a finding of no serious bodily injury).

*United States v. Triplett, 104 F.3d 1074 (8th Cir.), cert. denied, 520 U.S. 1236 (1997) (Threat of death adjustment was double counting in case for using firearm during crime of violence).

*United States v. Reyes-Oseguera, 106 F.3d 1481 (9th Cir. 1997) (Flight on foot was insufficient for reckless endangerment enhancement).

United States v. Dodson, 109 F.3d 486 (8th Cir. 1997) (Lacked proof of bodily injury for enhancement).

United States v. Sawyer, 115 F.3d 857 (11th Cir. 1997) (Enhancement for bodily injury was not supported by alleged psychological injury).

United States v. Drapeau, 121 F.3d 344 (8th Cir. 1997) (Enhancement for assaulting a government official applicable only when official is victim of the offense).

United States v. Sovie, 122 F.3d 122 (2d Cir. 1997) (Evidence to support enhancement for intending to carry out threat was insufficient).

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997) (Applying both brandishing weapon and threat of death enhancements was double counting).

*United States v. Hayes, 135 F.3d 435 (6th Cir. 1998) (Enhancements for reckless endangerment, and assault, during flight, were double counting).

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998) (Putting hand in pocket and warning to cooperate or “no one will get hurt” was not express threat of death).

United States v. Kushmaul, 147 F.3d 498 (6th Cir. 1998) (Holding baseball bat was not”otherwise used”).

*United States v. Thomas, 155 F.3d 833 (7th Cir. 1999) (Intent to carry out threat could not be proven by criminal history).

United States v. Smith, 156 F.3d 1046 (10th Cir. 1999) (Insufficient evidence of actual or threatened force or violence).

United States v. Richardson, 161

F.3d 728 (D.C. Cir. 1999) (Burglary was not shown to be crime of violence).

*United States v. Anglin, 169 F.3d 154 (2d Cir. 1999) (Bank tellers were not physically restrained).

United States v. Leahy, 169 F.3d 433 (7th Cir. 1999) (Departure of 10 levels for analogous terrorism enhancement was unreasonable).

United States v. Zendeli, 180 F.3d 879 (7th Cir. 1999) (Enhancement for injury did not apply to codefendant's injury).

United States v. Charles, 209 F.3d 1088 (8th Cir. 2000) (Two convictions, sentenced simultaneously, should have only counted as one prior crime of violence).

United States v. Brock, 211 F.3d 88 (4th Cir. 2000) (Enhancement for multiple threats was incompatible with base level for no threats).

Castillo v. United States, 530 U.S. 120 (2000) (In order to get aggravated sentence for carrying a firearm during crime of violence, use of a machinegun must be proven as element of offense).

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

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

*United States v. Campbell, 259 F.3d 293 (4th Cir. 2001) (Enhanced statutory maximum for use of deadly or dangerous weapon required pleading and proof beyond reasonable doubt).

United States v. Atwater, 272 F.3d 511 (7th Cir. 2001) (Five-level enhancement cannot be based on assumption that all bank robbers use firearms).

Enhancements-Immigration

*United States v. Fuentes-Barahona, 111 F.3d 651 (9th Cir. 1997) (Conviction occurring before effective date of guideline amendment could not be considered as aggravated felony).

United States v. Herrerra-Solorzano, 114 F.3d 48 (5th Cir. 1997) (Prior probated felony was not an aggravated felony in an illegal reentry case).

United States v. Reyna-Espinosa, 117 F.3d 826 (5th Cir. 1997) (Prior conviction for being an alien in unlawful possession of a firearm was not an aggravated felony).

*United States v. Viramontes-Alvarado, 149 F.3d 912 (9th Cir.), cert. denied, 525 U.S. 976 (1998) (Noncitizen's priors were not aggravated felonies).

United States v. Avila-Ramirez, 170 F.3d 277 (2d Cir. 1999) (Defendant's prior aggravated felony was not a listed offense at the time of his reentry).

United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000) (Theft was not aggravated felony at time of deportation and reentry).

Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002) (Embezzlement, without fraud or deceit, was not aggravated felony).

United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002) (Conviction for which maximum is probation is not aggravated felony).

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002) (Arizona felony endangerment is not an aggravated felony).

Career Enhancements

*United States v. Talbott, 78 F.3d 1183 (7th Cir. 1996) (Under the Armed Career Criminal Act guidelines, "felon in possession" was not a crime of violence).

*United States v. Sparks, 87 F.3d 276 (9th Cir. 1996) (Attempted home invasion was not a violent felony under the Armed Career Criminal Act).

*United States v. Murphy, 107 F.3d 1199 (6th Cir. 1997) (Two prior robberies were a single episode under Armed Career Criminal Act).

United States v. Bennett, 108 F.3d 1315 (10th Cir. 1997) (There was no proof that a prior burglary involved a dwelling or physical force under career offender provisions).

United States v. Hicks, 122 F.3d 12 (7th Cir. 1997) (Burglary of a building was not a crime of violence for career offender enhancement).

United States v. Rogers, 126 F.3d 655 (5th Cir. 1997) (Attempted drug crime did not support career offender enhancement).

*United States v. Covington, 133 F.3d 639 (8th Cir. 1998) (Evidence did not show imprisonment within last 15 years on predicate offense used for career offender enhancement).

United States v. Gottlieb, 140 F.3d 865 (10th Cir. 1998) (Defendant established that no firearm or

dangerous weapon was used in prior conviction defeating Three Strikes enhancement).

United States v. Dahler, 143 F.3d 1084 (7th Cir. 1998) (Defendant whose rights were restored was not armed career criminal).

*United States v. McElyea, 158 F.3d 1016 (9th Cir. 1999) (Crimes of a single transaction may not be counted separately under Armed Career Criminal Act).

*United States v. Thomas, 159 F.3d 296 (7th Cir.), cert. denied, 527 U.S. 1023 (1999) (Statutory rape without violence was not predicate crime under Armed Career Criminal Act).

United States v. Richardson, 166 F.3d 1360 (11th Cir. 1999) (Prior conviction under Armed Career Criminal Act must occur before felon in possession violation).

United States v. Wilson, 168 F.3d 916 (6th Cir. 1999) (Burglary of a building is not a career offender predicate unless it involves physical force, or its threat or attempt).

*United States v. Sacko, 178 F.3d 1 (1st Cir. 1999) (Court could not look at facts of prior conviction to determine whether it was a violent felony).

*United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999) (Prior conviction not counted under criminal history cannot be used as career offender predicate).

United States v. Martin, 215 F.3d 470 (4th Cir. 2000) (Bank larceny is not a crime of violence).

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

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

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

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

*Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001) (Not all felony DUIs in New York are crimes of violence).

United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001) (California DUI was not crime of violence).

