

REVERSED AND REMANDED (1999-2003)

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EFFECTIVE ASSISTANCE is a newsletter published by this office. It is distributed about four times a year. In addition to updating "Reversed and Remanded," the newsletter contains articles that are intended to be helpful to the CJA panel lawyers. Although the newsletter has as its primary focus lawyers in this district, most features have relevance to federal criminal practice general. Lawyers wishing to receive future publications should forward an e-mail address, name and phone number to the location below (preferably by e-mail). This publication have also been duplicated on a compact disc which is generally made available to CJA panel attorneys. It has also been published on the website of the Office of the Public Defender for the Southern District of Alabama.

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United States v. Allen, 190 F.3d 1208 (11th Cir. 1999)(intent to use as a weapon a “prohibited object” is element of offense and not merely sentencing factor, following Jones v. United States, 119 S. Ct. 1215 (1999)).

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United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)(failure to submit drug quantity determination to jury was plain error in light of *Apprendi*). [Ed. note: This case was overruled in part, but not in its essential holding, by the Ninth Circuit in United States v. Buckland, 289 F.3d 558 (9th Cir. 2002)(en banc).].

United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000)(where drug quantity was neither charged in the indictment nor proven to the jury beyond a reasonable doubt, defendant had to be sentenced without reference to drug quantity, following Apprendi v. New Jersey, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and overruling at least in part or by implication, United States v. Hester, 199 F.3d 1287 (11th Cir. 2000), cert. granted, judgment vacated and remanded, 2000 WL 797322 (2000)).

¹ Care should be taken in relying on any authority in this section other than for the core holding in Apprendi because of the ruling of the United States Supreme Court in United States v. Cotton, 535 U.S. 625 (2002)that failure to allege drug type and quantity in the indictment and to present evidence to a jury for proof beyond a reasonable doubt does not deprive the district court of jurisdiction.

[Ed. note: The essential holding of this case, while not overruled, was limited in the holding of United States v. Sanchez, 269 F.3d 1250, 1278 (11th Cir. 2001)(en banc), which held that failure to allege drug quantity in the indictment and failure to submit the quantity issue to a jury did not divest the district court of jurisdiction. Sanchez is in accord with the later Supreme Court decision in United States v. Cotton, 535 U.S. 625 (2002)].

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United States v. Jackson, 240 F.3d 1245 (10th Cir. 2001)(drug quantities not alleged in indictment). [Ed. note: Under United States v. Cotton, 535 U.S. 625 (2002), this does not divest the district court of jurisdiction.].

United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001)(Drug statute’s progression of increased mandatory minimum penalties based in part on the quantity of drugs possessed invokes, under *Apprendi*, the full range of constitutional protections required for “elements of the crime;” and thus a defendant convicted of conspiracy to distribute cocaine and attempt to possess cocaine with intent to distribute had to be sentenced under subsection providing no mandatory minimum sentence where indictment charged the offenses only in general language and the jury did not find beyond a reasonable doubt that the defendant possessed the minimum amount required for imposition of mandatory minimum penalties under other subsections.).

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United States v. Marshall, 173 F.3d 1312 (11th Cir. 1999)(Evidentiary errors in allowing DEA agent to testify whether crack cocaine obtained by police from informant came from source other than the defendants and in admitting evidence of previous drug convictions required reversal).

United States v. Heath, 188 F.3d 916 (7th Cir. 1999)(evidence of prior incident in which defendant was arrested on weapons charge not admissible under other acts rule).

United States v. Vega, 188 F.3d 1150 (9th Cir. 1999)(failure to provide reasonable notice of intent to rely on other acts evidence rendered the evidence inadmissible; not harmless error).

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United States v. Rodriguez, 260 F.3d 416 (5th Cir. 2001)(Prosecutor's comment on defendant's post-Miranda, post-arrest silence violated his right to due process and was not harmless, but did not preclude retrial on double jeopardy grounds.).

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United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002)(Condition of supervised release prohibiting child pornography convict from using computer or internet without probation officer's approval inflicted a greater deprivation on defendant's liberty than was reasonably necessary and exceeded the broad discretion of the sentencing judge.).

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United States v. Short, 181 F.3d 620 (5th Cir. 1999)(conviction on both conspiracy to distribute heroin and cocaine and leading, organizing and managing a continuing criminal enterprise was violation of double jeopardy because the first was a lesser included offense of the second).

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United States v. Brewer, 199 F.3d 1287 (11th Cir. 2000)(conviction under 21 U.S.C. § 841(a)(1) for possession with intent to distribute was lesser included offense of violation of 21 U.S.C. § 861(a)(1), using minor to distribute cocaine base, requiring reversal on double jeopardy grounds).

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United States v. Hunt, 212 F.3d 539 (10th Cir. 2000)(Double jeopardy barred appeal by United States where district court entered judgment of acquittal).

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United States v. White, 240 F.3d 127 (1st Cir. 2001)(drug distribution counts duplicative, for double jeopardy purposes, of count charging, on same conduct, distribution within 1,000 feet of school).

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Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002)(equitable tolling warranted for delay between petitioner's original attempt to file habeas petition and status conference held several months later; limitations period tolled during pendency of state habeas petition).

Dean v. United States, 278 F.3d 1218 (11th Cir. 2002)(Amended claims in § 2255 motion filed after limitations period ran when original motion was filed within 1 year; AEDPA limitations period related back because they arose from same set of facts as timely-filed claim.).

United States v. Berfield, 280 F.3d 486 (5th Cir. 2002)(presumption of prejudice from five year delay between indictment and unsealing).

Currie v. Matesanz, 281 F.3d 261 (1st Cir. 2002)(State post-conviction motion is pending for AEDPA purposes from time filed until finally disposed of and further appellate review unavailable.).

Newell v. Hanks, 283 F.3d 827 (7th Cir. 2002)(Petitioner's amendments to habeas corpus petition were substantially identical to original claims and related back to bring petition within one year grace period of AEDPA; government's possible substantial interference with defense witness's free and unhampered choice to testify warranted remand for evidentiary hearing to determine if due process violated .).

Scott v. Collins, 286 F.3d 923 (6th Cir. 2002)(State's failure to raise timeliness issue resulted in waiver of statute of limitations defense; sua sponte dismissal of petition as untimely was erroneous.).

