EFFECTIVE ASSISTANCE
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The Life Issue

> Life is the great primary and most precious and comprehensive of all human rights . . . whether it be coupled with virtue, honor, and happiness, or with sin, disgrace and misery, the continued possession of it is rightfully not a matter of volition; . . . [it is not] to be deliberately or voluntarily destroyed, either by individuals separately, or combined in what is called Government.
>
> *Frederick Douglass*

CARLOS A. WILLIAMS
EXECUTIVE DIRECTOR

Because life hangs in the balance, a capital case is profoundly different from every other criminal case and requires a transformation of counsel's role at every stage in the process. Counsel must make complex decisions during the pretrial, innocence and penalty phases of the case. These cases require a singular commitment to the client, the broadest possible legal and factual challenges, a sifting mitigation and fact investigation, the need to assemble a defense team, and the willingness to join in and benefit from the expertise of a small group of specialists in the field. Even the best trial lawyers fail to appreciate the demands imposed by these cases or the training and resources available. In short, we fail to raise the quality of work to meet the gravity of the proceedings. I intend here to highlight some of the problems, and suggest some solutions.

The first step is recognizing what you don't know.

Recently, I was required to make recommendations of "learned counsel" to the court in a capital case pursuant to 18 U.S.C. 3005. In consulting with specialists in the field to aid in my recommendation, it became apparent that few lawyers had the demonstrated zeal, knowledge or experience to meet the challenge. As lawyers representing countless capital defendants on appeal or in habeas proceedings, they are in position to view and evaluate our failures. Their successes are often built on those failures. However, for each person saved there were others they could not help because issues were not raised or properly preserved. The problem of identifying qualified lawyers in

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Use of Drug Treatment Information in Criminal Proceedings

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Assume, just for laughs, that you have agreed to take (or been appointed) to a revocation action where your client has had numerous positives at one of our local governmentally contracted drug treatment centers. At the time your client began his or her supervision, she signed a consent form for release of information to the probation office. Can any information obtained from a federally funded drug treatment program be used by the Government to revoke your client? The statute governing the matter is quite unclear.

United States Code 42 U.S.C. §290dd-2 deals with the confidentiality of "records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, *treatment*, rehabilitation or research, which is conducted, regulated, or directly or indirectly assisted by *any department or agency of the United States* . . . ." The code goes on to say that the records of these programs "shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under (b) of this section."

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Reversed and Remanded

CHRISTOPHER KNIGHT
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RESEARCH & WRITING ATTORNEY

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 listed in **bold face type** for your convenience. The opinions themselves should be consulted for detailed rationale and supporting authority. The official reporters consulted are 245 F.3d through 253 F.3d and 121 S. Ct.

United States Supreme Court

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

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capital cases suggests a need for intense specialized training and, perhaps, board certification, as means of raising quality of representation in capital cases.

According to the Spencer Committee Report, adopted in 1998 by the Federal Judicial Conference:

> "Counsel must not only be able to deal with the most serious crime –homicide– in the most difficult circumstances, but must also be thoroughly knowledgeable about a complex body of constitutional law and unusual procedures that do not apply in other criminal cases. — Learned counsel should have distinguished prior experience in the trial, appeal, or post conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that in combination with co-counsel will assure high quality representation."

Very few lawyers, general practitioners, lawyers specializing in criminal law, or federal defenders can claim a thorough knowledge of the constitutional and procedural laws applicable in capital cases. It is a sub-specialty in criminal practice with rules and expectations that are qualitatively different from other criminal cases. The field of specialists include organizations and individuals such as the Federal Death Penalty Resource Counsel Project (RCP), the Equal Justice Initiative, headed by Bryan Stevenson in Montgomery Alabama, and the Southern Center for Human Rights, headed by Stephen Bright. The Federal Death Penalty Resource Counsel Project (RCP) consists of three experienced capital litigators, David Bruck, Kevin McNally and Dick Burr, who support the work of court-appointed counsel. These organizations and other individual lawyers specializing in the field provide a broad network of resources to help fill the gap in knowledge and practice.