United States v. Sparks, 265 F.3d 825 (9th 2001) (Burglary of a storage locker was not violent felony).

United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001) (Prior juvenile adjudications that do not provide for jury trial must be pled and proven beyond a reasonable doubt).

United States v. Fulford, 267 F.3d 1241 (11th Cir. 2001) (Court may not consider charging information of prior conviction).

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

United States v. Allen, 282 F.3d 339 (5th Cir. 2002) (Court could not find prior was a serious drug offense solely based on police report).

United States v. Mason, 284 F.3d 555 (4th Cir. 2002) (Juvenile robbery conviction was not career offender predicate).

Cross References

United States v. Lagasse, 87 F.3d 18 (1st Cir. 1996) (There was no link between a knife-point robbery of a coconspirator, and the charged drug conspiracy, to justify an increase in sentence).

*United States v. Aderholt, 87 F.3d 740 (5th Cir. 1996) (Murder guidelines were improperly applied in a mail fraud conspiracy because murder was not an object of the conspiracy).

United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (Transportation of a child, not involving prostitution or production of a visual depiction, required cross reference to lower base level for sexual contact).

*United States v. Jackson, 117 F.3d 533 (11th Cir. 1997) (Police officer convicted of theft should not have been sentenced under civil rights guidelines).

United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (Torture was not relevant conduct in a drug case).

*United States v. Sanders, 162 F.3d 396 (6th Cir. 1999) (Possibility that defendant could have been charged with state burglary did not mean firearm was used in connection with another offense).

*United States v. Mezas De Jesus, 217 F.3d 638 (9th Cir. 2000) (Kidnaping, used to enhance sentence, needed to be proven by clear and convincing evidence).

United States v. Shabazz, 263 F.3d 603 (6th Cir. 2001) (Use base level, not total offense level, when calculating accessory after the fact).

United States v. Taylor, 272 F.3d 980 (7th Cir. 2001) (Shooting must be directly related to escape to enhance sentence).

United States v. Stubbs, 279 F.3d 402 (6th Cir. 2002) (Conviction for conspiracy cannot be sentenced as substantive offense).

United States v. Thomas, 280 F.3d 1149 (7th Cir. 2002) (Insufficient evidence to warrant homicide cross reference).

Abuse of Trust

*United States v. Jolly, 102 F.3d 46 (2d Cir. 1996) (Corporate principal could not get abuse of trust enhancement for defrauding investors).

United States v. Long, 122 F.3d 1360 (11th Cir. 1997) (Abuse of trust enhancement did not apply to prison employee who brought in contraband).

*United States v. Garrison, 133 F.3d 831 (11th Cir. 1998) (Owner of a health care provider did not occupy position of trust with Medicare).

United States v. Burt, 134 F.3d 997 (10th Cir. 1998) (Deputy sheriff's drug dealing did not merit abuse of trust or special skills enhancements).

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998) (Police switchboard operator did not occupy position of trust).

*United States v. Wadena, 152 F.3d 831 (8th Cir.), cert. denied, 526 U.S. 1050 (1999) (Money laundering, unrelated to defendant's position, did not warrant abuse of trust).

United States v. Holt, 170 F.3d 698 (7th Cir. 1999) (Part-time police officer did not justify abuse of trust enhancement).

United States v. Guidry, 199 F.3d 1150 (10th Cir. 1999) (Defendant must have relationship of trust with victim for abuse of trust to apply).

United States v. Tribble, 206 F.3d 634 (6th Cir. 2000) (Postal window clerk did not hold position of trust).

United States v. Ward, 222 F.3d 909 (11th Cir. 2000) (Bank guard did not occupy position of trust).

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

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

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002) (Security guard who robbed store did not have position of trust).

Obstruction of Justice

United States v. Williams, 79 F.3d 334 (2d Cir. 1996) (In order to justify an obstruction of justice enhancement, the court had to find the defendant knowingly made a false statement under oath).

*United States v. Strang, 80 F.3d 1214 (7th Cir. 1996) (Perjury in another case did not warrant an obstruction of justice enhancement in the instant case).

United States v. Medina-Estrada, 81 F.3d 981 (10th Cir. 1996) (Court must have found all elements of perjury were proven to give enhancement for obstruction of justice).

United States v. Hernandez, 83 F.3d 582 (2d Cir. 1996) (Staring at a witness and calling them "the devil," did not justify enhancement for intimidation).

United States v. Sisti, 91 F.3d 305 (2d Cir. 1996) (Obstruction of justice was only proper for conduct related to the conviction).

*United States v. Ruggiero, 100 F.3d 284 (2d Cir.), cert. denied, 522 U.S. 1138 (1998) (Judge properly refused to apply an obstruction of justice enhancement).

*United States v. Draves, 103 F.3d 1328 (7th Cir.), cert. denied, 521 U.S. 1127 (1997) (Fleeing from a police car was not obstruction of justice).

United States v. Harris, 104 F.3d 1465 (5th Cir.), cert. denied, 522 U.S. 833 (1997) (Actions of accessory after the fact did not justify obstruction enhancement when those same acts supported the substantive offense).

United States v. Zagari, 111 F.3d 307 (2d Cir. 1997) (No finding to support obstruction enhancement).

*United States v. Tackett, 113 F.3d 603 (6th Cir.), cert. denied, 522 U.S. 1089 (1998) (Court failed to find that government resources were wasted for obstruction enhancement).

United States v. Sawyer, 115 F.3d 857 (11th Cir. 1997) (Sentencing increase for reckless endangerment only applied to defendant fleeing law enforcement officer, not civilians).

*United States v. Sassanelli, 118 F.3d 495 (6th Cir. 1997) (Obstruction findings did not specify which statements were materially untruthful).

*United States v. Solano-Godines, 120 F.3d 957 (9th Cir.), cert. denied, 522 U.S. 1061 (1998) (Misrepresentation by the defendant did not obstruct justice).

United States v. Webster, 125 F.3d 1024 (7th Cir. 1997) (Finding that the defendant testified falsely lacked specificity).

United States v. Senn, 129 F.3d 886 (7th Cir. 1997) (Lying about minor details to grand jury was not obstruction).

United States v. Norman, 129 F.3d 1393 (10th Cir. 1997) (Concealing drugs at scene of crime was not obstruction).

United States v. McRae, 156 F.3d 708 (6th Cir. 1999) (Insufficient findings of obstruction of justice).

United States v. Jones, 159 F.3d 969 (6th Cir. 1999) (Irrelevant false testimony did not support obstruction of justice).

United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1999) (Failure to appear on unrelated offense was not obstruction).

United States v. Monzon-Valenzuela, 186 F.3d 1181 (9th Cir. 1999) (Absent perjury finding, adjustment for obstruction did not apply).

