

EFFECTIVE ASSISTANCE

Newsletter for CJA Panel Attorneys

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Maiden Voyage*

Walking a Swaying Tightrope: Pitfalls on the Way to a 5K Departure**

By: Carlos A. Williams,
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* *"The cradle rocks above an abyss, and common sense tells us that our existence is but a brief crack of light between two eternities of darkness."*

Vladimir Nabokov

The standard plea agreements are "take it, or leave it" propositions which invite cooperating defendants to step into the void of an illusory promise. The grossly unequal bargaining power between the parties is evidenced by a trend demanding more concessions of defendants: Waivers of direct and collateral appeal rights, waivers of the right to request information about the case under the Freedom of Information and Privacy Acts and waivers of Brady violations. Caution, vigilance and closer scrutiny of the issues raised by these adhesion contracts is necessary. (See "Mephistophelian Deals: The Newest in Standard Plea Agreements"

by Larry Kupers & John T. Philipsborn, *The Champion*, August 1999) (arguing that ineffective assistance of counsel and Brady violations cannot be waived.)

The potential for abuse of government power is most evident where the filing of the downward departure motion is left "solely to the discretion of the government." That provision makes defendants reasonably reluctant and nervous. It should: In the Fifth, Seventh and Eleventh Circuits, that language renders the agreement unreviewable and unenforceable. See U.S. v. Aderholt, 87 F.3d 740, 742-43 (5th Cir.1996), U.S. v. Burrell, 963 F.2d 976, 984-85 (7th Cir.1992), U.S. v. Forney, 9 F.3d 1492 (11th Cir. 1993).

In, Forney the court held that where the plea agreement left the determination of substantial assistance "solely" to the government, that language required the government merely to consider, and not file, a 5K1.1 motion. The panel found that Forney waived the bad faith claim and the right to challenge or appeal the government's decision. It held, however, that the conditional promise to file the downward departure motion was not reviewable for bad faith, absent a claim of unconstitutional or discriminatory motivation. Forney 9 F3d at 1500. The court apparently concluded that the "sole discretion" language in the agreement left the government with the
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*This is the first issue of Effective Assistance. It will be published quarterly and use the same format as its predecessor, The Defender, published by Alex Bunin. The collective effort of the Federal Defender's staff, colleagues, and friends makes this publication possible. We hope you find the information interesting and helpful.

Staff Changes: Christopher Knight takes on the position of Assistant Federal Defender, and Kristen Gartman Rogers is our new Research and Writing Specialist.

Local Motions: Relics or Requirements?

By: Lyn Hillman Campbell
Assistant Federal Defender

With the implementation of the local criminal discovery rules in 1997, motions under Fed. R. Crim. P. 16 were deemed made at the time of arraignment. However, because discovery problems still arise, the savvy practitioner needs to be ever mindful of when a discovery motion is necessary, even in light of the local rules of practice.

While SD ALA LR 16.13

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makes many motions unnecessary, the rule ends with the statement that a discovery motion is not necessary “unless the party making the request desires to preserve the discovery matter for appeal.” In other words, if an attorney believes that discovery has not been fully tendered under the local rule, or in the manner required by local rule, the attorney better file a motion to compel.

In my experience, I have filed motions to compel in the following cases: 1) where a defendant was interviewed on four occasions, yet no reports of interview were disclosed; 2) where voluminous discovery in a complex white collar case was not provided to the defense, but rather made available for inspection when the Government’s schedule permitted; and 3) where evidence discoverable under Brady v. Maryland was not disclosed. In each case, filing a motion preserved the issue for appeal, and usually got the AUSA involved to cough up the materials I sought.

But what about the admonition at arraignment that all pretrial motions or motions to compel must be filed by a date certain? File as soon as the problem presents itself, even if that is after the technical date for motions, if for no other reason than to preserve the issue for appeal.