Every year, the Clarence Darrow Death Penalty College at the University of Michigan Law School and the Bryan R. Schechmeister Death Penalty College at Santa Clara University School of Law provide an intensive five day course covering all aspects of death penalty representation. Both courses are limited to defense attorneys, and participants are required to work on their pending capital cases. Case summaries are distributed to the participants before the seminar begins. The courses are organized to provide both lectures and exercises covering all stages in the process. It is at once preparation in your individual case, an update on the latest and most creative approaches, and an introduction into a community willing to share knowledge and render assistance.

As one reads and discusses the case summaries, the facts in the various cases seem overwhelming. However, a transformation takes place when one realizes some cases contain facts and circumstances more horrific or problematic than your own, while others present similar difficulties. In the process, our collective burdens were eased as we struggled with ideas and solutions. The practice runs and brainstorming sessions are invaluable. One emerges inspired with fresh ideas and a renewed commitment. Soon the process causes a shifting of views, and compelling arguments in favor of life develop or come into focus. The experience is moving and, at times, intensely emotional. Mitigation evidence plays a major role in this transformation.

The individual life histories of clients invariably lead to common threads. It leads to experiences that scar an individual's development. The more horrific the facts in the case, the more likely one will discover extensive mental or psychological wounds caused by some life altering trauma or possibly an organic source. These traumatic and often chronic life experiences are often previously undiagnosed or ignored by parents or society at large. Once understood, these experiences can explain how a person could arrive at the point where we find them, charged with a capital offense. We come to understand that this person is no monster. This is a history of human failings in which society at large is, more often than not, complicit.

You can't tell by looking.

Mental health issues are at the core of many capital cases. They are most often hidden beneath layers of coping and masking practices. The mentally retarded, or persons suffering from childhood trauma, or schizophrenia, among others, learn to hide or mask their symptoms in order to cope. Hence, you cannot always tell by looking, or talking, that your client has serious mental health or retardation problems. Experts are essential in this area.

In one of my cases, the mitigation specialist suggested a serotonin level test. I was completely unfamiliar with the procedure or its importance. A deficiency of serotonin levels in the brain is evidence of an organic dysfunction. It is not apparent by visual observation or in regular conversation. A low serotonin level may indicate deficient impulse control leading to intermittent explosive disorder, suicide or severe aggression. If other factors are present, it could have an impact in the innocence phase as well. Mental health issues are fraught with "blind spots" which may be varied, complex and difficult to identify.

Once mental health is in issue, the client is usually whisked away for evaluation by government doctors for months at a time. Objectivity is not the hallmark of government psychiatric examinations. The defense should move for a limited background investigation and examination by a defense expert before mental health is placed at issue, and before a government's examination. If not, every effort must be made to counteract the government's report and seal it until it is clear the defense will offer evidence on the issue or until the penalty phase.

It is here that the mitigation specialist plays a critical role. This time-consuming investigation is far broader in scope than

the usual fact investigation. It extends to families, friends, schoolmates, teachers, counselors, doctors, and any agency which has had contact with the client over his lifetime. It will take months to complete. During the course of the investigation, the mitigation specialist will likely suggest issues to explore and the need for specialized medical evaluations (psychologist, neuropsychologist, neurologist, addictionologist, etc.).

You must rise above the facts to find the truth.

Although the above statement initially seems amusing, it has the resonance of truth. In death cases, lawyers must rise above facts going to guilt or innocence. They must build a thorough history of the defendant's life. Indeed, all capital cases involve predictions of future dangerousness, or the lack thereof. Mitigation is the heart and soul, the beginning and end, of every capital case. Yet, it is the lack of development and presentation of mitigation evidence from which many capital cases suffer. The development of a strong mitigation case can strengthen the defense case on guilt or innocence, or at minimum, put it in perspective, and provide an argument for life.

What is mitigation evidence? Broadly speaking it is any evidence which will humanize your client, that which will counter the government's claim that your client is unworthy of life. To some, the question may be elemental, but there are practitioners who do not know what a mitigation specialist is or does. Others do not believe they need a mitigation specialist. The case law suggests otherwise. The failure to investigate and present available mitigating evidence is grounds for reversal. Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995). As suggested above, unearthing this evidence may require expertise outside that of defense lawyers and fact investigators.

More than fifteen years ago, I was involved in my first capital case. Although I had less than five years experience, I was confident because my co-counsel was an excellent and experienced lawyer. I had primary responsibility for the pre-trial investigation and preparation. We prepared strictly for the innocence phase, it was all or nothing and mitigation was not in the mix. We did not hire a mitigation specialist. I was not familiar with the discipline. The case ended in a mistrial because one juror would not vote to convict. On retrial, the client was acquitted.