United States v. Gage, 183 F.3d 711 (7th Cir. 1999) (Defendant's denial that his robbery note mentioned a firearm did not justify obstruction adjustment).

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (Defendant convicted of threatening communications did not obstruct justice by sending additional threatening letter).

*United States v. Woodard, 239 F.3d 159 (2d Cir. 2001) (Unless defendant left district intending to miss court, it was not obstruction).

United States v. Shabazz, 263 F.3d 603 (6th Cir. 2001) (Obstruction applies only to crime of conviction).

United States v. McGiffen, 267 F.3d 581 (7th Cir. 2001) (Conclusions about defendant's testimony were not specific findings).

Ortega v. United States, 270 F.3d 540 (8th Cir. 2001) (Failed polygraph does not merit adjustment).

United States v. Jenkins, 275 F.3d 283 (3rd Cir. 2001) (Failing to appear at related state proceeding was not obstruction).

United States v. Williams, 288 F.3d 1079 (8th Cir. 2002) (Giving a false name at time of arrest did not hinder investigation).

Vulnerable Victim

*United States v. Castellanos, 81 F.3d 108 (9th Cir. 1996) (Merely because a fraud scheme used Spanish language media, did not justify an enhancement for victims particularly susceptible to fraud).

*United States v. Stover, 93 F.3d 1379 (8th Cir. 1996) (Persons' desire to adopt children did not make them vulnerable victims of an adoption agency).

*United States v. Shumway, 112 F.3d 1413 (10th Cir. 1997) (Prehistoric skeletal remains were not vulnerable victims).

*United States v. Robinson, 119 F.3d 1205 (5th Cir.), cert. denied, 522 U.S. 1139 (1998) (Asian-American merchants were not vulnerable victims).

United States v. Hogan, 121 F.3d 370 (8th Cir. 1997) (Victims must have been targeted in order to be considered vulnerable).

United States v. Monostra, 125 F.3d 183 (3rd Cir. 1997) (Victim's vulnerability must facilitate the crime in some manner).

United States v. McCall, 174 F.3d 47 (2d Cir. 1999) (Vulnerable victim enhancement is not a relative standard).

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (No evidence that defendant knew victims were vulnerable).

United States v. Castaneda, 239 F.3d 978 (9th Cir. 2001) (Club workers who were encouraged to provide sexual services for fees were not vulnerable victims).

Aggravating Role

United States v. Ivy, 83 F.3d 1266 (10th Cir.), cert. denied, 519 U.S. 901 (1996) (Insufficient findings for a managerial role).

United States v. Lozano-Hernandez, 89 F.3d 785 (11th Cir. 1996) (Leadership role in drug conspiracy was not proven).

United States v. Patasnik, 89 F.3d 63 (2d Cir. 1996) (Management role had to be based on managing people, not assets).

United States v. Wester, 90 F.3d 592 (1st Cir. 1996) (Court failed to make findings there were five or more participants).

United States v. Miller, 91 F.3d

1160 (8th Cir. 1996) (Lack of evidence that the defendant controlled others precluded a leadership role).

*United States v. Albers, 93 F.3d 1469 (10th Cir. 1996) (Leadership role could not be based solely on defendant's importance to the success of the conspiracy).

*United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996) (Murder-for-hire scheme had less than five participants).

United States v. Avila, 95 F.3d 887 (9th Cir. 1996) (Defendant who was the sole contact between a buyer and a seller was not an organizer).

United States v. Jobe, 101 F.3d 1046 (5th Cir.), cert. denied, 522 U.S. 823 (1997) (Defendant's position as bank director did not justify managerial role when he did not manage or supervise others).

United States v. DeGovanni, 104 F.3d 43 (3rd Cir. 1997) (Corrupt police sergeant was not a supervisor merely because of his rank).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 118 S.Ct. 248 (1997) (Clean Water Act violation lacked five participants for role adjustment).

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997) (To impose an upward role adjustment, the defendant must have supervised at least one person).

United States v. Bryson, 110 F.3d 575 (8th Cir. 1997) (Facts did not support upward adjustment for role).

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997) (Record did not support upward role adjustment).

United States v. Makiewicz, 122 F.3d 399 (7th Cir. 1997) (Defendant was not a leader for asking his father to accompany informant to motel).

United States v. Del Toro-Aguilar, 138 F.3d 340 (8th Cir. 1998) (Occasionally fronting drugs to coconspirators did not justify upward role adjustment).

*United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) (Defendant was not an organizer).

United States v. Lopez-Sandoval, 146 F.3d 712 (9th Cir. 1998) (Defendant was not an organizer).

*United States v. Glinton, 154 F.3d 1245 (11th Cir.), cert. denied, 119 S.Ct. 1281 (No managerial role for defendant who did not supervise or control others).

United States v. Walker, 160 F.3d 1078 (6th Cir.), cert. denied, 526 U.S. 1056 (1999) (Insufficient evidence of organizer role).

United States v. Graham, 162 F.3d 1180 (D.C. Cir. 1999) (Conclusionary statement that defendant was lieutenant did not justify role adjustment).

United States v. Tank, 200 F.3d 627 (9th Cir. 2000) (Insufficient evidence of defendant's leadership role).

United States v. Barrie, 267 F.3d 220 (3d Cir. 2001) (One-time transaction did not show leadership role).

United States v. Schuh, 289 F.3d 968 (7th Cir. 2002) (Tavern owner who allowed drug transactions in bar was not a leader or organizer).

Mitigating Role

United States v. Moeller, 80 F.3d 1053 (5th Cir. 1996) (No leadership role for a government official who inherited an historically corrupt system, but the defendant's lack of understanding of the entire scheme justified a minimal role adjustment).

*United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996) (There was an insufficient basis to deny a minor role reduction).

*United States v. Haut, 107 F.3d 213 (3rd Cir.), cert. denied, 521 U.S. 1127 (1997) (Arson defendants who worked at direction of others were minimal participants).

*United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998) (Sole charged defendant may receive minor role when justified by relevant conduct).

United States v. Neils, 156 F.3d 382 (2d Cir. 1999) (Defendant who merely steered buyers was minor participant).

Acceptance of Responsibility

United States v. Fells, 78 F.3d 168 (5th Cir.), cert. denied, 519 U.S. 847 (1996) (Defendant making a statutory challenge, could still qualify for acceptance of responsibility).

United States v. Patino-Cardenas, 85 F.3d 1133 (5th Cir. 1996) (No basis to deny credit when the defendant did not falsely deny relevant conduct).

United States v. Garrett, 90 F.3d 210 (7th Cir. 1996) (Defendant could not be denied acceptance when he filed an uncounseled, pro se motion to withdraw plea after his attorney died).