One practice point to watch out for (especially in multi-defendant cases) is the certification requirement under the rule wherein every motion must be accompanied by a statement that the moving party has contacted opposing counsel detailing the efforts of the moving party to work the problem out. Each attorney involved must submit a certification, but it is not clear whether such certification must be separate from the motion, or may be contained therein.

Also, don’t forget, the local rule requires the Government to

provide a designation under Fed. R. Crim. P. 12(d) of the Rule 16(a) evidence it will use at trial and notice of intent to use 404(b) evidence no later than the date of arraignment. Anyone for a motion in limine?

Walking a Swaying Tightrope

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same discretion it would have had without a plea contract.

Other cases suggest Forney was wrongly decided. Five Circuits take the position that the government’s refusal to move for a §5K1.1 downward departure can be challenged on the ground that the government acted irrationally or in bad faith. Among them: U.S. v. Isaac, 141 F.3d 477 (3d Cir.1998); U.S. v. Jones, 58 F.3d 688, 692 (D.C. Cir.1995) (in dicta); U.S. v. Rounsavall, 128 F.3d 665 (8th Cir.1997); U.S. v. Lee, 989 F.2d 377, 380 (10th Cir. 1993); U.S. v. Rexach, 896 F.2d 710 (2d Cir.1990) (pre- Wade holding reaffirmed in dicta in U.S. v. Ming He, 94 F.3d 782, 787 (2d Cir.1996). Given the split among the Circuits, the time is ripe for reconsideration by the Eleventh Circuit or an appeal to the United States Supreme Court.

The tension between the two lines of cases appears to center on competing considerations expressed in U.S. v. Santobello, 92 S.Ct. 495 (1971) and U.S. v. Wade, 504 U.S. 181(1992). In Santobello, the prosecution breached an oral plea agreement to remain silent at sentencing. Held: when a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration such promise must be fulfilled. In Wade, the defendant sought a departure for information he gave the government which led to the conviction of another person. There was no plea agreement and the government declined to recommend a downward departure. The court held that courts may review a prosecutor’s refusal to file a downward

departure motion and grant a remedy only if the refusal was based on an unconstitutional motive. Wade noted, however, that once the government uses its § 5K1.1 discretion as a bargaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement. Wade at 1843 citing Santobello and United States v. Conner, 930 F.2d 1073, 1075-77 (4th Cir. 1991). In other words, while the prosecution retains most of its discretion to make the § 5K1.1 motion under the standard plea agreement, it is not severed from the plea contract.

The instrument used to induce the defendant’s plea and waiver of constitutional rights obligates the prosecution to act in good faith with respect to all the agreement implies. That includes the § 5K1.1 motion and all the steps necessary to make it possible. That aspect of the contract survives the “sole discretion” clause and renders the failure to make the motion reviewable for misconduct or bad faith.

The “sole discretion” clause shields the prosecution if one presumes it did not breach any other part of the agreement or it did not act in bad faith. A breach of the agreement, unlike the “sole discretion” clause, does not require a showing of bad faith and may be established by a preponderance of the evidence. See U.S. v. Watson, 988 F.2d 544 (5th Cir. 1993). Breaches are judged according to the defendant’s reasonable understanding at the time of his plea. U.S. v. Boatner, 966 F.2d 1575, 1578 (11th Cir.1992). See U.S. v. Anzalone, 148 F.3d 940 (8th Cir. 1998)(The refusal to file a 5K motion due to defendant’s post agreement drug use was improper where it was unrelated to the quality of assistance rendered and infringed upon the court’s sentencing discretion.)

Practice tips: Effective assistance of the cooperating defendant is necessary throughout the process. In Ming He, the court required that

practitioners attend the debriefing sessions. It noted that counsel could assist in several important ways: (1) Explain questions the client does not understand; (2) Keep the client focused on the fact that while he or she seeks assistance from the government, that entity does not share the defendant's interest, even after the execution of the cooperating agreement; (3) Resolve potential disagreements, assist him/her in providing clear and accurate answers; and (4) Serve as a potential witness at sentencing to the facts supporting the client's claims. "A cooperating witness walks a swaying tightrope." U.S. v. Ming He, 94 F.3d 782, 789-90 (2d Cir. 1996) It's up to the defense to provide the safety net.