Looking back at that experience, I know we were not prepared for the penalty phase and therefore not fully prepared for the innocence phase. Some might say, why argue with success? However, look how close we came to losing. Those who use the term "winning ugly" understand that a continuing flaw does not bode well for future success.

Several years later, we took on another capital case. We prepared and presented mitigation evidence, but we still did not hire a mitigation specialist. Our client was convicted and sentenced to die. After that trial, I sought the assistance of the Equal Justice Initiative (E.J.I.). Their assistance resulted in a reversal and a new trial. E.J.I. continued to help, and I realized then that capital litigation is a specialized field. The first glimpse of that came with the sheer number, variety and scope of motions shared by E.J.I. after the new trial was granted. Unlike some criminal cases where tactical decisions may favor raising selective issues, in a capital case every conceivable issue must be raised. Many issues require knowledge of developing law and practice in capital litigation. A general practitioner, even one with years of experience in capital cases, can benefit from the specialized knowledge of organizations like E.J.I.

This year, our firm, the Southern District of Alabama Federal Defenders Inc., was appointed in two death cases in two months. After our appointment in the first case, I called a lawyer at the Federal Death Penalty Resource Counsel Project and related the facts of my case. Within a week I received a packet of materials from the network designed to provide a crash course into pretrial issues and trial issues likely to arise and, of course, mitigation material.

After second counsel was appointed per 18 USC § 3005, we hired a mitigation specialist and moved to enlarge the trial schedule and that of the Department of Justice authorization hearing. The typical criminal trial schedule is wholly inadequate in death cases. In federal capital cases every capital case must be authorized by the Attorney General and a defendant may elect to argue for non-authorization before the Justice Department. The fact and mitigation investigation must begin immediately because facts uncovered in that investigation may affect the overall strategy in the case. Mitigation evidence may be presented during counsel's argument against authorization, or it may be critical to the preparation pretrial motions, jury questionnaires, and voir dire.

A lesson before dying?

The penalty of death differs form all other forms of punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation - - [a]nd it is unique – in its absolute renunciation of al that is embodied in our concept of humanity. Furman v.Georgia, 408 U.S. 238, 306 (1972).

Every person facing a death sentence experiences levels of stress unknown to other criminal defendants, and indeed to most human beings. Defendants facing society's ultimate rejection are affected by the charge. The condemnation at some level seems justified. Their moods appear to swing between unworthiness and a sense that their life is worthy. The death penalty imposes a sense of urgency about the case, including the quality of representation, and almost everything associated with life. Because of this, attorneys specializing in capital cases advise that one should visit a client facing death at least twice weekly. They suggest that if the attorney himself cannot go to the prison, then perhaps another member of the staff can visit the client. One participant at a seminar responded: "I don't have that kind of time." However, these visits are necessary if the client and his family are to reveal sensitive matters long hidden from view. Moreover, a high level of trust and confidence in the attorney — which can only occur with regular and frequent visits — is critical if the defense hopes to convince the client to accept a plea bargain to a life sentence.

In his novel, *A Lesson Before Dying*, Ernest Gaines tells the story of a man

condemned to die and a teacher. The teacher was conscripted by family members to convince the condemned that he was in fact a human being and not a hog, as he was branded by defense counsel at trial. The teacher reluctantly agreed, but he had no idea how to accomplish the task. As in life, the history of the condemned man was shaped by childhood neglect. As in life, he was hostile, unresponsive, and withdrawn. Slowly, he responded, by accepting food, a radio and limited conversation. When he chose to speak, he wondered, what was the use? Why should it make any difference now? During his neglected life where was all this interest? Most saw him and treated him as less than human before he was charged. He understood that the teacher was among those unconvinced of his worth.

The conversations between the teacher and the condemned man transformed the teacher. He understood that the condemned man was aware of his humanity and his worth. The roles reversed as the teacher became the recipient of a lesson in the worth of one life and of life in general. This is the road defense counsel in a capital case must travel. It is not a lesson learned for all time. It is one that must be learned in the context of each case and with respect to each defendant. This can rarely be done without extensive interaction with the client. To get there, one must know the defendant and share conversations beyond the parameters of representation. Perhaps then counsel will discover the capacity to speak with unwavering conviction and honesty of the client's worth.