United States v. Flores, 93 F.3d 587

(9th Cir. 1996) (Defendant should have received credit for his written statement).

*United States v. Atlas, 94 F.3d 447 (8th Cir.), cert. denied, 520 U.S. 1130 (1997) (Defendant who timely accepted responsibility must be given the additional one-level downward adjustment).

United States v. Ruggiero, 100 F.3d 284 (2d Cir. 1996) (Single false denial did not bar credit for acceptance of responsibility).

United States v. McPhee, 108 F.3d 287 (11th Cir. 1997) (Defendant who qualified should not have been given less than the full three-point reduction for timely accepting responsibility).

*United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.), cert. denied, 522 U.S. 1017 (1998) (Defendant's pretrial statements of acceptance justified reduction though case was tried).

United States v. Marroquin, 136 F.3d 220 (1st Cir. 1998) (Creation of a lab report was not the type of trial preparation to deny extra point off for accepting responsibility).

United States v. Fisher, 137 F.3d 1158 (9th Cir. 1998) (Despite not guilty plea, admission in open court could be acceptance).

*United States v. McKittrick, 142 F.3d 1170 (9th Cir.), cert. denied, 525 U.S. 1072 (1998) (Defendant who did not contest facts at trial may be eligible for acceptance).

United States v. Ellis, 168 F.3d 558 (1st Cir. 1999) (Defendant who went to trial was still potentially eligible for timely acceptance of responsibility).

United States v. Rice, 184 F.3d 740 (8th Cir. 1999) (Defendant was entitled to full three-level reduction for acceptance).

United States v. Corona-Garcia, 210 F.3d 973 (9th Cir. 2000) (Even after trial, defendant could receive full credit for acceptance when he confessed fully and immediately upon arrest).

United States v. Ochoa-Gaytan, 265 F.3d 837 (9th Cir. 2001) (Defendant could get acceptance even after trial).

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001) (Court could not penalize defendant for refusal to cooperate).

Safety Valve

*United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996) (Eligibility for the safety valve did not depend on acceptance of responsibility).

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996) (On remand, the sentencing court could withdraw a leadership role so the defendant could qualify for safety valve).

*United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996) (To be eligible for safety valve, a defendant did not need to give information to a specific agent).

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

*United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996) (Government had to rebut the defendant's version in order to deny safety valve).

United States v. Sherpa, 97 F.3d 1239 (9th Cir.), *amended*, 110 F.3d 656 (1997) (Even a defendant who claimed innocence was eligible if he met requirements).

United States v. Wilson, 105 F.3d 219 (5th Cir.), cert. denied, 522 U.S. 847 (1997) (Co-conspirator's use of a firearm did not bar application of the safety valve).

United States v. Osei, 107 F.3d 101 (2d Cir. 1997) (Two-level safety valve adjustment applied regardless of mandatory minimum).

*United States v. Clark, 110 F.3d 15 (6th Cir. 1997) (Safety valve applied to cases that were on appeal at effective date).

United States v. Mertilus, 111 F.3d 870 (11th Cir. 1997) (Safety valve applied to a telephone count).

*United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998) (Court failed to consider safety valve at resentencing).

United States v. Carpenter, 142 F.3d 333 (6th Cir. 1998) (Refusal to testify did not bar safety valve).

United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) (Court failed to make findings regarding applicability of safety valve).

*United States v. Kang, 143 F.3d 379 (8th Cir. 1998) (Defendant could not be denied safety valve because government claimed he was untruthful absent supporting evidence).

United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999) (Unforeseen possession of firearm by coconspirator does not bar safety valve relief).

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000) (Plea agreement prohibiting further adjustments did not preclude safety valve).

United States v. Lopez, 264 F.3d 527 (5th Cir. 2001) (It does not matter in which order the court applies the guidelines).

United States v. Warnick, 287 F.3d 299 (4th Cir. 2002) (Safety valve not limited to statutes named in guideline).

Criminal History

*United States v. Spell, 44 F.3d 936 (11th Cir. 1995) (Judgement was the only conclusive proof of prior convictions).

United States v. Douglas, 81 F.3d 324 (2d Cir.), cert. denied, 517 U.S. 1251 (1996) (Juvenile sentence, more than five years old, was incorrectly applied).

United States v. Cox, 83 F.3d 336 (10th Cir. 1996) (Proper to attack a guidelines sentence when prior convictions were later successfully attacked).

*United States v. Parks, 89 F.3d 570 (9th Cir. 1996) (No criminal history points could be attributed to a defendant when indigence prevented payment of fines).

United States v. Flores, 93 F.3d 587 (9th Cir. 1996) (Court erroneously twice counted a single probation revocation to increase two prior convictions).

United States v. Ortega, 94 F.3d 764 (2d Cir. 1996) (Uncounseled misdemeanor was improperly counted).

United States v. Easterly, 95 F.3d 535 (7th Cir. 1996) (Fish and game violation should not have been counted).

*United States v. Gilcrist, 106 F.3d 297 (9th Cir. 1997) (Sentence, upon which parole began over 15 years ago, could not be counted toward criminal history).

United States v. Huskey, 137 F.3d 283 (5th Cir. 1998) (Prior convictions in same information were related cases for counting criminal history).

United States v. Walker, 142 F.3d 103 (2d Cir.), cert. denied, 525 U.S. 896 (1998) (Prior convictions for offenses that were calculated into offense level should not have received criminal history points).

United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998) (Arrest warrant did not determine nature of prior conviction).

United States v. Torres, 182 F.3d 1156 (10th Cir. 1999) (Prior convictions that are relevant conduct may not be counted toward criminal history).

United States v. Thomas, 211 F.3d 316 (6th Cir. 2000) (Two prior rapes were a single transaction).

United States v. Arnold, 213 F.3d 894 (5th Cir. 2000) (Sentence of less than a year and a day must be imposed within ten years of offense to count toward criminal history).

United States v. Stuckey, 220 F.3d 976 (8th Cir. 2000) (Military prior was not serious drug offense).

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

Upward Departures

United States v. Thomas, 62 F.3d 1332 (11th Cir.), cert. denied, 516 U.S. 1166 (1996) (Consequential damages did not justify an upward departure unless it was substantially in excess of typical fraud case).

*United States v. Henderson, 75 F.3d 614 (11th Cir. 1996) (Upward departure for multiple weapons in a drug case was improper).

United States v. Blackwell, 81 F.3d 945 (10th Cir. 1996) (Court did not have jurisdiction to increase a sentence after judgement was final).

United States v. Harrington, 82 F.3d 83 (5th Cir. 1996) (Court should not have upwardly departed for a defendant's status as an attorney without first considering application of abuse of trust).

*United States v. Sherwood, 98 F.3d 402 (9th Cir. 1996) (Just because victims were almost vulnerable, did not justify an upward departure).