United States v. Dodson, 291 F.3d 268 (4th Cir. 2002)(One year limitations period for filing motion to vacate did not begin to run until Court of Appeals issued mandate affirming district court's ruling as to counts remanded for resentencing.).[Ed. note: This holding is contrary to the holding of the Eleventh Circuit in Bond v. Moore, 309 F.3d 770 (11th Cir. 2002), which held that one year limitations period begins to run after 90 day period for filing with United States Supreme Court expires; this case apparently creates a split among the circuits on this issue as of this writing.].

Knight v. Schofield, 292 F.3d 709 (11th Cir. 2002)(Under doctrine of equitable tolling, petitioner was allowed one year from date he received notice that the state court denied relief on his state application to file federal habeas petition.).

Sweger v. Chesney, 294 F.3d 506 (3rd Cir. 2002)(Properly-filed state post-conviction proceeding challenging judgment tolls AEDPA statute of limitations.). [Ed. note: first impression in 3rd Circuit].

Ford v. Moore, 296 F.3d 1035 (11th Cir. 2002)(Statute of limitations under AEDPA is tolled during period of consideration of properly filed petition for state collateral relief regardless of whether that petition raises federally cognizable claims.).

Williams v. Bruton, 299 F.3d 981 (8th Cir. 2002)(Pending state post-conviction petition tolled one year limitations period for federal habeas corpus petition.).

Rodriguez v. Bennett, 303 F.3d 435 (2nd Cir. 2002)(Remand required to determine whether limitations-barred successive petition was entitled to be heard due to equitable tolling.).

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Pratt v. Greiner, 306 F.3d 1190 (2nd Cir. 2002)(Statute of limitations under AEDPA was tolled during pendency of state court properly filed motion to vacate; order of dismissal insufficient to allow for meaningful appellate review.).

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Johnson v. Chapman, 288 F.3d 1215 (10th Cir. 2002)(Failure of petitioner's state appellate counsel to perfect appeal was ineffective assistance of counsel, and petitioner would be released unless state granted him an out-of-time appeal.).

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United States v. Rea, 223 F.3d 741 (8th Cir. 2000)(church's use of materials purchased in interstate commerce and use of natural gas and fact that property in question was church property insufficient bases to satisfy jurisdictional requirement of federal arson statute).

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United States v. Patzer, 284 F.3d 1043 (9th Cir. 2001)(Government cannot argue on petition for rehearing a completely different theory to justify search if it was not argued in initial response brief on appeal.).

United States v. Haynes, 301 F.3d 669 (6th Cir. 2002)(Any consent to search vehicle was tainted by initial unlawful search.).

United States v. Larson, 302 F.3d 1016 (9th Cir. 2002)(Defendant’s agreement to stipulation may not have been voluntary, requiring remand of suppression motion determination.).

United States v. Myers, 308 F.3d 251 (3rd Cir. 2002)(Police officer lacked probable cause to arrest defendant for simple assault and under Pennsylvania domestic violence law and for carrying unlicensed firearm; since bag was not accessible to officer at time of defendant’s arrest, search of bag could not be justified as incident to lawful arrest.).

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United States v. Gorman, 314 F.3d 1105 (9th Cir. 2002)(Under Payton and 9th Circuit’s Underwood case, officer must have “reason to believe” defendant is on premises plus an arrest warrant to justify entry without a search warrant; court construed “reason to believe” to be tantamount to probable cause, apparently addressing an issue of first impression.).

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United States v. Tavares, 223 F.3d 911 (8th Cir. 2000)(no exigent circumstances existed to justify entry without compliance with knock and announce statute; good faith reliance exception did not apply).

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United States v. Lopez-Valdez, 178 F.3d 282 (5th Cir. 1999)(no reasonable suspicion to stop vehicle which had broken taillight in violation of Texas Transportation Code; good faith exception does not apply).

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United States v. Payne, 181 F.3d 781 (6th Cir. 1999)(no reasonable suspicion justifying search of defendant's property; evidence obtained by parole officer in violation of 4th Amendment must be suppressed).

United States v. Tovar-Valdivia, 193 F.3d 1025 (8th Cir. 1999)(*Terry* did not authorize a pat-down for weapons after search of the suspect's bag dispelled officer's reasonable suspicion; *Terry* did not authorize handcuffing and searching suspect after initial pat-down did not confirm existence of a weapon or contraband).

United States v. Wilson, 205 F.3d 720 (4th Cir. 2000)(Fourth Amendment does not allow traffic stop merely for temporary tags, and firearm seized as fruit of the unlawful stop should have been excluded).

United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000)(officer violated defendant's Fourth Amendment rights in stopping his vehicle based on mistaken belief that the absence of a registration sticker visible from the rear provided a reasonable basis for suspicion of a Baja California, Mexico, vehicle code violation).

United States v. Freeman, 209 F.3d 464 (6th Cir. 2000)(Motor home's weaving into emergency lane did not establish probable cause of traffic violation and probable cause that driver was intoxicated.).

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United States v. Sigmond-Ballesteros, 247 F.3d 943 (9th Cir. 2001)(no reasonable suspicion to justify stop).

United States v. Miles, 247 F.3d 1009 (9th Cir. 2001)(Officer exceeded permissible scope of *Terry* stop by manipulating small box in defendant's pocket which was clearly not a weapon and could not be immediately recognized as contraband.).

United States v. Hunt, 253 F.3d 227 (5th Cir. 2001)(Search, justified solely upon state trooper's regular practice of conducting vehicle search during traffic stop anytime driver gets out of car to meet trooper rather than waiting in vehicle for trooper to approach, violates Fourth Amendment).

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United States v. Johnson, 256 F.3d 214 (4th Cir. 2001)(Traffic stop invalid because state trooper did not possess articulable, reasonable suspicion that defendant's vehicle was in violation of state law establishing light transmission requirements for sunscreen device).

United States v. Childs, 256 F.3d 559 (7th Cir. 2001)(Officer lacked reasonable suspicion to exceed scope of stop's purpose by questioning passenger concerning drug possession, despite passenger's arrest by same officer three days earlier).

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United States v. Nee, 261 F.3d 79 (1st Cir. 2001)(District court did not clearly err in its finding that officer entered vehicle after *Terry* stop to make intentional search.).