NOTE: On February 8 - 9, 2002, many "Learned Counsels" will take part in a death penalty seminar sponsored by the ACDLA in Birmingham. The Clarence Darrow College is scheduled for May 18-23, 2002. The cost is $595 including room, breakfast and lunch. The Bryan Scheckmeister College is scheduled for August 3-8, 2002.

Use of Drug Treatment Information continued

Section (b), entitled "permitted disclosure" contains the following subsection:

(1) Consent

The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes, as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

If the patient does not consent, the information may only be disclosed to medical personnel to treat an emergency, for research purposes, provided the patient is not identified, and by court order, showing good cause, and the need to avert death or serious bodily harm, with appropriate safeguards to maintain confidentiality. USCA §290dd(b)(2). If it is unclear whether your client had a choice in his or her consent, then the consent may be involuntary, and ineffective as a grounds for introduction of the evidence..

Section 290dd(c) prohibits use of any substance abuse treatment record from any agency of the United States from being used in any criminal proceeding without the order set forth in section (b)(2). In other words, a court order is required for any substance abuse test results to be admitted in a criminal proceeding. The statute does not define what constitutes a criminal proceeding, leaving the door open for attacking the use of such information in a revocation proceeding. No case law exists on the matter.

The prohibition against use remains after the patient leaves the program. USCA §290dd(d). Subsection (g) gives the authority to write regulations to the Secretary of the Department of Health and Human Services (a great agency to write regulations dealing with criminal matters, huh!).

42 C.F.R. §2.22(d), in its sample notice to patients, states that patient records may be released upon the consent of the patient. 42 C. F. R. §2.2 states that records may be release upon the consent of the patient, subject to the regulations promulgated by the secretary. The sample notice is quite detailed. Any attack would need to begin with the production of the consent form, and an investigation into the circumstances under which is was obtained.

42 C.F.R. § 2.12(a)(2) states that the information kept by federally subsidized drug treatment programs may not be used to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. The rule prohibiting the use of patient records in criminal cases applies to "any person who obtains that information from a federally assisted alcohol or drug abuse program, regardless of the status of the person obtaining the information or of whether the information was obtained in accordance with these regulations." 42 C.F.R. §2.12(d)(1). The subsection goes on to state that the restriction bars the "introduction of that information as evidence in a criminal proceeding and any other use of the information to investigate or prosecute a patient with respect to a suspected crime." Id. Further, information obtained by undercover officers and patient access are also inadmissible. Id.

While information may be shared between a contract program and a probation officer in order to facilitate the oversight of the patient's progress, the information may not be used to justify a new criminal prosecution unless the Government applies for a court order authorizing the use of the information and establishes all of the following four factors (42 C.F.R. §2.65):

1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnappingkidnaping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.

3) Other ways of obtaining the information are not available or would not be effective.

4) The potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.

If a patient consents to the release of his records, a court order need not be obtained, but other compulsory process, such as a subpoena, may be necessary to compel production. United

States v. Martinez, 855 F.2d 863, No. 87-5270 (9th Cir. July 27, 1988)(unpublished), 42 C.F.R. §2.3.

With regard to revocation proceedings, disclosure of the information from the treatment center may also be done by consent of the patient, provided the patient has signed a consent form meeting the requirements of §2.31 (excluding section (a)(8)). The patient must be informed as to how long the consent will remain in effect, the length of the treatment, the type of criminal proceeding involved, the need for information in connection with the final disposition of that proceeding, and when the final disposition will occur; and the consent must be revocable upon the passage of a certain amount of time or the occurrence of the specified, ascertainable event, which may be no later that the termination of supervision. A person who receives that information may redisclose and use the information "only to carry out that person's official duties with regard to the patient's conditional release or other action in connection with which the consent was given." 42 C.F.R. §2.35.

This last regulation clearly authorizies the use of the information "with regard to the patients' conditional release" but noticeably omits any admissibility in court proceedings. The statute clearly states the information is not admissible unless authorized by the regulations. Further, if the patient is not given the option of refusing to consent to the release of the information, it is arguable that the consent is involuntary, and at that point, the information cannot be disclosed. 42 U.S.C. §290dd. Arguably, any consent form would have to contain specific language alerting the patient that the information could be used in a court proceeding in order to be valid consent. 42 C.F.R. 2.31.