Reversed & Remanded

By Christopher Knight
Assistant Federal Defender

The opinions cited below were reversed either in whole or in part for the reasons stated. They are published opinions, including significant habeas decisions, with official citations. Opinions of the United States Court of Appeals for the Eleventh Circuit are listed in **bold face type** for your convenience. The official reporters consulted are 169 F.3d through 181 F.3d. Reversals which benefitted the government are omitted.

U. S. SUPREME COURT

Jones v. United States, 119 S. Ct. 1215 (1999)(provisions of carjacking statute establishing higher penalties for serious bodily injury or death set forth additional elements of the offense requiring proof beyond a reasonable doubt).

O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999)(in order to satisfy exhaustion requirement for habeas corpus, petitioner must first present issue to state supreme court for discretionary review).

Lilly v. Virginia, 119 S. Ct. 1887(1999)(admission of non-testifying accomplice's confession violated defendant's Confrontation Clause rights).

Mitchell v. United States, 199 S. Ct. 1307 (1999)(neither guilty plea nor statements at plea colloquy functioned as waiver of right to remain silent at sentencing; court could not draw adverse inference from defendant's silence at sentencing in determining facts relating to details of crime).

U. S. COURTS OF APPEALS

United States v. Blasini-Lluberas, 169 F.3d 57 (1st Cir. 1999)(insufficient evidence of misapplication of bank funds).

United States v. Fore, 169 F.3d 104 (2nd Cir. 1999)(improper to order restitution for violations of Title 42).

United States v. Andrades, 169 F.3d 131 (2nd Cir. 1999)(failure to determine factual basis for plea and to determine that defendant understood nature of the charge).

United States v. Navarro, 169 F.3d 228 (5th Cir. 1999)(sentence by video conferencing does not comply with Rule 43 as to defendant's presence).

United States v. Brown, 169 F.3d 344 (6th Cir. 1999)(dismissal on speedy trial grounds affirmed).

Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999)(Michigan Supreme Court's finding that jury's possession of extraneous information was harmless unreasonable in light of U.S. Supreme Court precedent).

United States v. Wilson, 169 F.3d 418 (7th Cir. 1999)(improper firearms enhancement in drug case).

United States v. Leahy, 169 F.3d 433 (7th Cir. 1999)(unreasonable terrorism enhancement of 10 levels).

United States v. Aldrich, 169 F.3d 526 (8th Cir. 1999)(evidence of vacated convictions prejudicial).

United States v. Burch, 169 F.3d 666 (10th Cir. 1999)(district court lacked subject matter jurisdiction to try defendant under Indian Major Crimes Act).

United States v. Calderon, 169 F.3d 718 (11th Cir. 1999)(evidence did not support conviction for money laundering and conspiracy to commit money laundering).

Schledwitz v. United States, 169 F.3d 1003 (6th Cir. 1999)(collective exculpatory and impeaching value of undisclosed evidence required reversal).

Lucas v. O'Dea, 169 F.3d 1028 (6th Cir. 1999)(5th Amendment right to grand jury indictment violated when indictment charged intentional murder but instructions allowed wanton murder conviction—counsel ineffective for failing to object).

United States v. Rea, 169 F.3d 1111 (8th Cir. 1999)(restitution payment schedule required reconsideration).

United States v. James, 169 F.3d 1210 (9th Cir. 1999)(records concerning past violent acts of defendant's boyfriend were relevant to self-defense theory).

United States v. Sacko, 170 F.3d 227 (1st Cir. 1999)(error to delve into facts of prior statutory rape conviction to determine whether it was predicate offense under ACCA).

United States v. Francis, 170 F.3d 546 (6th Cir. 1999)(improper vouching for government witness, improper reference to plea agreements of two witnesses, improper bolstering of agent's credibility, improper attack on defendant's credibility).