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United States v. Belcher, 288 F.3d 1068 (8th Cir. 2002)(Detention of truck following stop violated Fourth Amendment; officer's inquiries regarding truck's bills of lading were improper under Arkansas law, which allowed officers to ask for and inspect bills of lading only if they had reasonable belief that vehicle was being operated in violation of regulations.).

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United States v. Santiago, 310 F.3d 336 (5th Cir. 2002)(Continued detention after records check was unreasonable under Fourth Amendment, and consent to search vehicle was product of unlawful extended detention.).

United States v. Colin, 314 F.3d 439 (9th cir. 2002)(no reasonable suspicion to stop vehicle under California statute prohibiting lane straddling).

United States v. Jones, 234 F.3d 234 (5th Cir. 2000)(although initial Terry stop of vehicle was valid, continued detention after drivers license check violated Fourth Amendment, driver's consent did not dissipate Fourth Amendment violation, and evidence obtained was due to be suppressed as fruit of the poisonous tree).

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United States v. Simon, 206 F.3d 392 (4th Cir. 2000)(Failure of executors of search warrant to leave notice or receipt in violation of rule required remand.).

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United States v. Gantt, 179 F.3d 782 (9th Cir. 1999)(good faith exception to exclusionary rule not implicated where officers failed to give defendant copy of search warrant, since violation was fault of officers, not judiciary).

United States v. Vigeant, 176 F.3d 565 (1st Cir. 1999)(affidavit in support of search warrant did not provide probable cause; good faith exception to exclusionary rule did not permit admission of weapons seized during execution of search warrant).

United States v. Scott, 260 F.3d 512 (6th Cir. 2001)(Search warrant signed by retired judge was void.).

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United States v. McCoy, 313 F.3d 561 (D.C. Cir. 2002)(Completion of prison term did not moot issue of proper calculation of sentence, even where no objection was raised until remand for resentencing.).

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United States v. Rice, 184 F.3d 740 (8th Cir. 1999)(Court has no discretion to deny reduction for acceptance of responsibility where defendant makes timely announcement of intent to plead guilty).

United States v. Zwick, 199 F.3d 672 (3rd Cir. 1999)(fact that government had to prepare for trial did not foreclose defendant from receiving one point reduction in offense level for acceptance of responsibility).

United States v. Cunningham, 201 F.3d 20 (1st Cir. 2000)(Defendant did not have to admit facts of forfeiture in order to be eligible for reduction for acceptance of responsibility.).

United States v. Whitman, 209 F.3d 619 (6th Cir. 2000)(remand for resentencing on issue of acceptance of responsibility).

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United States v. Rood, 281 F.3d 353 (2nd Cir. 2002)(Since defendant provided timely information to government about his involvement in offense, he was entitled to additional one level decrease for acceptance of responsibility.).

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United States v. Pena-Lora, 225 F.3d 18 (1st Cir. 2000)(insufficient evidence in hostage-taking conspiracy prosecution; mandatory sentences for using multiple weapons during single crime of violence could not be consecutive to each other).

United States v. Swan, 275 F.3d 272 (3rd Cir. 2002)(Note 6 of U.S.S.G. § 5G1.3(c) does not mandate consecutive sentences for defendant who commits offense while on federal or state probation, parole, or supervised release, only that consecutive sentences “should” be imposed, leaving discretion with district court.).

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United States v. Arnold, 213 F.3d 894 (5th Cir. 2000)(date on which city court sentence was pronounced, not later date on which probation was revoked and sentence began, was determining date on issue of whether prior sentence was imposed within

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United States v. Morales, 239 F.3d 113 (2nd Cir. 2000)(New York conviction for second-degree harassment did not warrant criminal history point).

United States v. Murphy, 241 F.3d 447 (6th Cir. 2001)(remanded for proper application of criminal history points for two misdemeanor convictions).

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United States v. Smith, 184 F.3d 415 (5th Cir. 1999)(erroneous application of first degree murder guideline in conspiracy to commit kidnapping case).

United States v. Thomas, 280 F.3d 1149 (7th Cir. 2002)(Homicide cross-reference was not warranted and was plain error.).

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United States v. Galvez-Falconi, 174 F.3d 255 (2nd Cir. 1999)(district court has authority to depart downward based on defendant's willingness to consent to deportation).

United States v. McMurtuary, 176 F.3d 959 (7th Cir. 1999)(unjustified sentencing disparities among co-conspirators should have been considered basis for downward departure).

United States v. Aker, 181 F.3d 167 (1st Cir. 1999)(remand for clarification as to basis of denial of departure based on diminished capacity).

United States v. Lahey, 186 F.3d 272 (2nd Cir. 1999)(since neither bank fraud statute nor statute prohibiting probation for Class B felonies precludes a sentence imposing no jail term, court allowed to depart from sentencing guidelines despite guideline directing a sentence including at least one month imprisonment).

United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999)(district court may depart downward on the basis of defendant's post-sentence rehabilitation).

United States v. Debeir, 186 F.3d 561 (4th Cir. 1999)(unique psychological condition, unusual susceptibility to abuse in prison, status as resident alien, employment consequences, negative publicity, fact that defendant was not a pedophile, alleged victimless nature of offense did not warrant downward departure).

United States v. Thorpe, 191 F.3d 339 (2nd Cir. 1999)(incorrect belief by district court that Guidelines required a downward departure before non-custodial probationary sentence could be imposed).

United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999)(absence of government consent did not necessarily preclude downward departure on basis of defendant's stipulation of deportation).

United States v. Castillo-Casiano, 198 F.3d 787)(plain error for district court not to consider nature of aggravated felony which resulted in increased base offense level in deciding whether downward departure appropriate).

United States v. Coleman, 188 F.3d 354 (6th Cir. 1999)(en banc)(district court may grant downward departure based upon government's improper investigatory techniques).

United States v. Daas, 198 F.3d 1167 (9th Cir. 1999)(abuse of discretion to deny downward departure due to sentencing disparity with co-defendants).

United States v. Bradstreet, 207 F.3d 76 (1st Cir. 2000)(Post-sentencing rehabilitation may be used to grant downward departure in a sufficiently exceptional case, citing *Koon* – first impression.).

United States v. Buchanan, 207 F.3d 344 (6th Cir. 2000)(District court required to consider alleged withdrawal from conspiracy as ground for downward departure; and, per concurring justice, dog sniff evidence inadmissible as unreliable.).