This is a matter in which the district court has shown interest. If you have a client facing revocation based only upon drug tests administered at a treatment program (not a probation color code test, which is not covered by these regulations), feel free to call our office for more information and assistance.

Summary of the Sentencing Guideline Amendments

Effective November 1, 2001

§2B1.1 - Adjusts base offense level for theft and property destruction, raising it to 6 (the current base offense level for fraud; amount of loss increase table has changed; new definition of loss which rejects the economic reality doctrine and adopts the net loss approach (where returned money for sold assets must reduce loss if returned prior to detection of offense); **more than minimal planning was deleted** for a victim enhancement for number of victims; the definition for sophisticated means changed; one cross referenced added for false statements relating to a chapter two offense.

§2T1.1, 2T1.4 and the Tax Table - higher penalties for moderate to high lax loss, and no decrease on lower loss amounts.

§2S1.1 and 2S1.2 - Penalties are up for laundering related to drug activity and down for fraud related laundering. The two guidelines were consolidated into one new §2S1.1. Money launderers now have two groups: direct and third party, the former being the more serious one. Enhancements for laundering related to specific unlawful activities (like drug trafficking) are doubled. Laundering will now be grouped with the underlying offenses.

§2L1.2 - The 16 level enhancement for prior aggravated felony in illegal reentry cases is changed to a graduated enhancement from 4 to 16 levels based upon the seriousness of the prior conviction. Downward departures are now generally discouraged, but more protection exists for those whose aggravated felonies are less serious. Some departures are still viable.

§3B1.2 - If a defendant is held accountable only for the drugs she personally handled, she is no longer automatically ineligible for a role reduction. Reversal of 11th Circuit position.

§2D1.1 - Amphetamine and Methamphetamine; Emergency amendments become a permanent part of the section; adds a two level enhancement for environmental violations as an alternative to the three level enhancement for substantial risk of harm to people or the environment (determined by a four factor test); mandatory restitution for environmental cleanup; amphetamine treated the same as methamphetamine; adds two level enhancement for importation of amphetamine; new offense for stealing anhydrous ammonia; GHB and other date rape drugs: The drugs are now schedule I drugs eligible for a level 38 base offense level (before, limited to base offense level 20); Ecstasy; changes marijuana equivalencies for this drug to those comparable to methamphetamine; PMA, a new drug, is added; Ephedrine and other precursor chemicals: 50% yield ratio adopted; highest offense level raised to 38; conversion table added.

§1B1.2(a) - Admissions during plea colloquy are not stipulations.

§2A2.2 - Aggravated assaults can now include an enhancement for use of a dangerous weapon and is not impermissible double counting.

§2K1.3 and 2K2.1 - Prohibited person definitions are reconciled; prohibited person determined at time of offense; clarifies which offenses are considered prior offenses; some enhancements for number of firearms are increased.

§2D1.1 - Safety valve is amended to allow defendants with offense levels less than 26 to receive a two-point reduction, but five-year minimum mandatory defendants cannot go below level 17; encouraged downward departure provision in application note 14 is deleted.

§2A1.6 - stalking base offense level increased to 18.

§§2G1.1, 2G1.2 - human trafficking amended to reflect new offenses.

§2H4.2 - new guideline for willful violation of the migrant and seasonal agricultural worker protection act.

§4B1.5 - applies if career offender does not and mirrors the career offender guideline, but applies to sex offenses and child pornography; five level enhancement or floor of 22 for a pattern of activity involving prohibited sexual conduct (two separate acts with a minor); multiple convictions of child pornography shall be grouped; offense levels increased for transporting a minor for sexual purposes.

§2B1.5 - offense levels increased for manufacturing counterfeit bills; does not apply to mere photocopying or really bad copies.

§2H1.3 - adds offense levels for unlawful disclosure of tax information and unlawful requests for audits; new three level reduction where the disclosure was with no intent to harm or obtain pecuniary gain.

§2C1.3 and §2C1.4 are consolidated. Cross reference added to §2B1.1 to §§2C1.1 and 2C1.2 to account for supplementation of the salaries of federal employees.

§§2M5.1, 2M5.2 - increase offense level for nuclear weapons and new offenses for biological and chemical weapons.