United States v. Davis, 170 F.3d 618 (6th

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Cir. 1999)(four-level upward departure for extreme conduct improper).

United States v. Johnson, 170 F.3d 708 (7th Cir. 1999)(no reasonable suspicion to stop defendant).

United States v. Grimm, 170 F.3d 760 (7th Cir. 1999)(breach of plea agreement where government withdrew recommendation of reduction of sentence based on acceptance of responsibility).

United States v. Span, 170 F.3d 798 (7th Cir. 1999)(drug quantity calculation lacked evidentiary basis).

United States v. Leopard, 170 F.3d 1013 (10th Cir. 1999)(lack of counsel at evidentiary hearing to support enhanced sentence for d-methamphetamine conviction required reversal).

United States v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999)(remand necessary to determine if lack of compliance with treaty requiring disclosure to consulate when foreign national is imprisoned was prejudicial).

United States v. Meksian, 170 F.3d 1260 (9th Cir. 1999)(error to require restitution for loss sustained by lenders due to worthlessness of collateral).

United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)(prior conviction was not for crime of violence for career offender purposes).

United States v. Ticchiarelli, 171 F.3d 24 (1st Cir. 1999)(defendant on remand did not waive drug quantity issue, and it was error not to consider his proffer on remand).

United States v. Kiyuyung, 171 F.3d 78 (2nd Cir. 1999)(failure to prove that firearms were in plain view).

United States v. Randall, 171 F.3d 195 (4th Cir. 1999)(constructive amendment of indictment occurred when proffer,

argument and instructions allowed conviction for possession with intent to distribute when indictment charged only distribution).

United States v. Haas, 171 F.3d 259 (5th Cir. 1999)(remand for failure properly to calculate loss).

United States v. Hayes, 171 F.3d 389 (6th Cir. 1999)(plain error to rely on undisclosed victim impact letters in sentencing).

Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999)(evidentiary hearing required on issue of ineffective assistance).

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999)(special condition prohibiting defendant from employment as truck driver if it required his absence from city for more than 24 hours was an abuse of discretion).

United States v. Johnson, 171 F.3d 601 (8th Cir. 1999)(no reasonable suspicion of criminal activity to warrant interception of Express Mail package).

United States v. Watson, 171 F.3d 695 (D.C. Cir. 1999)(prosecutor's misstatement of evidence in closing argument warranted new trial).

United States v. Cohen, 171 F.3d 796 (3rd Cir. 1999)(remanded for factual findings on issue of acceptance of responsibility).

United States v. Stansfield, 171 F.3d 806 (3rd Cir. 1999)(reversed in part because arson statute of limitations had run).

United States v. McClain, 171 F.3d 1168 (8th Cir. 1999)(error in counting misdemeanors as felonies in sentencing defendant as armed career criminal).

United States v. Hendricks, 171 F.3d 1184 (8th Cir. 1999)(defendant who qualified for safety valve could not be sentenced to term of supervised release in excess of 3-5 years).

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United States v. Cataldo, 171 F.3d 1316 (11th Cir. 1999)(enhancement for obstruction of justice not warranted).

United States v. Mastrangelo, 172 F.3d 288 (3rd Cir. 1999)(prosecutor's misstatement of terms of stipulation required reversal).

United States v. Mancillas, 172 F.3d 341 (5th Cir. 1999)(no basis for restitution award).

United States v. Clayton, 172 F.3d 347 (5th Cir. 1999)(evidence did not support enhancement for obstruction of justice).

United States v. Jones, 172 F.3d 381 (5th Cir. 1999)(inmate entitled to present evidence of actual innocence on motion to vacate).

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

United States v. Corral, 172 F.3d 714 (9th Cir. 1999)(reliance on unreliable double hearsay required remand).

United States v. Gergen, 172 F.3d 719 (9th Cir. 1999)(jury instruction eliminating mens rea requirement in possession of firearm was error; government had burden of proving defendant knew of particular characteristics of weapon which made it a firearm).