United States v. Ross, 210 F.3d 916 (8th Cir. 2000)(additional findings necessary on issue of role in offense; downward departure not supported by finding that not all wire fraud proceeds were put to fraudulent use or by perceived sentencing guidelines disparity).

United States v. Patterson, 215 F.3d 776 (7th Cir. 2000)(counsel's extended absences from trial warranted new trial for ineffective assistance; remand required to determine if sentencing judge understood he had discretion to depart from guidelines where he imposed life sentence).

United States v. Greer, 223 F.3d 41 (1st Cir. 2000)(remand to determine if court had imposed downward departure).

United States v. Simpson, 228 F.3d 1294 (11th Cir. 2000)(plain error in calculation of drug quantity; error to downwardly depart from statutory mandatory minimum sentence in absence of a motion by the government under 18 U.S.C. § 3553(e) or unless defendant falls within provisions of safety valve statute, 18 U.S.C. § 3553(f)).

United States v. White, 240 F.3d 127 (1st Cir. 2001)(drug distribution counts duplicative, for double jeopardy purposes, of count charging, on same conduct, distribution within 1,000 feet of school; remand for consideration of whether appropriate case for downward departure from mandatory stacking provisions of U.S.S.G. § 5G1.2).

United States v. Lewis, 249 F.3d 793 (8th Cir. 2001)(remanded for resentencing because court could not determine whether district court thought it had authority to depart for "lesser harms," i.e. that defendant pawned gun to pay bills, because this was not type of evil envisioned by Congress when it enacted §§ 922(a)(6) and 922(g)(1)).

United States v. Walter, 256 F.3d 891 (9th Cir. 2001)(Childhood abuse was extraordinary and could constitute basis for

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United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001)(Cultural assimilation is permissible basis for downward departure in alien reentry case.).

United States v. Carty, 264 F.3d 191 (2nd Cir. 2001)(Downward departure could be based upon severe pre-sentence confinement conditions.).

United States v. Powell, 269 F.3d 175 (3rd Cir. 2001)(If downward departure may be based on either discretionary or legal grounds, proper procedure is to remand to district court to clarify basis for departure.).

United States v. Gonzalez, 281 F.3d 38 (2nd Cir. 2002)(Spontaneity is not a subset of limited duration factor or significant planning factor with respect to issue of aberrant conduct so that district court should have considered whether downward departure was warranted because defendant's behavior was, in some significant degree, spontaneous.)

United States v. Lukse, 286 F.3d 906 (6th Cir. 2002)(Government was bound by plea agreement to file downward departure motion despite facts that defendants were seen smoking marijuana in jail prior to sentencing.).

United States v. Harris, 293 F.3d 863 (5th Cir. 2002)(Because victim provoked offensive behavior, downward departure was appropriate.).

United States v. Dominguez, 296 F.3d 192 (3rd Cir. 2002)(Grant of downward departure is discretionary where unusual or extraordinary effect on family members.).

United States v. Downing, 297 F.3d 52 (2nd Cir. 2002)(Denial of downward adjustment of sentence on basis of failure to complete acts necessary to carry out substantive offense was erroneous in prosecution for conspiracy to commit wire fraud and securities fraud.).

United States v. Carr, 303 F.3d 539 (4th Cir. 2002)(Where district court erroneously determines it has no authority to downwardly depart, remand is required.).

United States v. Truman, 304 F.3d 586 (6th Cir. 2002)(District court had discretion to depart for defendant's assistance which did not involve investigation or prosecution of another person.).

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002)(Allegedly diminished mental capacity is possible ground for downward departure in cocaine conspiracy case.).

United States v. Kushner, 305 F.3d 194 (3rd Cir. 2002)(That defendant's "intended loss" overrepresented the seriousness of his offense is ground for downward departure.).

United States v. Parish, 308 F.3d 1025 (9th Cir. 2002)(downward departure upheld in child pornography case where district court determined defendant's stature, demeanor and naivete rendered him susceptible to abuse while in prison).

United States v. Silleg, 311 F.3d 557 (2nd Cir. 2002)(Diminished capacity may form basis of downward departure in child pornography case; district court may have misapprehended its authority to downwardly depart.). [Ed. note: Of course, the Feeney Amendment has changed this.].

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United States v. Warren, 186 F.3d 358 (3rd Cir. 1999)(large quantities of drugs possessed by defendant did not warrant upward departure where defendant didn't intend anyone to consume the drugs; statement in PSR about defendant's purported other

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United States v. Stevens, 192 F.3d 263 (2nd Cir. 1999)(inadequate reasons for upward departure from recommended supervised release term).

United States v. Holmes, 193 F.3d 200 (3rd Cir. 1999)(upward departure for extraordinary abuse of trust upheld; proper factual inquiry not made before determining restitution amount).

United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999)(upward departure based on the suspected but uncharged real offense conduct of assault was plain error).

United States v. Medford, 194 F.3d 419 (3rd Cir. 1999)(Selection of midpoint between high and low estimates of stolen items' fair market value, as measure of loss, was arbitrary; upward departure was improper absent notice to defendants; upward departure based on cultural, non-monetary value of stolen items was proper.).

United States v. Cones, 195 F.3d 941 (7th Cir. 1999)(unusually high purity of heroin did not justify upward departure).

United States v. Bartsma, 198 F.3d 1191 (10th Cir. 1999)(failure to justify degree of upward departure; reasonable presentence notice necessary to impose special condition of release requiring registration as sex offender).

United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001)(Upward departure from criminal history category cannot be based on conduct which constituted relevant conduct already considered in computing base offense level).

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001)(Upward departure from second-degree murder range on grounds that murder was premeditated was precluded.).

United States v. Smith, 267 F.3d 1154 (D.C. Cir. 2001)(Upward departure based on prior uncharged conduct was not warranted.).

United States v. Olabanji, 268 F.3d 636 (9th Cir. 2001)(Where court upwardly departed from Chapter 7 sentencing guidelines in imposing sentence following revocation of probation, court erred in failing to consider guideline range of underlying offense of conviction.).

United States v. Hannah, 268 F.3d 937 (10th Cir. 2001)(inadequate basis for upward departure on record).

United States v. Martinez, 274 F.3d 897 (5th Cir. 2001)(improper upward departures imposing consecutive sentences beyond guideline range and statutory maximum).