Reversed and Remanded *continued from front page*

Lackawanna County Dist. Attorney v. Coss, 121 S. Ct. 1567 (2001)(Failure to appoint counsel is a constitutional defect warranting habeas relief where petitioner challenges current sentence on the ground that it was enhanced based on an unconstitutional prior conviction where counsel was not appointed.).

Daniels v. U.S., 121 S. Ct. 1578 (2001)(Motion to vacate is not proper vehicle to challenge constitutionality of conviction and sentence under ACCA where defendant failed to pursue these remedies while they were available. Only violations involving right to counsel warrant such relief.).

Penry v. Johnson, 121 S. Ct. 1910 (2001)(Habeas relief warranted where instructions on mitigating circumstances in capital case failed to provide jury with vehicle to give effect to mitigating circumstances of mental retardation and childhood abuse.).

Kyllo v. U.S., 121 S. Ct. 2038 (2001)(Use of thermal imaging to measure heat emanating from home was search with the meaning of the Fourth Amendment.).

Alabama v. Bozeman, 121 S. Ct. 2079 (2001)(Article IV bars any further criminal proceedings against defendant held under the Interstate Agreement on Detainers when a defendant is returned to the original place of imprisonment before trial.).

Duncan v. Walker, 121 S. Ct. 2001 (2001)(Application for federal habeas corpus review is not "application for State post-conviction or other collateral review" within the meaning of the AEDPA.).

United States Courts of Appeal

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. Banks-Giombetti, 245 F.3d 949 (7th Cir. 2001)(district court lacked authority to sanction defendant with costs of jury venire).

United States v. Silver, 245 F.3d 1075 (9th Cir. 2001)(in product substitution case, market value of goods disposed of by government should have been offset against disposal costs when calculating actual loss).

United States v. Ratcliff, 245 F.3d 1246 (11th Cir. 2001)(superseding indictment broadened or substantially amended original charge so that original indictment did not toll statute of limitations with respect to superseding indictment).

Boyette v. Lefevre, 246 F.3d 76 (2nd Cir. 2001)(*Brady* violation occurred where prosecution failed to disclose to defense material which could have suggested an alternative perpetrator or could have helped impeach victim; state court interpretation was unreasonable application of clearly established federal law which warranted relief under the AEDPA.).

United States v. Velazquez, 246 F.3d 204 (2nd Cir. 2001)(insufficient evidence of heat of passion to establish that underlying offense was voluntary manslaughter; clarification required as to malice; *Apprendi* error recognizable even if defendants withdrew their appeals due to possibility of increased sentence after remand).

United States v. Romary, 246 F.3d 339 (4th Cir. 2001)(12-year old sentence could not be considered for career offender purposes).

United States v. Thomas, 246 F.3d 438 (5th Cir. 2001)(amount of crack cocaine defendant possessed was fact which increased penalty beyond statutory maximum and resulted in unconstitutional sentence under *Apprendi*).

United States v. Stewart, 246 F.3d 728 (D.C. Cir. 2001)(defendant who receives a gun in return for drugs has not "used" a gun during and in relation to a drug trafficking offense under *Bailey*).

United States v. Johnson, 246 F.3d 749 (5th Cir. 2001)(insufficient factual basis to support plea to charge of arson of property used in interstate commerce where no showing of substantial effect on interstate commerce or active employment of church building for commercial purposes).

United States v. Middleton, 246 F.3d 825 (6th Cir. 2001)(insufficient factual findings to support obstruction of justice enhancement).

United States v. Noble, 246 F.3d 946 (7th Cir. 2001)(failure to charge drug quantity in indictment and submit issue to jury was plain error requiring resentencing).

United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001)(sentence of two days for resisting arrest was not at least 30 days imprisonment or one year's probation so as to justify additional criminal history point).

United States v. Bradford, 246 F.3d 1107 (8th Cir. 2001)(*Apprendi* violations occurred where there was no jury finding of drug quantity and it was unclear whether defendants had prior drug conviction.).

United States v. King, 246 F.3d 1166 (9th Cir. 2001)(remand required to determine applicability of organizer or leader enhancement).

United States v. Davidson, 246 F.3d 1240 (9th Cir. 2001)(defendant could not be required to register as sex offender for possession of child pornography "transported by computer" under 1995 version of California penal code in effect at time of the offense).