United States v. Gordon, 172 F.3d 753 (10th Cir. 1999)(constitutional claims not procedurally barred on motion to vacate).

United States v. Cerceda, 172 F.3d 806 (11th Cir. 1999)(district court violated statute when he refused to recuse himself when it was learned he was subject of federal grand jury investigation; timely motion to reconsider tolls running of 30-day period for filing notice of appeal).

Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999)(mailbox rule applies to filing

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of habeas petition, and deadline is one year after effective date of AEDPA).

United States v. Mitchell, 172 F.3d 1104 (9th Cir. 1999)(evidence of defendant's poverty prejudicial and not harmless).

United States v. Bensimon, 172 F.3d 1121 (9th Cir. 1999)(admission of 17-year old conviction was abuse of discretion because prejudicial effect outweighed probative value).

United States v. Davoudi, 172 F.3d 1130 (9th Cir. 1999)(improper valuation of property for restitution purposes).

United States v. Barron, 172 F.3d 1153 (9th Cir. 1999)(improper for district court to condition granting of motion to vacate on defendant's withdrawal of guilty plea).

United States v. Carey, 172 F.3d 1268 (10th Cir. 1999)(warrantless seizure of computer files of child pornography in closed files violated 4th amendment because not in plain view; consent to search apartment did not carry over to contents of computer files).

United States v. Cabrera, 172 F.3d 1287 (11th Cir. 1999)(improper attribution of amount of fraud loss to defendant; factual findings necessary when computing fraud loss amount).

United States v. Amirault, 173 F.3d 28 (1st Cir. 1999)(photo of young naked female did not contain a "lascivious exhibition of the genitals" in prosecution for child pornography).

United States v. Crandon, 173 F.3d 122 (3rd Cir. 1999)(necessary to consider defendant's motivation or purpose in taking photos before determining applicability of cross-reference for receipt of child pornography).

United States v. Paster, 173 F.3d 206 (3rd Cir. 1999)(additional one-level reduction in sentence for assisting in investigation required; proportionality

concerns required remand as a result of 9-level upward departure).

United States v. Hoskins, 173 F.3d 351 (6th Cir. 1999)(insufficient evidence of drug conspiracy).

Burns v. Gammon, 173 F.3d 1089 (8th Cir. 1999)(possible cause for procedural default in conflict of interest of appellate counsel).

Moore v. United States, 173 F.3d 1131 (8th Cir. 1999)(resentencing required on underlying drug trafficking charge upon vacatur of conviction for using firearm in connection with drug trafficking offense).

LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999)(lethal gas method of execution in Arizona declared violation of 8th Amendment; cause and prejudice established for failure to raise in first habeas petition).

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. Gatewood, 173 F.3d 983 (6th Cir. 1999)(indictment for making false statement not premised on statement which is facially false is defective, and evidence was insufficient).

Jake v. Herschberger, 173 F.3d 1059 (7th Cir. 1999)(defendant in state custody given credit for federal time running from date stay of state conviction was entered).

United States v. McCall, 174 F.3d 47 (2nd Cir. 1999)(error to apply relative standard of invulnerability and not absolute "particularly vulnerable" standard in applying U.S.S.G. § 3A1.1(b) and to fail to make particularized findings).

Mingo v. Artuz, 174 F.3d 73 (2nd Cir.

1999)(habeas petitioner entitled to remand for consideration of confrontation clause and procedural default issues).

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. Kinlock, 174 F.3d 297 (2nd Cir. 1999)(district court cannot order restitution due and payable immediately when defendant incapable of making payments, and must develop reasonable payment schedule for defendant's term of incarceration).

United States v. Anderson, 174 F.3d 515 (5th Cir. 1999) (relevant conduct implicating only property damage and no criminal misconduct wrongly included in determining base offense level).

United States v. Adams, 174 F.3d 571 (5th Cir. 1999)(Prosecution failed to prove requisite intent under Migratory Bird Treaty Act where defendant's scattering of wheat on field fell under bonafide agricultural operations or procedures exception).

