

# EFFECTIVE ASSISTANCE

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## Meth 101

### Basic Meth Manufacture 101

K. Lyn Hillman Campbell  
Assistant Federal Defender

*Editors note: This article also appears in the April 2001 edition of the Guardian.*

The federal government tends to react to surges in the use of a particular drug with draconian legislation. In the late 1980s, crack cocaine was the plague of prominence, and the government responded with penalties 100 times more severe than for powder cocaine. While the federal crack laws defy logic (because pharmacologists agree that crack and cocaine are the same drug with the same long-term problems), many a defendant now languishes in prison under the harsher crack guidelines.

But crack is old news. The federal government, reacting as usual, has picked a

new favorite for extermination: Methamphetamine. And, as with crack, the penalties and prosecutions are on the rise. Simply put, methamphetamine is the next front line in the war on drugs. Because of the ease of manufacture and the current popularity of the drug, methamphetamine cases are multiplying exponentially in places where methamphetamine rarely existed just a few years ago. One such place is Alabama.

The feds have traps for the uneducated criminal practitioner which could cost clients many years of their lives. With the rise in meth prosecutions, every defense attorney needs a crash course in the basics of methamphetamine and DEA practices with regard to the drug.

Also, familiarity with the proposed methamphetamine sentencing guidelines and the current scheme under

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### **Reversed & Remanded**

Christopher Knight  
Assistant Federal Defender

The opinions cited below were reversed either in whole or in part for the reasons stated. These opinions are contained in the Federal Reporter and Supreme Court Reporter Advance Sheets. They are published opinions, including significant habeas decisions, with official citations. Opinions of the United States Court of Appeals for the Eleventh Circuit are summarized in **bold face type** for your convenience. The opinions themselves should be consulted for detailed rationale and supporting authority. The official reporters consulted are 234 F.3d to 242 F.3d. While the Supreme Court has issued significant criminal decisions recently, those decisions do not yet appear in the advance sheets. Please consult the electronic database of your choice for summaries of those decisions.

### **United States Courts of Appeal**

United States v. Giron-Reyes, 234 F.3d 78 (1st Cir. 2000)(second competency hearing required where defendant initially found incompetent, court had hospitalized him to determine if he had attained requisite competency and had been certified by warden as competent).

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### **Sentencing Commission Promulgates Guideline Amendments**

Tom Hutchison  
Attorney, Federal Defender Training Group

The Sentencing Commission recently voted to promulgate a number of amendments to the *Sentencing Guidelines Manual*. The amendments will take effect November 1. Here is a brief outline of the more significant amendments that were promulgated. A more detailed synopsis will be sent out later.

Immigration. The Commission revised the aggravated-felony enhancement of 2L1.2. The new enhancement — 16 levels for certain aggravated felonies, including (most notably) a crime of violence and a drug-trafficking offense for which the sentence imposed exceeded 13 months; 12 levels for a drug-traffick-

ing felony for which the sentence imposed did not exceed 13 months; 8 levels for any other aggravated felony.

Drug couriers. The Commission revised the commentary to 3B1.2 to make clear that a drug courier is not precluded from a role reduction even though the courier is held accountable only for the drugs personally handled by the courier.

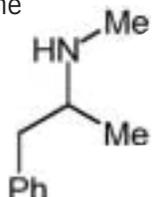
Theft and fraud. The Commission combined the theft, property destruction, and fraud guidelines into a new guideline, in the process increasing punishment levels. The new guide

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the guidelines is a must for adequate representation of any meth defendant.

### What exactly is methamphetamine?

Methamphetamine is a stimulant also known as "poor-man's" cocaine.<sup>1</sup> The Nazi regime used methamphetamine during the first part of World War II to fortify its troops and help its fighter pilots survive behind enemy lines without food or sleep.<sup>2</sup> In fact, the Nazis added methamphetamine to a candy bar marketed under the name "Schokakola."<sup>3</sup>



Users of meth can snort, smoke, shoot or eat the drug. Meth comes in a crystal or powder form. The crystal form is smoked much like crack cocaine. However, the meth high lasts much longer than the crack cocaine high, and users can hit a one gram rock of crystal meth 10-15 times.<sup>4</sup> The DEA estimates that 9.4 million Americans have sampled methamphetamine during their lives.<sup>5</sup>

### How is methamphetamine produced?

Many recipes exist for methamphetamine, some of which are available from sources on the internet. However, most methamphetamine that has turned up in Mobile's federal courts comes either from meth labs in the Western regions of the country, or from clandestine laboratories (in meth speak "clan labs") located in and around Mobile.