United States v. Martin, 278 F.3d 988 (9th Cir. 2002)(Recidivism could not form basis for offense level departure under the Guidelines.).

United States v. Cade, 279 F.3d 265 (5th Cir. 2002)(District court's use of state sentences as relevant conduct did not justify upward departure on ground that criminal history category did not adequately reflect seriousness of past criminal conduct.).

United States v. Guzman, 282 F.3d 177 (2nd Cir. 2002)(When considering upward departure for failure of guideline to reflect seriousness of the offense, court improperly applied analogous guideline for bribery where it should have started with base offense level of the offense of conviction, and only then, in exercise of its discretion, applied the analogous guideline for upward departure.).

United States v. Walker, 284 F.3d 1169 (10th Cir. 2002)(Despite defendant's extensive criminal history, seven-level upward departure was not justified by reasoned explanation by district court.).

United States v. Diaz, 285 F.3d 92 (1st Cir. 2002)(District court's failure to give notice of upward departure based on inadequacy of criminal history category and in determining that conduct posed a substantial risk of death or bodily injury to multitude of victims warranted remand.).

United States v. Cross, 289 F.3d 476 (7th Cir. 2002)(improper methodology in departing upwardly for inadequacy of criminal history category where district court failed to tailor the departure by increasing the offense level in response to extra criminal history points).

United States v. Hurlich, 293 F.3d 1223 (10th Cir. 2002)(insufficient evidence to support sentencing enhancement for possession of firearm in connection with another felony offense; failure to articulate reasons for degree of upward departure).

United States v. Cicirello, 301 F.3d 135 (3rd Cir. 2002)(District court erred in single step adjustment in upwardly departing based on hypothetical scenario instead of proceeding sequentially.).

United States v. Spring, 305 F.3d 276 (4th Cir. 2002)(error in departing upward without prior notice to defendant).

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United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999)(Defendant not to be held accountable for entire amount of drugs sold by conspiracy where evidence established he was only individual seller; evidence of conspiracy's sales based on unreliable evidence).

United States v. Rivera-Maldonado, 194 F.3d 224 (1st Cir. 1999)(district court's finding as to drug quantity under sentencing guidelines lacked sufficient indicia of reliability where district court utilized incorrect metric conversions and presentence report failed to break down drug quantity by drug type and failed to indicate how total drug quantity was calculated).

United States v. Santos, 195 F.3d 549 (9th Cir. 1999)(drug quantities triggering mandatory minimum sentences under 21 U.S.C. § 841(b) are determined exclusively by reference to offense of conviction and not by relevant conduct, abrogating *United States v. Keyes*, 40 F.3d 1148 and following great weight of authority from other circuits). [Ed. note: The decision cites no authority on this issue from the Eleventh Circuit.]

United States v. Morrison, 207 F.3d 962 (7th Cir. 2000)(clear error in calculation of drug quantities).

United States v. Gigley, 207 F.3d 1212 (10th Cir. 2000)(Offense level should have been based on quantity of pure methamphetamine, not mixture.).

United States v. Asch, 207 F.3d 1238 (10th Cir. 2000)(Drugs possessed for personal consumption cannot be considered when determining statutory sentencing range.).

United States v. Moore, 212 F.3d 441 (8th Cir. 2000)(31.8 grams of cocaine base improperly included in determining base level).

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United States v. Eschman, 227 F.3d 886 (7th Cir. 2000)(improper to use one-to-one conversion ratio in conspiracy to manufacture methamphetamine case because it was theoretically possible to convert precursor chemicals into same amount of drug; also remanded for reconsideration of failure to give 3 point acceptance or responsibility reduction).

United States v. Simpson, 228 F.3d 1294 (11th Cir. 2000)(plain error in calculation of drug quantity; error to downwardly depart from statutory mandatory minimum sentence in absence of a motion by the government under 18 U.S.C. § 3553(e) or unless defendant falls within provisions of safety valve statute, 18 U.S.C. § 3553(f)).

United States v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000)(error to attribute entire drug quantity in conspiracy absent explicit finding of responsibility).

United States v. Stott, 245 F.3d 890 (7th Cir. 2001)(conversion ratio - cocaine to cocaine base - not based on reliable evidence).

United States v. Williams, 247 F.3d 353 (2nd Cir. 2001)(In prosecution for possession with intent to distribute, drugs meant only for personal use must be excluded from quantity calculation for sentencing.).

United States v. Palmer, 248 F.3d 569 (7th Cir. 2001)(U.S. Marshal's testimony that gang member, who did not personally testify at sentencing hearing,, told him defendant possessed 241 grams of crack cocaine, did not support finding of more than 150 grams.).

United States v. Camacho, 261 F.3d 1071 (11th Cir. 2001)(Weight of pure LSD alone, not entire weight of liquid solution, determines appropriate base offense level).

United States v. Morgan, 292 F.3d 460 (5th Cir. 2002)(Weight of pure LSD alone, not of entire liquid solution, controls base offense level). [Ed. note: first impression case in 5th Circuit].

United States v. Keresztury, 293 F.3d 750 (5th Cir. 2002)(district court erroneously based offense level on weight of LSD/Vodka mixture and not on pure LSD.).

United States v. Noble, 299 F.3d 907 (7th Cir. 2002)(no reliable evidence to support district court's drug quantity determination).

United States v. Culp, 300 F.3d 1069 (9th Cir. 2002)(Evidence did not support estimated average transaction size used by district court to approximate drug quantities.).

United States v. Sandlin, 313 F.3d 351 (6th Cir. 2002)(plain error to aggregate drug quantities accumulated over period of three months).

United States v. Rosacker, 314 F.3d 422 (9th Cir. 2002)(forensic lab report not sufficiently reliable to support quantity approximation).

United States v. Seesing, 234 F.3d 456 (9th Cir. 2000)(insufficient evidence to support finding as to drug quantity).

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United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999)(remanded to determine if direct probation—not suspended sentence—results in enhancement for “aggravated felony” under U.S.S.G. § 211.2(b)(1)(A)).

United States v. Waskom, 179 F.3d 303 (5th Cir. 1999)(three point reduction in offense level for uncompleted conspiracy should have been given; one defendant entitled to recusal of sentencing judge).