United States v. Ramirez, 174 F.3d 484 (5th Cir. 1999)(tape recordings of conversations between two witnesses disclosable under Jencks Act-remand needed to determine Government's culpability).

United States v. Gibbs, 174 F.3d 762 (6th Cir. 1999)(insufficient evidence to prove conspiracy under "slight evidence" test and to prove firearms convictions).

United States v. Apker, 174 F.3d 934 (8th Cir. 1999)(§2255 motion dismissed by district court remanded to determine if charges government agreed not to prosecute in exchange for guilty plea to 924(c) charge were more serious than 924(c) charge).

United States v. Brooks, 174 F.3d 950

(8th Cir. 1999)(insufficient factual findings and insufficient evidence to justify obstruction of justice enhancement).

United States v. Barragan-Mendoza, 174 F.3d 1024 (9th Cir. 1999)(district court lacked jurisdiction to amend sentence).

Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999)(failure of counsel to investigate evidence of client's actual innocence was constitutionally defective requiring habeas relief).

United States v. Phillips, 174 F.3d 1074 (9th Cir. 1999)(defendant could appeal despite waiver in plea agreement where sentence violated VWPA because he was ordered to pay restitution beyond amounts directly related to tax fraud).

United States v. Ensminger, 174 F.3d 1143 (10th Cir. 1999)(district court miscalculated intended loss in prosecution for violation of false document statute).

Gallego v. United States, 174 F.3d 1196 (11th Cir. 1999)(Counsel's failure to explain right to testify at trial warranted vacating of sentence for ineffective assistance).

United States v. Maragh, 174 F.3d 1202 (11th Cir. 1999)(Magistrate must obtain on record explicit and personal consent of parties, not counsel, for magistrate to conduct voir dire).

United States v. Pruitt, 174 F.3d 1215 (11th Cir. 1999)(Detention of two defendants and search of van following traffic stop not authorized).

United States v. Rosario-Peralta, 175 F.3d 48 (1st Cir. 1999)(abuse of discretion to rule records not relevant without first reviewing them).

United States v. Santana, 175 F.3d 57 (1st Cir. 1999)(allowing jury during deliberations to observe defendant's ears, which were covered by headphones during trial, allowed jury to

consider extrinsic information).

McHale v. United States, 175 F.3d 115 (2nd Cir. 1999)(proper remedy where counsel fails to perfect a direct appeal and ineffective assistance is claimed in §2255 motion is for Court of Appeals to recall mandate dismissing direct appeal and reinstate the appeal; it is not necessary to show that appeal had merit).

United States v. Goynes, 175 F.3d 350 (5th Cir. 1999)(failure to prove intent in prosecution for mailing threatening communications).

United States v. LeBlanc, 175 F.3d 511 (7th Cir. 1999)(no knowing and voluntary waiver of right to revocation hearing).

United States v. Hoover, 175 F.3d 564 (7th Cir. 1999)(abuse of discretion for district court to order defendant to surrender savings bonds to pay his tax liability).

United States v. Barnett, 175 F.3d 580 (7th Cir. 1999)(denial of habeas petitioner's motion for trial continuance violated due process, and limit on voir dire re: gang bias violated 6th Amendment).

United States v. Checora, 175 F.3d 782 (10th Cir. 1999)(departures for extreme conduct not adequately supported; restitution order not supported by sufficient evidence).

United States v. Green, 175 F.3d 822 (10th Cir. 1999)(prior convictions and attribution of drugs not supported by sufficient evidence).

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. Bailey, 175 F.3d 966 (11th Cir. 1999)(attorney may be entitled to reimbursement for reasonable cost of suit-of-clothing for his client).

United States v. LaValle, 175 F.3d 1106 (9th Cir. 1999)(Defendant who successfully attacks state conviction may seek review of federal sentence that was enhanced because of prior state conviction).

United States v. Burgess, 175 F.3d 1261 (11th Cir. 1999)(error to fail to give requested no-adverse-inference instruction, and error not harmless).