Methamphetamine is relatively easy to manufacture. The most popular clan lab method of production in South Alabama is the "Nazi" method, named for the Nazis who first produced methamphetamine through the use of anhydrous ammonia. Anhydrous ammonia is a chemical used by farmers as a fertilizer, and used by seafood packing plants in the production of commercial seafood. Because of the use by the seafood industry, anhydrous ammonia is readily available in South Alabama. Most other ingredients can be purchased from hardware and automotive supply stores.

### Why are the feds so concerned with meth?

According to the DEA, the popularity of meth has increased dramatically in the past six years.<sup>6</sup> The number of meth labs seized by the DEA increased ten fold in the six-year period between 1993 and 1999.<sup>7</sup> Another factor in meth popularity is that, along with marijuana, methamphetamine is a drug which a user can produce at home.<sup>8</sup>

Congress, in response to the surge in use, passed legislation to increase the penalties for methamphetamine and amphetamine possession and manufacture and directed the United States Sentencing Commission to promulgate new guideline amendments implementing the changes.<sup>9</sup> In response, the commission proposed several meth and related amendments.

An emergency amphetamine amendment takes effect May 1, 2001, and raises the penalties for amphetamine to equal the penalties for methamphetamine.<sup>10</sup> Another emergency amendment deals with the possession of pseudoephedrine (the active ingredient in Sudafed and other over-the-counter medications) and other chemicals used to make methamphetamine. This amendment uses the amount of methamphetamine (actual) which a defendant could produce using the precursor chemicals (assuming a 50% yield) to set the base offense level under §2D1.1.<sup>11</sup> Recently enacted amendment 608 also adds enhancements for meth offenses where human life or the environment is endangered through the manufacture of the drug. This last amendment, which was temporary, is proposed as a permanent guideline amendment.<sup>12</sup>

### What should the defense know about meth?

The DEA claims that any client could convert pseudoephedrine to methamphetamine through a 100% theoretical yield of 92% by weight.<sup>13</sup> In other words, if your client has 100 grams of pseudoephedrine she could make 92

grams of methamphetamine. However, the DEA's own research shows that 100% theoretical yields are impossible to create in the real world.<sup>14</sup>

The defense practitioner should begin with the recipe for methamphetamine. Actual yields differ depending on the method used. While the "Nazi" method is popular in South Alabama due to the readily available supply of anhydrous ammonia, it is not the only method of meth manufacture.

If your client is caught with methamphetamine that she produced, the methamphetamine is probably "methamphetamine (actual)." Meth (actual) has a higher offense level under the federal sentencing guidelines because it is a pure form of methamphetamine, not a mixture of meth and some other substance. If your client is caught with precursor chemicals (like thousands of Sudafed pills or anhydrous ammonia), the conversion will be to meth (actual). The conversion calculation is a critical determination because the base offense level is set from the converted methamphetamine estimate.

While the commission has proposed 50% as a conversion ratio<sup>15</sup>, the proposal has not yet been approved by Congress. Even if approved, published literature indicates the 50% conversion ratio is still generous.<sup>16</sup> With an expert, defense counsel can show that a conversion ratio lower than 50% should be employed. Depending on a client's recipe for methamphetamine, the actual yield can be as low as 17%.<sup>17</sup>

When challenged, the DEA will admit its theoretical yield ratio is just that: Theoretical.<sup>18</sup> However, the DEA will argue that its ratio is based upon scientific fact, not mere opinion, as defense ratios are.<sup>19</sup> The savvy practitioner

should hire an expert (and there are many with backgrounds in law enforcement) who will, armed with law enforcement scientific studies, dispute the DEA position.

1. *DEA Congressional Testimony: Hearing before the Subcommittee on Criminal Justice, Drug Policy and Human Resources*, 106<sup>th</sup> Cong. 98-00 (Sept. 18, 2000)(statement of John Andrejko, Special Agent in Charge, Atlanta Field Division, Drug Enforcement Administration).