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United States v. Thayer, 201 F.3d 214 (3rd Cir. 2000)(merely committing bankruptcy fraud did not warrant enhancement for violation of a judicial process).

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000)(enhancement due to alleged “special skill” of tax preparation did not warrant upward adjustment).

United States v. Rutherford, 175 F.3d 899 (11th Cir. 1999)(Trial court must determine what confidential informant’s testimony would have been before denying defendant’s motion to disclose informant’s names where defendant presented misidentification defense; notice of intent to seek statutory enhancement must list defendant’s prior convictions.).

United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999)(Bruton error not harmless; insufficient evidence of conspiracy in drug case; insufficient evidence of using or carrying firearm in relation to drug trafficking crime; insufficient notice by government of intent to seek sentence enhancement based on prior convictions).

United States v. Merino, 190 F.3d 956 (9th Cir. 1999)(Environmental clean-up cost of \$32,000 was not “substantial” expenditure warranting sentence enhancement).

United States v. Magluta, 198 F.3d 1265 (11th Cir. 1999)(improper reliance on same conduct to depart for “loss of confidence in an important institution” and for “significant disruption of a governmental function;” error to enhance base level by nine levels for bail jumping).

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999)(improper enhancement based on use of private airplane in drug importation case).

United States v. Walker, 202 F.3d 181 (3rd Cir. 2000)(official victim enhancement not warranted where prison cook supervisor who was attacked did not spend significant time guarding prisoners).

United States v. Butler, 207 F.3d 839 (6th Cir. 2000)(Sentence enhancement not warranted for defendant’s participation in robbery with minor; concurring opinion holds guideline authorizing enhancement for using or attempting to use a minor in an offense contrary to statute because it applied to defendants regardless of their age.).

United States v. Brock, 211 F.3d 88 (4th Cir. 2000)(two-level enhancement for threats to injure person in prosecution for interstate harassing communications incompatible with base offense level of six which did not involve threat to injure person or property).

United States v. Pedragh, 225 F.3d 240 (2nd Cir. 2000)(post-offense convictions could not be included as “prior felony convictions” for purposes of enhancing sentence).

United States v. Kroeger, 229 F.3d 700 (8th Cir.2000)(plain error to apply environmental-harm enhancement in determining offense level for count of endangering life in manufacturing methamphetamine case).

Steele v. Blackman, 236 F.3d 130 (3rd Cir. 2001)(second misdemeanor conviction for possessing 30 grams or less of marijuana was not “aggravated felony” under Controlled Substances Act).

United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001)(en banc)(Conviction of transporting , selling, importing, giving

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United States v. Montano, 250 F.3d 709 (9th Cir. 2001)(2 level enhancement for smuggling involving sophisticated concealment in drug smuggling case not warranted).

United States v. Bennett, 252 F.3d 559 (2nd Cir. 2001)(improper enhancement of sentence on ground that wife refused to surrender her interest in property).

United States v. Alarcon, 261 F.3d 416 (5th Cir. 2001)(Mere fact that child was riding in truck carrying marijuana shipment did not support conviction for using minor; sentencing enhancement for using minor to commit crime was plain error.).

United States v. Maung, 267 F.3d 1113 (11th Cir. 2001)(Enhancement for being “in the business of receiving and selling stolen property” was improper; restitution order which exceeded 90-day time period was invalid.).

United States v. Cervantes-Nava, 281 F.3d 501 (5th Cir. 2002)(Texas DWI offense was not crime of violence or aggravated felony warranting increase in base offense level.).

United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002)(prior felonies not aggravated so as to justify 4-level enhancement).

United States v. Chau, 293 F.3d 96 (3rd Cir. 2002)(improper enhancement of sentence for failure to obtain refuse disposal permit).

United States v. Lee, 296 F.3d 792 (9th Cir. 2002)(Imposition of special skills enhancement upon conviction based on use of fraudulent website on internet was not warranted.).

United States v. Jiminez, 300 F.3d 1166 (9th Cir. 2002)(Enhancements for using minor in commission of offense and for obstruction of justice were not warranted.).

United States v. Stallings, 301 F.3d 919 (8th Cir. 2002)(Prior non-entered felony conviction could not be used to enhance sentence.).

United States v. Garcia-Cantu, 302 F.3d 308 (5th Cir. 2002)(Texas state conviction for injury to a child was not crime of violence to qualify as “aggravated felony” for enhancement purposes.).

United States v. Crispo, 306 F.3d 71 (2nd Cir. 2002)(Bankruptcy trustee was not “government officer or employee” within meaning of sentencing guideline providing for enhancement if victim was government officer or employee.).

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United States v. Zendeli, 180 F.3d 879 (7th Cir. 1999)(statutory sentence enhancement for personal injury to person improperly applied where injured person was co-conspirator in arson/insurance fraud scheme).

United States v. Farrow, 198 F.3d 179 (6th Cir. 1999)(impermissible double counting by relying on same conduct, use of car as dangerous weapon, in determining that defendant committed aggravated assault and in applying 4-level enhancement for otherwise using a dangerous weapon).

United States v. Dixon, 201 F.3d 1223 (9th Cir. 2000)(clear error for imposing enhanced sentence for creating substantial risk of death or serious bodily injury where illegal aliens were put in trunk of vehicle).

United States v. Swiney, 203 F.3d 397 (6th Cir. 2000)(Sentencing Guidelines reasonable foreseeability analysis, not theory of

co-conspirator vicarious liability, determines whether defendant is subject to 20-year minimum sentence based on fact that death resulted from use of heroin distributed by members of conspiracy).

United States v. Shumpert Hood, 210 F.3d 660 (6th Cir. 2000)(“minor assault” guidelines provision applied, not “aggravated assault” provision).

United States v. Wright, 248 F.3d 765 (8th Cir. 2001)(no evidence to support enhancement of 4 levels for serious bodily injury).

United States v. Blue, 255 F.3d 609 (8th Cir. 2001)(Evidence did not support sentence enhancement for using force or on ground that victim was in “custody, care, or supervisory control” of defendant).

United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001)(DUI conviction without injury was not crime of violence and thus not “aggravated felony” warranting 16-level increase.).

United States v. Landerros-Arreola, 260 F.3d 407 (5th Cir. 2001)(Menacing conviction could not be treated as “aggravated felony” for sentencing enhancement purposes.).