United States v. Taylor, 176 F.3d 331 (6th Cir. 1999)(conviction for using firearm during commission of crime of violence reversed where defendant delivered firearm to co-conspirator days before the alleged robbery).

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. Hernandez, 176 F.3d 719 (3rd Cir. 1999)(error to instruct jury that they can convict based on what is in their own heart, soul and spirit).

United States v. Stotts, 176 F.3d 880 (6th Cir. 1999) ("use" and "carry" prongs of 18 U.S.C. §924(c) not met requiring reversal for insufficient evidence).

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. Whitehead, 176 F.3d 1030 (8th Cir. 1999)(prejudicial error in failing to give instruction on "insolvency" when it was element of crime of bank fraud and false statement).

United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999)(reversal for prosecutorial misconduct with numerous instances of improper comment).

United States v. Charley, 176 F.3d 1265 (10th Cir. 1999)(insufficient evidence to support conviction of child abuse on Indian reservation).

United States v. Summers, 176 F.3d 1328 (11th Cir. 1999)(imposition of enhancement under amended Sentencing Guideline violates ex post facto clause).

United States v. Lozada-Riveram 177 F.3d 98 (1st Cir. 1999)(error to admit prior report of law enforcement agent and jailhouse statements to cooperating witness not harmless).

United States v. Morrow, 177 F.3d 272 (5th Cir. 1999)(reversible error for defendants to be held responsible for losses in bank fraud conspiracy outside their period of employment).

United States v. Davis, 177 F.3d 552 (6th Cir. 1999)(when one juror requested to be excused from deliberations, it was error not to question all jurors about prejudicial, extraneous information; error not to merge conviction for stealing U.S. property into robbery conviction).

United States v. Stevens, 177 F.3d 579 (6th Cir. 1999)(double jeopardy barred retrial where key witness refused to testify after grant of immunity and jailing and there was no manifest necessity for mistrial).

United States v. Wells, 177 F.3d 603 (7th Cir. 1999)(district court failed to set restitution schedule).

United States v. Jackson, 177 F.3d 628 (7th Cir. 1999)(cross appeal by government resulted in career offender enhancement under U.S.S.G. §4B1.1).

Shurn v. Delo, 177 F.3d 662 (8th Cir.

1999)(prosecutor's closing in sentencing phase of capital trial violated due process; denial of habeas petition reversed in part).

United States v. Hopper, 177 F.3d 824 (9th Cir. 1999)(interest and penalties not to be included in tax loss calculation; disproportionate sentence required reversal under clear and convincing standard).

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).

Henry v. Kernan, 177 F.3d 1152 (9th Cir. 1999)(involuntary confession not harmless).

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

Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999)(deficient performance by counsel in presenting mitigating evidence at capital sentencing phase).

United States v. Sacko, 178 F.3d 1 (1st Cir. 1999)(error to delve into facts of prior statutory rape conviction to determine whether predicate offense under ACCA).

United States v. DiPina, 178 F.3d 68 (1st Cir. 1999)(prior juvenile dispositions not countable in criminal history calculation unless tantamount to guilty or nolo pleas).

United States v. McGuire, 178 F.3d 205 (3rd Cir. 1999)(insufficient proof of interstate commerce in prosecution under 18 U.S.C. § 844(i)).

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).

United States v. Matthews, 178 F.3d 295 (5th Cir. 1999)(carjacking conviction reversed in light of Jones v. United States, 119 S.Ct. 1215, 1228 (1999)).

Singleton v. Johnson, 178 F.3d 381 (5th Cir. 1999)(evidentiary hearing required on issue of whether counsel knew of defendant's desire to appeal).

United States v. Dale, 178 F.3d 429 (6th Cir. 1999)(plain error to impose maximum sentence under general verdict in charge of conspiracy to possess with intent to distribute both cocaine and marijuana where jury given enhanced unanimity instruction).