2. Jenifer Joseph, *Fertilizer Cranks Up Drug Production*, (Mar. 31, 1999) <http://more.abcnews.go.com/sections/us/dailynews/nazimethod.html>

3. Id.

4. Drug Enforcement Administration, *Methamphetamine*, (viewed Mar. 29, 2001) <http://www.usdoj.gov/dea/connern/meth.html>.

5. Id.

6. DEA Congressional Testimony, *supra*.

7. Id.

8. Id.

9. United States Sentencing Commission, *Sentencing Commission Seeks to Increase Penalties for Counterfeiting and Amphetamine Offenses*, (Mar. 1, 2001) (press release, on file with author).

10. Id.

11. Thomas W. Hutchison & Janet G. Hinton, *Grid & Bear It*, Champion, Mar. 2001, at 30.

12. Hutchison & Hinton, *supra* at 31.

13. Memorandum from Thomas J. Janovsky, Deputy Assistant Administrator, Office of Forensic Sciences, Drug Enforcement Administration, to All Laboratory Directors (Sept. 26, 2000)(on file with author).

14. Edwin G. Albers, *Estimation of Drug Product Yields from Clandestine Laboratory Synthesis Routes*, (unpublished DEA study, South Central Laboratory), excerpt found at <http://rhodium.lycaem.org/chemistry/clic.html>. This writer has been unable to

obtain this document. In the case in which this writer tried to force the Government to produce the article, the Government took the position that it was not Brady material. Due to a stipulation to drug quantity, the Brady issue is not yet ripe. This writer encourages all counsel to request this document in every case involving the conversion of pseudoephedrine to methamphetamine.

15. Hutchison & Hinton, *supra*, at 31.

16. Nila Bremer & Robin J. Wollery, *The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product with the Lithium-Ammonia Reduction Method as Employed in Clandestine Laboratories*, MAPS Newsletter (Fall 1999) at 8 (copy on file with author).

17. Id.

18. *United States v. Crisp*, No. 99-18-01-M (N. H. Dec. 5, 2000)(testimony of Charles Cusumano, DEA Northeast Laboratory, at 20)(on file with author).

19. Letter from AUSA Patsy B. Dow to AFD K. Lyn Hillman Campbell (Mar. 12, 2001)(on file with author).

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Sentencing Commission continued

line has a comprehensive new definition of "loss."

**Money laundering.** The Commission merged 2S1.1 and 2S1.2 into a new guideline. The purpose of the amendment is to tie the offense level for money laundering more closely to the offense level for the underlying offense that was the source of the laundered money.

**Sex offenses.** The Commission added a new chapter 4, part B guideline modeled upon the career offender guideline. The new guideline, entitled "Repeat and Dangerous Sex Offender Against Minors," applies if the career offender guideline does not apply. Subsection (a) applies if the defendant committed the instant offense after having been convicted of a sex offense. Subsection (a) sets a floor of criminal history category V and sets the offense level

based on the statutory maximum for the instant offense (unless the offense level from chapters 2 and 3 of the *Manual* is higher). Subsection (b) applies if the defendant engaged in a "pattern of activity involving prohibited sexual conduct" and calls for a five-level enhancement (with a floor of 22) in the offense level determined under chapters 2 and 3 of the *Manual*.

**Safety Valve.** The Commission removed the requirement of a minimum offense level of 26 from the safety-valve provision of 2D1.1 and added a provision to 5C1.2 imposing a floor of offense level 17 for a defendant who qualifies for the lifting of a mandatory minimum under 5C1.2.

**Meth labs.** The Commission repromulgated as a regular amendment the temporary amendment that takes effect May

1. The Commission, however, made some changes, most notably in the amendment to 2D1.1. The regular amendment makes the new three-level enhancement for creating a substantial risk of harm to human life or the environment an alternative to the two-level enhancement of present 2D1.1(b)(5). The temporary amendment makes those two enhancements cumulative.

**Ecstasy.** The Commission repromulgated as a regular amendment, without change, the temporary amendment that takes effect May 1.

**Amphetamine.** The Commission repromulgated the temporary amendment that takes effect May 1. The regular amendment is the same as the temporary amendment.

**List I chemicals.** The Commission repromulgated the temporary amend-

ment that takes effect May 1. The regular amendment is the same as the temporary amendment.