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996) (Justification was based on guideline amendment after offense occurred).

*United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996) (The difference between seven and five offenses did not justify departure for multiple counts).

United States v. Mangone, 105 F.3d 29 (1st Cir.), cert. denied, 510 U.S. 1258 (1997) (Failure to give notice of upward departure was plain error).

*United States v. Otis, 107 F.3d 487 (7th Cir. 1997) (Failure to give notice of an upward departure was plain error).

United States v. Arce, 118 F.3d 335 (5th Cir. 1997) (Manufacturing firearms was not a basis for upward departure).

United States v. White, 118 F.3d 739 (11th Cir. 1997) (Lenient guideline range was not a ground for upward departure).

*United States v. DePace, 120 F.3d 233 (11th Cir.), cert. denied, 523 U.S. 1153 (1998) (Upward departure was without notice).

United States v. Johnson, 121 F.3d 1141 (8th Cir. 1997) (Defendant did not get notice of upward departure).

United States v. Stein, 127 F.3d 777 (9th Cir. 1997) (Upward departure based on more than minimal planning and multiple victims was unwarranted).

United States v. Corrigan, 128 F.3d 330 (6th Cir. 1997) (Neither, number of victims, number of schemes, nor amount of loss, supported upward departure).

United States v. Candelario-Cajero, 134 F.3d 1246 (5th Cir. 1998) (Absent an upward departure, grouped counts cannot receive consecutive sentences).

United States v. Terry, 142 F.3d 702 (4th Cir. 1998) (Extent of upward departure was not supported by findings).

*United States v. Hinojosa-Gonzales, 142 F.3d 1122 (9th Cir.), cert. denied, 525 U.S. 1033 (1999) (Defendant did not get adequate notice of upward departure).

*United States v. G.L., 143 F.3d 1249 (9th Cir. 1998) (Lenient theft guidelines did not justify upward departure).

*United States v. Almaguer, 146 F.3d 474 (7th Cir. 1998) (Use of firearm was included in guideline and did not justify upward departure).

United States v. Nagra, 147 F.3d 875 (9th Cir. 1998) (Upward departure based upon factor considered by guidelines was double counting).

*United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998) (Commentary Note on grouping did not provide basis for upward departure).

United States v. Johnson, 152 F.3d 553 (6th Cir. 1998) (Arson was within heartland of cases and did not justify upward departure).

United States v. Lawrence, 161 F.3d 250 (4th Cir. 1999) (Must specify findings to depart up for under-representation of criminal history).

United States v. Whiteskunk, 162 F.3d 1244 (10th Cir. 1999) (Upward departure must include some method of analogy, extrapolation, or reference to the guidelines).

*United States v. Jacobs, 167 F.3d 792 (3rd Cir. 1999) (Court did not adequately explain upward departure for psychological injury).

United States v. Higgins, 270 F.3d 1070 (7th Cir. 2001 (Bank fraud did not justify ten-level departure).

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002) (Court should have begun departure from guideline of charged offense).

United States v. Walker, 284 F.3d 1169 (10th Cir. 2002) (No justification for departure for under-representation of criminal history).

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

Downward Departures

United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995) (Downward departure was allowed to give credit for acceptance of responsibility on consecutive sentences).

Koon v. United States, 518 U.S. 81 (1996) (A district court could depart from the guidelines if (1) the reason was not specifically prohibited by the guidelines; (2) the reason was discouraged by the guidelines but exceptional circumstances apply; or (3) the reason was neither prohibited nor discouraged, and the reason was not previously addressed by the applicable guideline provisions in that case).

*United States v. Conway, 81 F.3d 15 (1st Cir. 1996) (Court could not refuse a downward departure based upon information received as part of a cooperation agreement).

United States v. Graham, 83 F.3d 1466 (10th Cir.), cert. denied, 519 U.S. 1132 (1997) (Extreme vulnerability to abuse in prison could justify a downward departure).

*United States v. Walters, 87 F.3d 663 (5th Cir.), cert. denied, 519 U.S. 1000 (1996) (Downward departure was approved for a defendant who did not personally benefit from money laundering).

*United States v. Cubillos, 91 F.3d 1342 (9th Cir. 1996) (Basis for downward departure could no longer be categorically rejected after *Koon*).

*United States v. Jaroszenko, 92

F.3d 486 (7th Cir. 1996) (Remorse could be considered as a ground for downward departure).

United States v. Sanders, 97 F.3d 856 (6th Cir. 1996) (Downward departure was available for an Armed Career Criminal).

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996) (Court could grant departure for effect on innocent employees of the defendant).

United States v. Etherton, 101 F.3d 80 (9th Cir. 1996) (Court had authority to reduce the sentence after a revocation of supervised release when the guidelines were later amended to provide for a lower range).

*United States v. Williams, 103 F.3d 57 (8th Cir. 1996) (Court could reduce a sentence for a retroactive amendment even after a reduction for substantial assistance).

United States v. Lopez, 106 F.3d 309 (9th Cir. 1997) (Prosecutors' violation of ethical rule in meeting with an indicted defendant justified a downward departure).

*United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (Rehabilitation was a proper basis for downward departure).

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

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997) (Court should not have limited a downward departure just because the defendant already received credit for accepting responsibility).

*United States v. McBroom, 124 F.3d 533 (3rd Cir. 1997) (Reduced mental capacity was a basis for downward departure in a child porn case).

*United States v. Rounsavall, 128 F.3d 665 (8th Cir. 1997) (Defendant was entitled to an evidentiary hearing to determine if the government's failure to move for a reduced sentence was irrational, in bad faith, or unconstitutionally motivated).

United States v. Clark, 128 F.3d 122 (2d Cir. 1997) (Downward departure for a lesser harm was available in a felon in possession case).

United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998) (Court could depart downward to credit time served on an expired state sentence for the same conduct).

United States v. Kaye, 140 F.3d 86 (2d Cir. 1998) (Court can depart downward based on assistance to state law enforcement without motion by government).

United States v. Campo, 140 F.3d 415 (2nd Cir. 1998) (Judge could not refuse to depart solely because he did not like USA's policy about not recommending a specific sentence).

United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (Court could depart based on entrapment and diminished capacity).

United States v. Faulks, 143 F.3d 133 (3rd Cir. 1998) (Agreement not to contest forfeitures may be basis for downward departure).

United States v. Crouse, 145 F.3d 786 (6th Cir. 1998) (Civic involvement justified downward departure).

*United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (Post-offense drug rehabilitation can justify downward departure).

United States v. Stockheimer, 157 F.3d 1082 (2nd Cir.), cert. denied, 525 U.S. 1184 (1999) (Refusing to consider downward departure based on economic reality of intended loss was plain error).