United States v. Guy, 282 F.3d 991 (8th Cir. 2002)(“deeming” provision of sentencing guideline defining “serious bodily injury” inappropriately applied; more specific findings required on issues of whether serious bodily injury appropriate on basis of protracted impairment of bodily members or mental faculties and on basis of extreme physical pain).

United States v. Londono, 285 F.3d 348 (5th Cir. 2002)(Two-level enhancement for taking property “from the person of another” was not justified where defendant took diamonds from x-ray belt at security checkpoint at airport while accomplice prevented salesman from passing through metal detector.).

United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2002)(Defendant’s prior conviction for unlawfully possessing firearm in place licensed for selling alcoholic beverages was not a “crime of violence” which would support 16-level increase to base offense level.).

United States v. Charles, 301 F.3d 309 (5th Cir. 2002)(Sentencing Guidelines definition of “crime of violence,” not statutory definition, controlled in determination of whether prior felony conviction supported enhancement; simple motor vehicle theft under Texas law is not a crime of violence.).

United States v. Turner, 305 F.3d 349 (5th Cir. 2002)(Determination of whether burglary of a building was a “crime of violence” for purpose of increasing base offense level turned on conduct expressly charged in indictment for the prior conviction, which was not in the record.).

United States v. Costello, 307 F.3d 553 (7th Cir. 2002)(Enhancement for use of physical force in relation to prostitution offense only applied to force against prostitute.).

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United States v. Gallo, 195 F.3d 1278 (11th Cir. 1999)(Reasonable foreseeability required to enhance drug sentence based on co-conspirator’s possession of firearm.).

United States v. Jamieson, 202 F.3d 1293 (11th Cir. 2000)(defendant’s sentence erroneously enhanced based on his possession of a semiautomatic weapon which was not one of the nine weapons specifically banned by the Violent Crime Control Act).

United States v. Sandoval-Barajas, 206 F.3d 853 (9th Cir. 2000)(improper 16-level enhancement for possession of firearm by non-citizen—not an “aggravated felony”).

United States v. Rome, 207 F.3d 251 (5th Cir. 2000)(Speculation that defendant would have stolen all 87 guns on display in store he broke into was insufficient basis for 6-level enhancement for crime involving 50 guns or more.).

United States v. Mojica, 214 F.3d 1169 (10th Cir. 2000)(defendant's sentence properly reduced to level 6 because shotgun he possessed was used in connection with brother's lawful sporting activity).

United States v. Aquino, 242 F.3d 859 (9th Cir. 2001)(Weapons enhancement under Sentencing Guidelines could not be imposed on defendant convicted of using and carrying firearm during drug trafficking offense.).

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001)(insufficient evidence of Hobbs Act violations; court could not enhance sentence by 5 levels for weapons based on brandishing or possession by a co-defendant).

United States v. Jordan, 256 F.3d 922 (9th Cir. 2001)(Due process requires that aggregated nine-level sentence enhancements for firearm possession and abduction to facilitate escape be proven by clear and convincing evidence, not mere preponderance of the evidence).

United States v. Le, 256 F.3d 1229 (11th Cir. 2001)(District court's error in applying seven-level firearm increase to defendant's sentence for Hobbs Act convictions was not harmless).

United States v. Highsmith, 268 F.3d 1141 (9th Cir. 2001)(insufficient evidence to prove defendant in constructive possession of firearm during commission of drug-related crime).

United States v. McAllister, 272 F.3d 228 (4th Cir. 2001)(insufficient evidence to justify enhancement for gun possession during illegal drug activity).

United States v. Atwater, 272 F.3d 511 (7th Cir. 2001)(District Judge ignored particulars of case in enhancing defendant's sentence by five levels for use of gun during bank robbery, relying instead on his own conclusion that guns are usually used in bank robberies.).

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001)(insufficient evidence to justify weapons enhancement for defendant who pled guilty to weapons charge).

United States v. Stubbs, 279 F.3d 402 (6th Cir. 2002)(District court plainly erred in sentencing defendant for crime of using or carrying firearm in connection with drug trafficking crime, which crime was a different offense than the charged crime of conspiracy.).

United States v. Lucas, 282 F.3d 414 (6th Cir. 2002)(insufficient evidence to justify enhancement for possession of firearm in connection with drug offense).

United States v. Timmons, 283 F.3d 1246 (11th Cir. 2002)(Conviction under 18 U.S.C. § 924(c) precluded sentencing enhancement for possession of weapon in connection with drug trafficking offense.).

United States v. Pena-Sarabia, 297 F.3d 983 (10th Cir. 2002)(Evidence of husband's possession of firearm in their home was insufficient to establish defendant's possession under safety valve provision.).

United States v. Cicirello, 301 F.3d 135 (3rd Cir. 2002)("reason to believe" guns would be used in commission of another felony not warranted by evidence; no evidence of "substantial risk of death or bodily injury to multiple individuals;" district court erred in single step adjustment in upwardly departing based on hypothetical scenario instead of proceeding sequentially).

United States v. Collins, 313 F.3d 1251 (10th Cir. 2002)(Failure of district court to reduce sentence where it failed to properly examine circumstances in determining whether defendant's purpose in possessing weapons was solely lawful for sporting was reversible error.).

United States v. Romano, 314 F.3d 1279 (11th Cir. 2002)(In 18 U.S.C. § 922(g)(1) prosecution, inclusion in sentence of base offense level increases based on conduct involved in count which was to be dismissed pursuant to plea agreement was plain error.).

United States v. Seesing, 234 F.3d 456 (9th Cir. 2000) (error to apply altered serial number sentencing enhancement to non-firearms counts).

United States v. Thompson, 234 F.3d 726 (D.C. Cir. 2000)(sentence vacated for improper gun enhancement for stolen gun).

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United States v. Woodard, 239 F.3d 159 (2nd Cir. 2001)(factual findings insufficient to sustain enhancement for obstruction of justice).

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United States v. Santos, 195 F.3d 549 (9th Cir. 1999)(drug quantities triggering mandatory minimum sentences under 21 U.S.C. § 841(b) are determined exclusively by reference to offense of conviction and not by relevant conduct, abrogating *United States v. Keyes*, 40 F.3d 1148 and following great weight of authority from other circuits).² [Ed. note: The decision cites no authority on this issue from the Eleventh Circuit.]