**Guns.** (1) The Commission revised the gun table of 2K2.1. The new table has two-level increments, instead of one-level increments, and has new entries for 100-199 guns (8-level enhancement) and 200 or more guns (10-level enhancement). (2) The Commission revised 2K1.3 and 2K2.1 to make clear that for the purpose of determining the base offense level, a defendant's status as a prohibited person is to be determined as of the time of the instant offense, not the time of sentencing. (3) The Commission revised the base-offense level provisions of 2K1.3 and 2K2.1 that

are triggered by the defendant having one or more "prior" felony conviction. The Commission resolved a circuit split over the meaning of "prior" by specifying that prior means before committing the instant offense, not before being sentenced for the instant offense.

The Justice Department opposed promulgation of the money-laundering and immigration amendments. At the public hearing, the Justice Department's witness (the acting deputy Attorney General) hinted that the Justice Department might go to Congress to defeat those proposals. I do not know if the Justice Department will do that, but the tone at Friday's meeting suggests that it will not.

The defenders' guidelines committee — Jon Sands (chair), Mike Dane, Tom Hillier, Shelley Stark, Abe Clott (E.D. N.Y.), Andrea Smith (S.D. Ill.), and Janine Yunker (D. Colo.) — invested a considerable amount of time and energy during this amendment cycle. A.J. Kramer joined Jon Sands in testifying before the Commission last month. Bob Van Norman, John Butcher (D. N.M.), and Zig Popko (D. Ariz.) assisted the guidelines committee with the proposed amendments affecting Native-American defendants. The committee also received a great deal of help from Janet Hinton, a paralegal in E.D. Missouri. on detail to the DSD.

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Reversed & Remanded continued

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).

United States v. Henriques, 234 F.3d 263 (5th Cir. 2000)(insufficient connection to internet to satisfy jurisdictional interstate commerce element in child pornography prosecution where one of three images was not connected to internet).

Jeffers v. Chandler, 234 F.3d 277 (5th Cir. 2000)(post-conviction statute 28 U.S.C. § 2241 has savings clause which allows a successive motion on a claim that was based on a Supreme Court decision handed down after petitioner was convicted and sentenced and after he had exhausted his opportunities for post-conviction relief).

United States v. Angle, 234 F.3d 327 (7th Cir. 2000)(child pornography conviction and sentence remanded because defendant did not receive notice prior to sentencing of the intent to impose the sex offender registration requirement as a special condition of supervised release; also defendant did not receive proper application of cross-reference to sexual abuse guideline).

United States v. Sadler, 234 F.3d 369 (8th Cir. 2000)(district court lacked authority to reopen original sentence to recalculate incorrectly calculated alternate sentence).

United States v. Orso, 234 F.3d 436 (9th Cir. 2000)(post-*Miranda* statements were tainted by improperly obtained pre-*Miranda* incriminating statements).

United States v. Ruiz-Lopez, 234 F.3d 445 (9th Cir. 2001)(evidence insufficient to determine that alien was "found" in the United States).

United States v. Seesing, 234 F.3d 456 (9th Cir. 2000)(insufficient evidence to support finding as to drug quantity; error to apply altered serial number sentencing enhancement to non-firearms counts; error in not complying with rule regarding acceptance of guilty plea was not harmless; pro se motion improperly recharacterized as motion for post-conviction relief without protecting defendant's rights).

United States v. Rojan-Millan, 234 F.3d 465 (9th Cir. 2000)(district court should have evaluated defendant's role relative to all participants in the alleged conspiracy and not relative only to his co-defendant's participation in determining whether two-point downward adjustment for minor participation was warranted).

**United States v. Rodriguez-Fernandez, 234 F.3d 498 (11th Cir. 2000)(in prosecution of alien for escape, there was no evidence that alien was confined at direction of Attorney General).**

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

United States v. Tran, 234 F.3d 798 (2nd Cir. 2000)(no jurisdiction to enter judgment or impose sentence for uncharged, aggravated crime of using or carrying short-barreled rifle where grand jury indictment not waived; statutory factors not considered in imposing restitution).

United States v. Flowal, 234 F.3d 932 (6th Cir. 2000)(defendant was entitled to have jury determine beyond a reasonable doubt the quantity of drugs he possessed).