United States v. Fagan, 162 F.3d 1280 (10th Cir. 1999) (Court could depart downward for exceptional remorse).

*United States v. Jones, 160 F.3d 473 (8th Cir. 1999) (Government actions prejudicing defendant can justify downward departure).

*United States v. Martinez-Ramos, 184 F.3d 1055 (9th Cir. 1999) (Court had authority to depart downward to remedy sentencing disparity).

*United States v. Coleman, 188 F.3d 354 (6th Cir. 1999) (Court must look at case as a whole to see if factors take case out of "heartland" for downward departure).

United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999) (Government need not consent to departure for stipulated deportation).

United States v. Wells, 211 F.3d 988 (6th Cir. 2000) (Plea agreement required only full cooperation, not substantial assistance).

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

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

United States v. Walter, 256 F.3d

891 (9th Cir. 2001) (Defendant was eligible for departure for childhood abuse).

United States v. Busekros, 264 F.3d 1158 (10th Cir. 2001) (Departure for substantial assistance allowed defendant to retain federal benefits).

United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001) (Cultural assimilation is basis for departure).

Fines / Restitution

*United States v. Remillong, 55 F.3d 572 (11th Cir. 1995) (Restitution order reversed for a defendant with no ability to pay and no future prospects).

United States v. Ledesma, 60 F.3d 750 (11th Cir. 1995) (Restitution order could only be applied to charges of conviction).

*United States v. Mullens, 65 F.3d 1560 (11th Cir.), cert. denied, 517 U.S. 1112 (1996) (Record lacked findings to support restitution when amount was specific offense characteristic).

United States v. Maurello, 76 F.3d 1304 (3rd Cir. 1996) (The court had to make findings to determine actual loss to victim).

*United States v. Reed, 80 F.3d 1419 (9th Cir.), cert. denied, 519 U.S. 882 (1996) (Restitution order had to be limited to conduct of conviction).

United States v. Blake, 81 F.3d 498 (4th Cir. 1996) (Restitution could only be based on the loss directly related to the offense, and the court had to make findings that the defendant can pay that amount without undue hardship).

*United States v. Giwah, 84 F.3d 109 (2d Cir. 1996) (Restitution order failed to indicate that all statutory factors were considered).

United States v. Sharma, 85 F.3d 363 (8th Cir. 1996) (No reason was given for an upward departure on a fine).

United States v. Hines, 88 F.3d 661 (8th Cir. 1996) (In assessing fine and restitution, the court should have considered the defendant's familial obligations of his recent marriage).

*United States v. Upton, 91 F.3d 677 (5th Cir.), cert. denied, 520 U.S. 1228 (1997) (No restitution was available to victims not named in the indictment).

*United States v. Sablan, 92 F.3d 865 (9th Cir. 1996) (Consequential expenses could not be included in a restitution order).

United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996) (The court failed to fully consider the defendant's ability to pay restitution).

United States v. Santos, 93 F.3d 761 (11th Cir.), cert. denied, 520 U.S. 1170 (1997) (Defendant could not be ordered to pay restitution for money taken in a robbery for which he was not convicted).

*United States v. Monem, 104 F.3d 905 (7th Cir. 1997) (Court did not make sufficient factual findings to justify the fine of a defendant who claimed inability to pay).

*United States v. McMillan, 106 F.3d 322 (10th Cir. 1997) (Court could reduce a fine for substantial assistance).

United States v. Messner, 107 F.3d 1448 (10th Cir. 1997) (Restitution had to be based on actual loss).

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997) (A defendant could not be ordered to pay restitution for acquitted conduct).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 (1997) (Facts did not support restitution order).

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997) (Fine was not justified for a defendant with a negative net worth).

United States v. Khawaja, 118 F.3d 1454 (11th Cir. 1997) (Government was not a victim for purposes of awarding restitution).

*United States v. Gottesman, 122 F.3d 150 (11th Cir. 1997) (Defendant's promise to pay back-taxes did not authorize court-ordered restitution).

*United States v. Baggett, 125 F.3d 1319 (9th Cir. 1997) (Restitution must be based upon a specific statute).

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997) (Restitution should not have been higher than the loss).

United States v. Drinkwine, 133 F.3d 203 (2d Cir. 1998) (Insufficient evidence that defendant could pay a fine).

United States v. Menza, 137 F.3d 533 (7th Cir. 1998) (Defendant did not have to pay restitution for amount greater than losses).

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998) (Defendant could not be ordered to pay restitution on loan unrelated to fraud).

United States v. Stoddard, 150 F.3d

1140 (9th Cir. 1998) (Restitution could not exceed actual loss).

*United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998) (Court must consider defendant's ability to pay restitution).

*United States v. Dunigan, 163 F.3d 979 (6th Cir. 1999) (Court did not adequately consider defendant's ability to pay restitution).

United States v. Brierton, 165 F.3d 1133 (7th Cir. 1999) (Restitution can only be based on loss from charged offense).

United States v. Merric, 166 F.3d 406 (1st Cir. 1999) (Court could not delegate scheduling of installment payments to probation officer's discretion).

United States v. Johnston, 199 F.3d 1015 (9th Cir. 1999) (Forfeited money should have been subtracted from restitution).

United States v. Prather, 205 F.3d 1265 (11th Cir. 2000) (Amount of special assessment governed by date of offense).

United States v. Beckett, 208 F.3d 140 (3rd Cir. 2000) (Restitution should not have been ordered without determining ability to pay).

United States v. Norris, 217 F.3d 262 (5th Cir. 2000) (Restitution was not for actual loss).

United States v. Griffin, 215 F.3d 866 (8th Cir. 2000) (Loss from food stamp fraud was limited to actual benefits diverted).

United States v. Andra, 218 F.3d 1106 (9th Cir. 2000) (Tax loss should not have included penalties and interest).

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

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001) (High restitution scheduled during prison sentence was abuse of discretion).

United States v. Lomow, 266 F.3d 1013 (9th Cir. 2001) (Expenses incurred after seizing property could not be basis for restitution).

United States v. Follett, 269 F.3d 996 (9th Cir. 2002) (Court cannot order defendant to reimburse for counseling that was free to victim).

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (Report's failure to document loss excused defendant's failure to object to restitution amount).

Appeals

United States v. Byerley, 46 F.3d 694 (7th Cir. 1996) (Government waived argument by inconsistent position at sentencing).

United States v. Caraballo-Cruz, 52 F.3d 390 (1st Cir. 1995) (Government defaulted on double jeopardy claim).

*United States v. Carillo-Bernal, 58 F.3d 1490 (10th Cir. 1995) (The government failed to timely file certification for appeal).

United States v. Petty, 80 F.3d 1384 (9th Cir. 1996) (Waiver of appeal of an unanticipated error was not enforceable).