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United States v. Forbes, 172 F.3d 675 (9th Cir. 1999)(both probation and straight imprisonment cannot be imposed).

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United States v. Rhodes, 177 F.3d 963 (11th Cir. 1999)(3 year term of supervised release for misdemeanor exceeded statutory maximum of one year).

United States v. Comito, 177 F.3d (9th Cir. 1999)(improper admission of hearsay evidence at revocation hearing).

United States v. Armstrong, 186 F.3d 1055 (8th Cir. 1999)(invalid probation condition prohibiting defendant from reentering park for non-business activities in prosecution for violation of National Park Service regulation).

United States v. Brings Plenty, 188 F.3d 1051 (8th Cir. 1999)(revocation sentence of 2 years supervised release exceeded maximum allowed where maximum SRT for original conviction was 3 years, 12-month prison term imposed for current

revocation, and defendant had previously served 6-month revocation term).

United States v. Loy, 191 F.3d 360 (3rd Cir. 1999)(remand for district court to state reasons for imposing additional conditions of supervised release).

United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999)(person in pretrial detention is not “imprisoned” in connection with a conviction as would toll term of supervised release).

United States v. Breedlove, 197 F.3d 524 (D.C. Cir. 1999)(improper supervised release term of 5 years for Class C felony).

United States v. Breedlove, 204 F.3d 267 (D.C. Cir. 2000)(term of supervised release exceeded statutory maximum).

Johnson v. United States, ___ U.S. ___, 120 S. Ct. 1795 (2000)(18 U.S.C. § 3583(h) applies only to cases in which the initial offense occurred after September 13, 1994, the date of its enactment. At the time of defendant’s conviction, 18 U.S.C. § 3583(e)(3) gave the district court the authority to reimpose supervised release upon recommitment after revocation. Therefore, the district court was authorized to impose another term of supervised release after recommitment.).

United States v. Zanghi, 209 F.3d 1201 (10th Cir. 2000)(remanded for district court to explain why supervised release and home confinement imposed).

United States v. Carmichael, 216 F.3d 224 (2nd Cir. 2000)(two-level downward departure inappropriate; plain error to rely on erroneous assumption in increasing period of supervised release from four to five years at resentencing).

United States v. Keeling, 235 F.3d 533 (10th Cir. 2000)(remanded for resentencing on issue of supervised release).

Lopez v. Davis, 121 S. Ct. 714 (2001)(Bureau of Prisons has discretion, under governing statute, to promulgate regulation categorically denying early release to prisoners whose felonies involved use of firearm.).

United States v. Peterson, 248 F.3d 79 (2nd Cir. 2001)(impermissibly vague conditions imposed on sex offender regarding use of internet and enrollment in sex-offender program as directed by probation; condition that defendant must notify third parties of risks occasioned by his criminal record improper because it required notification of prior conviction).

United States v. Sesma-Hernandez, 253 F.3d 403 (9th Cir. 2001)(In deciding petition for revocation of supervised release, district court must articulate findings as to all disputed matters sufficient to permit appellate review).

United States v. Merced, 263 F.3d 34 (2nd Cir. 2001)(Defendant’s sentence, when combined with prior term of imprisonment, violated two year maximum period of supervised release applicable to Class D felony.).

United States v. Monteiro, 270 F.3d 465 (7th Cir. 2001)(Seizure authority contained in special condition of supervised release must be reasonably related to ends of rehabilitation and protection of public.).

United States v. Scott, 270 F.3d 632 (8th Cir. 2001)(Where there was no evidence that defendant had propensity to commit future sex crimes, imposition of special conditions of release was abuse of discretion.).

United States v. Guagliardo, 278 F.3d 868 (9th Cir. 2002)(Conditions of defendant’s probation prohibiting his possession of any kind of pornography and from residing in close proximity to places frequented by children were unconstitutionally vague.).

United States v. Moreci, 283 F.3d 293 (5th Cir. 2002)(Supervised release term for sentence imposed under 21 U.S.C. § 841(b)(1)(C) should have been three years, not five years, resulting in plain error.).

United States v. Maxwell, 285 F.3d 336 (4th Cir. 2002)(error in imposing supervised release term after second revocation because court did not deduct from the total amount of supervised release authorized by statute term of imprisonment imposed as part of first postrevocation sentence as well as imprisonment imposed as result of second postrevocation sentence).

United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002)(Condition of supervised release prohibiting child pornography convict from using computer or internet without probation officer’s approval inflicted a greater deprivation on defendant’s liberty than was reasonably necessary and exceeded the broad discretion of the sentencing judge.).

United States v. Thomas, 299 F.3d 150 (2nd Cir. 2002)(The judgment was remanded to strike non-binding supervised release conditions that prohibited the defendant from possession of any ID in the name of another person).

United States v. Modena, 302 F.3d 626 (6th Cir. 2002)(abuse of discretion in requiring defendant to undergo testing and treatment for drug and alcohol abuse and to abstain from use of alcohol during term of supervised release).

United States v. Tschebaum, 306 F.3d 540 (8th Cir. 2002)(Sentence which did not consider all relevant statutory sentencing factors was plainly unreasonable in revoking probation.).

United States v. Gross, 307 F.3d 1043 (9th Cir. 2002)(remand for consideration of required statutory factors in modifying terms of supervised release).

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United States v. Samaniego, 187 F.3d 1222 (10th Cir. 1999)(government failed to lay proper basis for admissibility of summaries of phone records at trial; Court of Appeals declined to apply harmless error rule because government failed to raise it in briefs).

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United States v. Byrd, 208 F.3d 592 (7th Cir. 2000)(Refusing to allow defendant to show jury shackles and restraints in which he was held at time of alleged assault was abuse of discretion and not harmless.).

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United States v. Barnette, 211 F.3d 803 (4th Cir. 2000)(Reversible error committed in death penalty case when district court refused to allow defense expert to testify in surrebuttal to contest prosecution expert's rebuttal testimony diagnosing defendant as a psychopath.).

United States v. Sauza-Martinez, 217 F.3d 754 (9th Cir. 2000)(failure of court to give limiting instruction when it admitted post-arrest incriminating statement by co-defendant directly implicating defendant was plain error).

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United States v. Bownes, 224 F.3d 302 (4th Cir. 2000)(improper venue because essential conduct element of harboring a fugitive occurred outside district).

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