United States v. Romo-Romo, 246 F.3d 1272 (9th Cir. 2001)(Alien who has never left the United States cannot be convicted for reentering.).

United States v. Dove, 247 F.3d 152 (4th Cir. 2001)(error to include non-criminal conduct as relevant conduct in calculating sentence).

United States v. Brandon, 247 F.3d 186 (4th Cir. 2001)(Intent to manufacture or distribute was not inherent in defendant's prior drug conviction so that conviction was not serious drug felony for armed career criminal purposes.).

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

Dunn v. Colleran, 247 F.3d 450 (3rd Cir. 2001)(State court determination that prosecutor had not violated plea agreement was unreasonable.).

Gardner v. Johnson, 247 F.3d 551 (5th Cir. 2001) (psychiatrists's pre-examination warnings insufficient to apprise petitioner that statements might be used against him to secure death penalty in violation of Fifth Amendment self-incrimination clause; state court's determination to contrary was unreasonable interpretation of federal law).

United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001)(en banc)(Conviction of transporting, selling, importing, giving away, or otherwise importing marijuana into California does not qualify as an aggravated felony under 16-level enhancement provision of the Guidelines.).

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. Morris, 247 F.3d 1080 (10th Cir. 2001)(Five convictions for firearm use during robbery violated Double Jeopardy Clause.).

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. Howerter, 248 F.3d 198 (3rd Cir. 2001)(Defendant did not commit federal bank larceny when, as treasurer authorized to write checks for private organization, he cashed unauthorized checks payable to himself.).

United States v. Lawrence, 248 F.3d 300 (4th Cir. 2001)(Resentencing using video teleconferencing violates rule regarding defendant's presence.).

United States v. Miranda, 248 F.3d 434 (5th Cir. 2001)(remand because criminal history incorrectly calculated).

United States v. Loe, 248 F.3d 449 (5th Cir. 2001)(insufficient evidence to support money laundering convictions because government could not prove withdrawal contained dirty money).

United States v. Marshall, 248 F.3d 525 (6th Cir. 2001)(Dual larceny conviction, one for taking money with intent to steal and the other for receiving money stolen from bank, was improper; insufficient evidence to support money laundering conviction.).

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

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001)(Petitioner did not file second or successive petition when he filed petition after first petition was dismissed without prejudice because it contained unexhausted claims; petitioner entitled to COA with respect to claims district court found to be procedurally defaulted.).

McGregor v. Gibson, 248 F.3d 946 (10th Cir. 2001)(Writ should have been granted because reasonable judge should have had a bona fide doubt about petitioner's competence.).

United States v. Farese, 248 F.3d 1056 (11th Cir. 2001)(Resentencing required because it was unclear whether the government proved beyond a reasonable doubt that money laundering was the object offense of conspiracy.).

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. Caro, 248 F.3d 1240 (10th Cir. 2001)(Trooper's request to search vehicle for VIN number exceeded permissible scope of traffic stop; defendant's consent to search for VIN number insufficient to purge taint from request; consent to search after air fresheners discovered did not purge taint of unlawful detention.).

United States v. Wilson, 249 F.3d 366 (5th Cir. 2001)(Defendant was entitled to hearing on fact issue as to adequacy of government's application to support tolling of five-year limitation period.).

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. Hardeman, 249 F.3d 826 (9th Cir. 2001)(indictment dismissed for violation of statutory speedy trial rights; court on remand must determine whether dismissal is with or without prejudice).

United States v. Velasco-Heredia, 249 F.3d 963 (9th Cir. 2001)(Determination of drug quantity by preponderance by court rather than by jury beyond a reasonable doubt violated *Apprendi* even though term of imprisonment imposed was within range applicable to admitted drug quantity, because term of supervised release exceeded term of admitted drug quantity.).

United States v. Hitt, 249 F.3d 1010 (D.C. Cir. 2001)(time-barred conspiracy count properly dismissed).

United States v. Colon, 250 F.3d 130 (2nd Cir. 2001)(Knowledge of civilian 911 operator employed by police department could not be imputed to dispatching or arresting officers under the collective knowledge doctrine as a basis for reasonable suspicion supporting stop and frist, in the absence of any evidence that operator made any assessment of reasonable suspicion or was trained to do so.).