United States v. Lewis, 235 F.3d 215 (4th Cir. 2000)(failure to make factual findings required remand on restitution issue).

Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000)(failure to investigate and present meaningful mitigating evidence in preparation for sentencing phase of capital trial was ineffective).

Bronaugh V. Ohio, 235 F.3d 280(6th Cir. 2000) (statute of limitations for filing federal habeas petition was tolled for period of time in which petitioner's application to reopen direct appeal was pending).

United States v. Jones, 235 F.3d 343 (7th Cir. 2000)(simple assault and battery held not a crime of violence for career offender status).

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. Osage, 235 F.3d 519 (10th Cir. 2000)(failure to object to search of sealed can in suitcase did not permit officer to destroy the can or render it completely useless for intended function).

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

United States v. Simmonds, 235 F.3d 827 (3rd Cir. 2000)(victim's lost insurance premium discounts not "property" damaged by arson for restitution purposes).

Hudson v. Hunt, 235 F.3d 892 (4th Cir. 2000)(deficient performance of counsel regarding consultation with client about appeal required remand for prejudice determination).

United States v. Behrman, 235 F.3d 1049 (7th Cir. 2000)(remand for restitution determination).

United States v. Bowman, 235 F.3d 1113 (8th Cir. 2000)(facts as stipulated were insufficient to support conviction for money laundering under "structuring" subsection).

Koskela v. United States, 235 F.3d 1148 (8th Cir. 2001)(failure to hold evidentiary hearing on issue of whether counsel rendered ineffective assistance by not presenting alibi witnesses and alibi defense was abuse of discretion).

United States v. Franklin, 235 F.3d 1165 (9th Cir. 2000)(district court could not rely upon state court charging papers for defendant's prior burglary convictions and PSR information to enhance sentence under the ACCA).

United States v. Edwards, 235 F.3d 1173 (9th Cir. 2000)(violation of local rule during pendency of trial in discovering receipt in bag held by court clerk containing receipt with defendant's name on it was not harmless).

United States v. Kelly, 235 F.3d 1238 (10th Cir. 2000)(error to sua sponte recharacterize motion to modify sentence as motion to vacate).

United States v. Crowley, 236 F.3d 104 (2nd Cir. 2000)(district court should have given requested instruction on voluntary intoxication).

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. Corp, 236 F.3d 325 (6th Cir. 2001)(insufficient nexus with interstate commerce to sustain conviction under child pornography statute, and statute was unconstitutional as applied to defendant: defendant was 23, victim 17 and was not exploited; activity of 17-yr-old involved in sexual activity not connected to interstate commerce; defendant not involved in distribution or sharing with others of pictures, not involved with other minors, and not alleged to be pedophile).

United States v. Grissett, 236 F.3d 452 (8th Cir. 2001)(defendant who withdrew from conspiracy more than five years from indictment could not be prosecuted in face of limitations defense).

Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001)(habeas petitioner entitled to evidentiary hearing on ineffective assistance of counsel claims; right to counsel violated during presentence interview, and *Teague* nonretroactivity doctrine did not bar petitioner’s Fifth and Sixth Amendment claims challenging denial of counsel during presentence interview).

Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000)(amendment of habeas petition to assert newly exhausted claims was not abuse of writ, and amendment could relate back to original filing; outright dismissal of mixed petition was error without giving petitioner opportunity to dismiss unexhausted claims).

**United States v. Santa, 236 F.3d 662 (11th Cir. 2000)(circumstances not sufficiently exigent to justify warrantless search of apartment and arrest of defendant’s husband; husband’s consent to search was product of unlawful arrest).**

United States v. Goodall, 236 F.3d 700 (D.C. 2001)(Where parties agreed on 57-71 guideline range, but actual guideline range was 70-87 months, and entered into an 11(e)(1)(C) plea agreement, district court erred by failing to consider the entire 57-71 stipulated guideline range and not just the overlapping 70-71 month guideline range; if court meant to accept plea agreement, but modified it to the range suggested by the PSR, then the defen-

dant must be resentenced with the court considering the entire 57-71 month range; if the court rejected the plea agreement, then the court must give the defendant an opportunity to withdraw his plea [recognizing split of authority with 7th and 9th Circuits agreeing with this decision and the 1st and 4th Circuits disagreeing].).