*United States v. Ready, 82 F.3d 551 (2d Cir. 1996) (Waiver of appeal did not cover issue of restitution and was not waived).

*United States v. Thompson, 82 F.3d 700 (6th Cir. 1996) (Technicalities that did not prejudice the government were not cause to deny a motion to extend time to file an appeal).

*United States v. Agee, 83 F.3d 882 (7th Cir. 1996) (Waiver of appeal, not discussed at the plea colloquy, was invalid).

*United States v. Webster, 84 F.3d 1056 (11th Cir. 1996) (When a law was clarified between trial and appeal, a point of appeal was preserved as plain error).

*United States v. Allison, 86 F.3d 940 (9th Cir. 1996) (Remand was proper even though the district court could still impose the same sentence).

*United States v. Perkins, 89 F.3d 303 (6th Cir. 1996) (Orally raising an issue of double-counting at sentencing preserved it for appeal).

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996) (Appellate court refused to use a substantive change to the guidelines to uphold a sentence that was improper at the time imposed).

United States v. Alexander, 106 F.3d 874 (9th Cir. 1997) (Rule of the case barred reconsideration of a suppression order after remand).

United States v. Zink, 107 F.3d 716 (9th Cir. 1997) (Waiver of appeal of sentence did not cover a restitution order).

United States v. Saldana, 109 F.3d 100 (1st Cir. 1997) (Defendant had a jurisdictional basis to appeal a denial of a downward departure).

*Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) (Pro se petitioner's out-of-time appeal was treated as a motion for extension of time).

United States v. Arteaga, 117 F.3d 388 (9th Cir.), cert. denied, 522 U.S. 988 (1997) (Evidence that was precluded at trial could not support convictions on appeal).

*In Re Grand Jury Subpoena, 123 F.3d 695 (1st Cir. 1997) (Third party may appeal the denial of a motion to quash without risking a contempt citation).

*United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998) (Vague appeal waiver was void).

United States v. Montez-Gavira, 163 F.3d 697 (2d Cir. 1999) (Deportation did not moot appeal).

*United States v. Gonzalez, 259 F.3d 355 (5th Cir. 2001) (*Apprendi* error was preserved even when defendant waived appeal).

United States v. Smith, 263 F.3d 571 (6th Cir. 2001) (Government appeal, of suppression, was dismissed when there was no certification that appeal was not filed in bad faith).

Resentencing

*United States v. Moore, 131 F.3d 595 (6th Cir. 1997) (Limited remand did not allow a new enhancement at resentencing).

*United States v. Wilson, 131 F.3d 1250 (7th Cir. 1997) (Government waived the issue of urging additional relevant conduct at resentencing).

United States v. Rapal, 146 F.3d 661 (9th Cir. 1998) (Higher resentence presumed vindictiveness).

*United States v. Ticchiarelli, 171 F.3d 24 (1st Cir.), cert. denied, 528 U.S. 850 (1999) (Sentence imposed, between original sentence and remand, could not be counted at resentencing).

United States v. Jackson, 181 F.3d 740 (6th Cir. 1999) (Resentencing did not overcome presumption of vindictiveness).

*United States v. Faulks, 201 F.3d 208 (3rd Cir. 2000) (Defendant could not be resentenced in abstentia).

United States v. Osborne, 291 F.3d 908 (6th Cir. 2002) (Resentencing mandated where court did not determine whether defense counsel discussed PSR with defendant).

Supervised Release / Probation

United States v. Doe, 79 F.3d 1309 (2d Cir. 1996) (Occupational restriction was not supported by the court's findings).

United States v. Edgin, 92 F.3d 1044 (10th Cir.), cert. denied, 519 U.S. 1069 (1997) (Court failed to provide adequate reasons to bar a defendant from seeing his son while on supervised release).

United States v. Wright, 92 F.3d 502 (7th Cir. 1996) (Simple possession of drugs was a Grade C, not a Grade A violation, of supervised release).

United States v. Leaphart, 98 F.3d 41 (2d Cir. 1996) (Misdemeanor did not justify a two year term of supervised release).

United States v. Myers, 104 F.3d 76 (5th Cir.), cert. denied, 520 U.S. 1218 (1997) (Court could not impose consecutive sentences of supervised release).

*United States v. Collins, 118 F.3d 1394 (9th Cir. 1997) (Illegal ex post facto application of rule allowing additional term of release after revocation).

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997) (Court could not order deportation as a condition of supervised release).

United States v. Aimufa, 122 F.3d 1376 (11th Cir. 1997) (Court lacked authority to modify conditions of release after revocation).

*United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997) (Failure to provide allocution at supervised release revocation was plain error).

United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997) (Probation revocation for a drug user did not require a prison sentence; treatment is an option).

United States v. Biro, 143 F.3d 1421 (11th Cir. 1998) (Deportation could not be condition of supervised release).

United States v. Bonanno, 146 F.3d 502 (7th Cir. 1998) (Court improperly delegated discretion over drug testing to probation officer).

United States v. Balogun, 146 F.3d 141 (2d Cir. 1998) (Court could not order supervised release tolled while defendant out of country).

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998) (Deportation cannot be condition of supervised release).

*United States v. Evans, 155 F.3d 245 (3rd Cir. 1998) (Cannot make reimbursement for court-appointed counsel a condition of supervised release).

United States v. Havier, 155 F.3d 1090 (9th Cir. 1998) (Motion to revoke must specifically identify charges).

*United States v. Kingdom, 157 F.3d 133 (2d Cir. 1998 (Revocation sentence should have been concurrent sentences based on most serious violation).

United States v. Waters, 158 F.3d 933 (6th 1999) (Defendant had right to allocution at revocation hearing).

United States v. Strager, 162 F.3d 921 (6th Cir. 1999) (Disrespectful call to probation officer did not justify revocation).

United States v. McClellan, 164 F.3d 308 (6th Cir. 1999) (Court must explain why it is departing above revocation guidelines).

*United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (Court could not order that defendant not leave city for more than 24 hours as condition of supervised release).

United States v. Danser, 270 F.3d 451 (7th Cir. 2001) (Court cannot sentence defendant to consecutive terms of supervised release).

United States v. Monteiro, 270 F.3d 465 (7th Cir. 2001) (Without a special condition the defendant is not subject to unlimited warrantless searches).

United States v. Scott, 270 F.3d 632 (8th Cir. 2001) (No connection between bank robbery conviction and special condition for sexual offenders).

United States v. Maxwell, 285 F.3d 336 (4th Cir. 2002) (In calculating a second revocation, the court must subtract time already served on the previous revocation).

United States v. Swenson, 289 F.3d 676 (10th Cir. 2002) (Court failed to deduct previous time served in setting second revocation).