Ford v. Bowersox, 178 F.3d 522 (8th Cir. 1999)(one year limitation period for filing habeas petition does not apply if judgment became final prior to enactment of the AEDPA).

Restrepo v. Kelly, 178 F.3d 634 (2nd Cir. 1999)(failing to file notice of appeal by attorney is cause and prejudicial per se for purpose of habeas review).

United States v. Coates, 178 F.3d 681 (3rd Cir. 1999)(manner and schedule of payments necessary in restitution order in order to comply with MRVA).

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)).

Arredondo v. United States, 178 F.3d 778 (6th Cir. 1999)(ineffective assistance in failing to object to drug quantity).

United States v. Barger, 178 F.3d 844 (7th Cir. 1999)(improper dismissal of various § 2255 claims as moot).

United States v. Mett, 178 F.3d 1058 (9th Cir. 1999)(fiduciary exception to attorney-client privilege did not apply in embezzlement case; erroneous admission of legal memoranda in violation of

privilege not harmless).

United States v. King, 178 F.3d 1377 (11th Cir. 1999)(order of restitution to victim other than victim named in indictment erroneous).

United States v. Napoli, 179 F.3d 1 (2nd Cir. 1999)(remand required to determine if defendant served more than one year and one month for prior conviction).

Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999)(ineffective assistance claim not obviously lacking in merit).

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).

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. Frega, 179 F.3d 793 (9th Cir. 1999)(misleading jury instruction on RICO).

United States v. Sorensen, 179 F.3d 823 (9th Cir. 1999)(unsigned loan application cannot support conviction for submitting false statement).

United States v. Miller 179 F.3d 961 (5th Cir. 1999)(failure to award safety valve erroneous because defendant's prior drug activities did not qualify as part of the same course of conduct or common scheme or plan with offense of conviction, and defendant was not required to provide government with truthful information regarding those activities).

United States v. Sickinger, 179 F.3d 1091 (8th Cir. 1999)(failure to prove injuries sustained— no enhancement under kidnapping provision).

United States v. Glover, 179 F.3d 1300 (11th Cir. 1999)(2-level enhancement for aggravating role unwarranted

where defendant managed only asset of conspiracy, not another participant).

United States v. Ramos, 179 F.3d 1333 (11th Cir. 1999)(new trial required because not harmless error to deny defendant's pretrial motion to depose witness in Columbia).

United States v. Jackson, 180 F.3d 55 (2nd Cir. 1999)(erroneous instruction on element of threat to reputation which has no nexus to a claim of right in prosecution for transmission of extortionate threats to injure reputation).

United States v. Livorsi, 180 F.3d 76 (2nd Cir. 1999)(inadequate plea colloquy due to incomplete inquiry into defendant's mental state).

United States v. Nunez, 180 F.3d 227 (5th Cir. 1999)(erroneous jury instruction allowed defendant to be convicted of uncharged crime).

Brown v. Andrews, 180 F.3d 403 (2nd Cir. 1999)(closure of trial during undercover officer's testimony violated defendant's right to public trial).

United States v. Moreno-Chaparro, 180 F.3d 629 (5th Cir. 1999)(no reasonable suspicion that vehicle might contain illegal aliens or contraband in stop of vehicle 60 miles north of border checkpoint).

United States v. Wall, 180 F.3d 641 (5th Cir. 1999)(1996 and 1997 incidents involving seizure of marijuana from defendant's former girlfriend not relevant conduct in connection with 1992 marijuana offense).

White v. Johnson, 180 F.3d 648 (5th Cir. 1999)(ineffective assistance for failing to file appeal within time allowed by Texas law).

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. Martin, 180 F.3d 965 (8th Cir. 1999)(insufficient evidence to support conviction for being felon in

possession of firearm—constructive possession issue).

United States v. Fortier, 180 F.3d 1217 (10th Cir. 1999)(guideline for first degree murder improperly used)

United States v. Harness, 180 F.3d 1232 (11th Cir. 1999)(aggravating role enhancement improperly applied in illegal diversion of federal funds case).

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