United States v. Carter, 236 F.3d 777 (6th Cir. 2001)(plain error where prosecutor misstated the testimony of key identification witness and insisted that defense counsel was lying about the testimony; misconduct affected defendant’s substantial rights and seriously affected integrity of the judicial proceeding requiring remand for new trial).

United States v. Centracchio, 236 F.3d 812 (7th Cir. 2001)(government appeal under 18 U.S.C. § 3731 of granting of motion to suppress is required prior to jeopardy attaching and divests district court of jurisdiction until the appeal is decided).

United States v. Peterson, 236 F.3d 848 (7th Cir. 2001)(insufficient evidence of de minimus impact on interstate commerce in Hobbs Act prosecution).

United States v. Riley, 236 F.3d 982 (8th Cir. 2001)(counsel could not stipulate to lab chemist’s testimony over objection from defendant; and insufficient foundation laid for admission of lab report under business records exception to hearsay rule).

United States v. Camarillo-Tello, 236 F.3d 1024 (9th Cir. 2001)(breach of plea agreement by government when it both failed to include all reasons underlying its recommendation for four-level departure and when it failed to orally recommend four-level departure).

United States v. Jeter, 236 F.3d 1032 (9th Cir. 2001)(guidelines do not contemplate only one level reduction for acceptance of responsibility).

Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001)(counsel’s preparation for sentencing phase of capital trial was deficient and prejudiced defendant).

United States v. Petrillo, 237 F.3d 119 (2nd Cir. 2000)(tax evasion and mail fraud counts should have been grouped).

Soffar v. Johnson, 237 F.3d 411 (5th Cir. 2000)(police officer violated petitioner's Fifth Amendment right against self-incrimination in responding to his ambiguous request for an attorney, which rendered his subsequent uncounseled written statements violative of *Miranda*).

Rideau v. Whitley, 237 F.3d 472 (5th Cir. 2000)(delay in filing petition did not justify dismissal; prima facie equal protection violation occurred in selection of grand jury resulting from racial discrimination).

Burton v. United States, 237 F.3d 490 (5th Cir. 2000)(life sentence exceeded statutory maximum for alleged offense—possession of cocaine base with intent to distribute).

United States v. Curry, 237 F.3d 598 (6th Cir. 2000)(remand necessary to determine whether district court applied correct review standard (clearly erroneous standard) in reinstating allegations to which magistrate found lack of probable cause; district court required to allow defendant to allocute prior to imposing sentence).

United States v. Jemison, 237 F.3d 911 (7th Cir. 2001)(2 concurrent 66 month sentences improper where statutory maximum was 60 months).

United States v. Hanson, 237 F.3d 961 (8th Cir. 2001)(failure to give *Miranda* warnings to defendant in custody).

United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001)(probative value of evidence of structure of drug operation and of evidence of fees paid to drug couriers outweighed by danger of unfair prejudice; exclusion of admissible evidence relative to defendant's special psychological problems, evidence of arrest of prior owner of vehicle used by defendant to cross border, and instruction that erroneously lowered government's standard of proof on issue of knowledge not harmless error).

United States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001)(claim of ineffective assistance of counsel concerning use/carrying firearm conviction related to validity of plea and therefore survived waiver provision in plea agreement).

**United States v. Dennis, 237 F.3d 1295 (11th Cir. 2001)(bank fraud conviction not supported by sufficient evidence absent showing that bank was federally insured).**

United States v. Mustafa, 238 F.3d 485 (3rd Cir. 2001)(failure to inquire into defendant's ability to pay restitution ordered).

United States v. Villarini, 238 F.3d 530 (4th Cir. 2001)(venue improper for money laundering prosecution where embezzlement occurred in district but actual money laundering occurred in another district).

United States v. Arambula, 238 F.3d 865 (7th Cir. 2001)(false testimony minimizing scope of conspiracy did not warrant enhancement for obstruction of justice).

United States v. Butler, 238 F.3d 1001(8th Cir. 2001)(failure to allege drug quantity in indictment and failure to submit issue to jury was plain error requiring resentencing).

United States v. Henley, 238 F.3d 1111 (9th Cir. 2001)(district court erred in failing to make factual findings regarding claim of racial bias of juror).