Ineffective Assistance of Counsel

*Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995) (Counsel failed to determine that the defendant was a habitual offender before plea).

United States v. Cook, 45 F.3d 388 (10th Cir. 1995) (Court infringed on counsel's professional judgement).

*Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995) (Counsel failed to correct misstatements that state sentence could run concurrent with potential federal sentence).

Montemoino v. United States, 68 F.3d 416 (11th Cir. 1995) (Failure to file notice of appeal after request by defendant).

*United States v. Hansel, 70 F.3d 6 (2d Cir. 1995) (Counsel failed to raise statute of limitations).

Upshaw v. Singletary, 70 F.3d 576 (11th Cir. 1995) (Claim of ineffective assistance of counsel at plea was not waived even though not raised on direct appeal).

United States v. Streater, 70 F.3d 1314 (D.C. 1995) (Counsel gave bad legal advice about pleading guilty).

Martin v. United States, 81 F.3d 1083 (11th Cir. 1996) (Counsel failed to file a notice of appeal when requested to do so by the defendant).

Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996) (Counsel was found ineffective for not objecting to inadmissible evidence).

Glock v. Singletary, 84 F.3d 385 (11th Cir.), cert. denied, 519 U.S. 1044 (1996) (Counsel's failure to discover and present mitigating evidence at the sentencing proceeding required an evidentiary hearing).

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996) (Counsel's bad sentencing advice required remand).

*United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996) (Prejudice was presumed when trial counsel was forced to prove his own ineffectiveness at a hearing).

Baylor v. Estelle, 94 F.3d 1321 (9th Cir.), cert. denied, 520 U.S. 1151 (1997) (Counsel was ineffective for failing to follow up on lab reports suggesting that the defendant was not the rapist).

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) (Lawyer's failure to raise a suppression issue was grounds for remand).

United States v. Baramdyka, 95 F.3d 840 (9th Cir.), cert. denied, 520 U.S. 1132 (1997) (Appeal waiver did not bar a claim of ineffective assistance of counsel).

*United States v. Glover, 97 F.3d 1345 (10th Cir. 1996) (Ineffective for counsel to fail to object to the higher methamphetamine range).

Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996) (Failure to file a motion to suppress could be grounds for ineffectiveness claim).

Fern v. Gramley, 99 F.3d 255 (7th Cir. 1996) (Prejudice could be presumed from an attorney's failure to file an appeal upon the defendant's request).

Griffin v. United States, 109 F.3d 1217 (7th Cir. 1997) (Counsel's advice to dismiss appeal to file motion to reduce a sentence was

prima facie evidence of ineffective assistance of counsel).

*United States v. Kauffman, 109 F.3d 186 (3rd Cir. 1997) (Failure to investigate insanity defense was ineffective assistance of counsel).

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (Failure to investigate the defendant's mental illness was ineffective assistance of counsel).

United States v. Gaviria, 116 F.3d 1498 (D.C. Cir.), cert. denied, 522 U.S. 1082 (1997) (Counsel was ineffective for giving incorrect sentencing information in contemplation of plea).

United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) (Counsel was ineffective for failing to urge downward role adjustment).

United States v. Taylor, 139 F.3d 924 (D.C. Cir. 1998) (Counsel was ineffective for failing to inform client of advice of counsel defense).

*Smith v. Stewart, 140 F.3d 1263 (9th Cir.), cert. denied, 525 U.S. 929 (1998) (Failure to investigate mitigating evidence was ineffective).

Tejeda v. Dubois, 142 F.3d 18 (1st Cir. 1998) (Counsel's fear of trial judge hindered defense).

United States v. Kliti, 156 F.3d 150 (2d Cir. 1998) (Defense counsel who witnessed exculpatory statement had conflict).

United States v. Moore, 159 F.3d 1154 (9th Cir. 1999) (Irreconcilable conflict between defendant and lawyer).

United States v. Alvarez-Tautimez, 160 F.3d 573 (9th Cir. 1999) (Counsel ineffective for failing to withdraw plea after co-defendant's suppression motion granted).

United States v. Granados, 168 F.3d 343 (8th Cir. 1999) (Counsel was ineffective for unfamiliarity with guidelines and failure to challenge breach of plea agreement).

United States v. Harfst, 168 F.3d 398 (10th Cir. 1999) (Failure to argue for downward role adjustment can be ineffective assistance of counsel).

Prou v. United States, 199 F.3d 37 (1st Cir. 1999) (Counsel failed to attack timeliness of statutory drug enhancement).

United States v. Hall, 200 F.3d 962 (6th Cir. 2000) (Despite waiver, dual representation denied effective assistance of counsel).

*Combs v. Coyle, 205 F.3d 269 (6th Cir.), cert. denied, 531 U.S. 1035 (2000) (Counsel failed to object to post arrest statement, or to investigate defense expert witness).

United States v. Patterson, 215 F.3d 812 (8th Cir. 2000) (Absences of counsel during trial denied effective assistance).

*Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) (Failure to investigate mitigating evidence was ineffective assistance).

United States v. Mannino, 212 F.3d 835 (3rd Cir. 2000) (Failing to raise sentencing issue denied effective assistance).

United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000) (But for counsel's deficient performance, defendant would not have pled guilty).

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

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

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

Glover v. United States, 531 U.S. 198 (2000) (Counsel's failure to object to application of guidelines that increased sentence was ineffective assistance).

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

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

Wanatee v. Ault, 259 F.3d 700 (8th Cir. 2001) (Counsel failed to advise client of affect of felony-murder rule).

Glover v. Miro, 262 F.3d 268 (4th Cir. 2001) (Overworked attorney did not spend enough time with client).

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (Attorney slept through portions of trial).

Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001) (Failure to raise objection to prosecutor's misconduct during closing argument).

Hunt v. Mitchell, 261 F.3d 575 (6th Cir. 2001) (Defendant denied right to confer with new counsel ten minutes before trial).

Magana v. Hofbauer, 263 F.3d 542

(6th Cir. 2001) (Counsel misinformed defendant about effect of plea agreement).

Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001) (Failure to allege ineffectiveness claim on direct appeal can be ineffective assistance of counsel).

Dixon v. Snyder, 266 F.3d 693 (7th Cir. 2001) (Counsel misunderstood admissibility of witness statements).

Manning v. Huffman, 269 F.3d 720 (6th Cir. 2001) (Failure to object to participation of deliberation by alternate jurors).

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) (Failure to investigate family history and psychiatric background).

Eagle v. Linahan, 279 F.3d 926 (11th Cir. 2002) (Failure to appeal adverse *Batson* ruling).

Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002) (Failure to investigate brain damage and child abuse).

Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002) (Counsel failed to adequately argue against weak prosecution case).

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (Inadequate mitigation investigation).

Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002) (Counsel conceded defendant's guilt on several counts over objection).

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