United States v. Christakis, 238 F.3d 1164 (9th Cir. 2001)(remanded for hearing to determine if active conflict of interest in counsel representing unindicted co-conspirator prior to representing defendant).

United States v. Austin, 238 F.3d 1 (1st Cir. 2001)(value of car stolen before robbery not robbery-related loss under sentencing guidelines).

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

United States v. Thomas, 239 F.3d 163 (2nd Cir. 2001)(government's failure to disclose defendant's statements at administrative hearing required reversal).

Lindstadt v. Keane, 239 F.3d 191 (2nd Cir. 2001)(ineffective assistance resulted from four errors by defense counsel, including failure to request study relied on by prosecution expert).

United States v. Samaria, 239 F.3d 228 (2nd Cir. 2001)(insufficient evidence to sustain conviction for credit card fraud).

United States v. Davis, 239 F.3d 283 (2nd Cir. 2001)(actual conflict of interest).

Virgin Islands v. Martinez, 239 F.3d 293 (3rd Cir. 2001)(sentences violated Virgin Islands statute requiring court to suspend at least portion of custodial term when imposing split sentence).

United States v. Galo, 239 F.3d 572 (3rd Cir. 2001)(district court improperly focused on defendant's conduct instead of statutory definitions of state court convictions relating to sexual exploitation of children in enhancing sentence for production of material depicting sexual exploitation of minor).

United States v. Haddix, 239 F.3d 766 (6th Cir. 2001)(search of home not supported by exigent circumstances).

United States v. Bandy, 239 F.3d 802 (6th Cir. 2001)(treating use of short-barreled shotgun as sentencing factor rather than element of crime violated *Apprendi*).

United States v. Castaneda, 239 F.3d 978 (9th Cir. 2001)(improper application of vulnerable victim enhancement based on economic vulnerability of Mann Act victims).

DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001)(erroneous exclusion of husband's journal deprived defendant of due process and was objectively unreasonable and not harmless).

Flowers v. Walter, 239 F.3d 1096 (9th Cir. 2001)(express statement of retroactivity by Supreme Court not required for habeas claim to rely on "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" within meaning of AEDPA, such that claim

can be brought in second or successive petition; *Riggins v. Nevada* claim was new watershed rule of criminal procedure that applied retroactively under *Teague v. Lane* and could be brought in second petition).

United States v. Schaffer, 240 F.3d 35 (D.C. Cir. 2001)(presidential pardon rendered case moot and required vacatur of all opinions, judgments, and jury verdict).

United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001) (remand on ineffective assistance of counsel claim; evidence insufficient to establish that defendant's organizational activity was "otherwise extensive;" hence four level enhancement not justified).

United States v. Edmonds, 240 F.3d 55 (D.C. Cir. 2001)(character of school, as defined in 18 U.S.C. § 860(a), is element of offense which must be proved beyond reasonable doubt in prosecution for possessing cocaine base within 1,000 feet of school).

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).

Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001)(confrontation right abridged when defendant prohibited from cross-examining alleged statutory rape victim about prior false claim that she had been forcibly raped).

United States v. Westmoreland, 240 F.3d 618 (7th Cir. 2001)(failure to submit issue of drug quantity to jury was reversible plain error).

United States v. Houltts, 240 F.3d 657 (7th Cir. 2001)(prior conviction under general burglary statute for burglary of building was not crime of violence under career offender statute).

United States v. Smith, 240 F.3d 732 (8th Cir. 2001)(remand for drug quantity determination of whether defendant subject to ten-year statutory minimum).

United States v. Matthews, 240 F.3d 806 (9th Cir. 2001)(ACCA sentence enhancement based on prior burglary convictions could not be imposed absent both conviction records and statutes).

Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001)(notes of prosecutor regarding medical examiner's opinion regarding time and location of victim's death were material to place of death and thus discoverable under *Brady*).

United States v. Jackson, 240 F.3d 1245 (10th Cir. 2001)(drug quantities not alleged in indictment).

United States v. Sanders, 240 F.3d 1279 (10th Cir. 2001)(insufficient evidence that defendant had knowledge attachment to weapon was a silencer).

United States v. Abbott, 241 F.3d 29 (1st Cir. 2001)(failure of government to disclose at plea linkage between plea agreements with defendant and his mother, who was charged with witness tampering, rendered plea proceeding defective).

United States v. Harrison, 241 F.3d 289 (2nd Cir. 2001)(error in failure to inform defendant during plea colloquy that he was subject to minimum mandatory sentence was not harmless).

United States v. Sau Hung Yeung, 241 F.3d 321 (3rd Cir. 2001)(defendant only accountable for quantity of heroin actually delivered to informant).

United States v. Salter, 241 F.3d 392 (5th Cir. 2001)(money laundering and narcotics convictions should have been grouped for sentencing; prior convictions for tax evasion and drug trafficking should have been combined for sentencing as part of common scheme or plan).

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

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

Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2001)(invocation of religious authority by prosecution during penalty phase warranted habeas relief).

United States v. Vega, 241 F.3d 910 (7th Cir. 2001)(right to appeal sentence in excess of court's jurisdiction may not be waived).

United States v. Jacobo-Zavala, 241 F.3d 1009 (8th Cir. 2001)(district court abused discretion by withholding "leave of court" to file dismissal of indictment by prosecutor).

United States v. Johnson, 241 F.3d 1049 (8th Cir. 2001)(government's failure to file departure motion was breach of plea agreement and was reviewable).

United States v. Apker, 241 F.3d 1060 (8th Cir. 2001)(remanded to determine appropriate punishment based on sentencing guidelines rather than applicable statutory maximums).

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001)(pointing gun at teller and telling her to "get down" was not physical restraint under guidelines; no enhancement warranted for participating in bank robbery with minor absent evidence that defendant acted affirmatively to involve the minor in the robbery).

United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001)(*Brady* waiver in plea agreement was invalid; defendant made threshold showing that government acted with unconstitutional motive in refusing to recommend departure so as to warrant evidentiary hearing).

Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001)(petitioner entitled to evidentiary hearing on ineffective assistance claim; state court procedural default did not bar federal habeas review because last reasoned state-court opinion did not clearly invoke procedural default rule).

Wilcox v. McGee, 241 F.3d 1242 (9th Cir. 2001)(counsel's failure to make double jeopardy claim for second prosecution for same burglary offense was ineffective assistance, which claim was fairly presented to state courts).

**United States v. Martinez, 241 F.3d 1329 (11th Cir. 2001)(district court may exercise jurisdiction over motion for return of property filed after criminal proceedings have ended).**

United States v. Jones, 242 F.3d 215 (4th Cir. 2001)(police officer who had received anonymous tip that “several black males” were drinking beer and causing a disturbance near intersection and who did not find or see anyone at intersection, lacked reasonable suspicion to stop automobile carrying four African-American males).

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).

United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001)(failure to have jury determine drug quantity was plain error under *Apprendi* and not harmless where defendant received life sentence; enhancement improper where jury did not find beyond reasonable doubt that murder was object of kidnaping).

United States v. Kadonsky, 242 F.3d 516 (D.C. Cir. 2001)(court may not impose fine without making findings about defendant’s ability to pay).

United States v. Garcia, 242 F.3d 593 (5th Cir. 2001)(without jury determination, defendant’s sentence could not exceed statutory default maximum provided by 21 U.S.C. § 841(b)(1)(D)).

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).

Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2001)(state procedural bars not “adequate” to preclude federal habeas review; petition dismissed without prejudice did not make subsequent petition second or successive).

United States v. Edwards, 242 F.3d 928 (10th Cir. 2001)(search could not be justified as incident to lawful arrest, inventory search, or under exigent circumstances doctrine).

United States v. Corral-Gastelum, 240 F.3d 1181 (9th Cir. 2001)(evidence of mere proximity to marijuana insufficient to convict in 21 U.S.C. § 846 prosecution).

United States v. Jackson, 240 F.3d 1245 (10th Cir. 2001)(errors in sentencing based on drug quantities not alleged in indictment required reversal).



Effective Assistance published by:

**Carlos A. Williams**  
Executive Director

Edited by:

**K. Lyn Hillman Campbell**  
Assistant Federal Defender

**Southern District of Alabama  
Federal Defenders Organization**  
2 South Water Street, 2nd Floor  
Mobile, Alabama 36602  
(334) 433-0910 / 433-0686 Fax  
E-mail: pubdef@awireless.net