United States v. Boudreau, 250 F.3d 279 (5th Cir. 2001)(Defendant's use of computer in relation to interstate commerce counts, later dismissed, did not warrant enhancement for smuggling child pornography, since defendant was convicted of smuggling magazines in which no computer was used– government's relevant conduct theory as to computer images rejected.).

United States v. Strayhorn, 250 F.3d 462 (6th Cir. 2001)(*Apprendi* objection adequately preserved, and district court's drug quantity, relevant conduct, finding violated *Apprendi* although it did not exceed the default statutory maximum for a defendant with a prior felony drug conviction.).

United States v. Harbin, 250 F.3d 532 (7th Cir. 2001)(Prosecution's mid-trial use of peremptory challenge in violation of court's instruction violated defendant's due process rights.).

United States v. Scott, 250 F.3d 550 (7th Cir. 2001)(Mere possession of access device completed the crime so that restitution for amount of loss was not warranted because this was not charged conduct.).

United States v. Ray, 250 F.3d 596 (8th Cir. 2001)(*Apprendi* violation warranted resentencing because defendant subjected to higher statutory maximum without jury determination of drug quantity.).

United States v. Peoples, 250 F.3d 630 (8th Cir. 2001)(FBI agent's testimony about conversation between defendants, giving lay opinion as to meaning of words and phrases used, was inadmissible; and error was not harmless.).

United States v. Searing, 250 F.3d 665 (8th Cir. 2001)(error to overrule objection to restitution figure solely based objected-to facts in PSR and probation officer's unsworn comments about what a victim had told him).

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. Blanding, 250 F.3d 858 (4th Cir. 2001)(Error for court to sustain under *Batson* challenge to defense counsel's strike of white veniremember who had displayed bumper sticker with confederate flag).

Agnew v. Leibach, 250 F.3d 1123 (7th Cir. 2001)(habeas relief warranted because bailiff who tended to jury during trial testified concerning defendant's confession).

Saffold v. Newland, 250 F.3d 1262 (9th Cir. 2001)(Mailbox rule applied both to filing of federal habeas petition and to filing of state habeas petition; defendant's pending state habeas petition tolled limitations period for filing federal petition under AEDPA.).

Judd v. Haley, 250 F.3d 1308 (11th Cir. 2001)(Total closure of courtroom during sexual abuse victim's testimony violated defendant's 6th Amendment right to a public trial.).

United States v. Barnes, 251 F.3d 251 (1st Cir. 2001)(Term of supervised release violated *Apprendi.)*.

United States v. Brown, 251 F.3d 286 (1st Cir. 2001)(No-knock entry was not permissible to prevent destruction of evidence and could not be justified under *Leon* principle of reasonable reliance.).

United States v. Kloess, 251 F.3d 941 (11th Cir. 2001)(Defense of "safe harbor" to obstruction of justice charge where allegedly obstructive conduct was in nature of bona fide legal services raised affirmative defense requiring government to prove its case.).

United States v. Fields, 251 F.3d 1041 (D.C. Cir. 2001)(Plain error occurred when court imposed life sentences for drug conspiracy in absence of jury findings required by *Apprendi.)*.

United States v. Landham, 251 F.3d 1072 (6th Cir. 2001)(deficient indictment with respect to interstate transmission of threats to kidnap; insufficient evidence to prove true threat to kidnap or threat to injure; vulgar disparaging comments to wife did not support conviction for making obscene interstate telephone calls).

United States v. Adams, 252 F.3d 276 (3d Cir. 2001)(District court's failure to ask defendant if he wished to exercise his right to allocution required resentencing.).

Solis v. United States, 252 F.2d 289 (3d Cir. 2001)(Defendant entitled to evidentiary hearing on claim that he instructed attorney to appeal, but attorney failed to act.).

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

Galarza v. Keane, 252 F.3d 630 (2nd Cir. 2001)(Trial court failed to adjudicate under *Batson* whether it credited prosecutor's proffered explanations for striking three prospective jurors with Hispanic names.).

United States v. Banks, 252 F.3d 801 (6th Cir. 2001)(Post- plea criminal charges did not preclude reduction for acceptance of responsibility; failure to provide written statement of his offenses for pre-sentence investigation report was not deliberate refusal to cooperate with government.).

Huss v. Graves, 252 F.3d 952 (8th Cir. 2001)(Retrial of defendant violated double jeopardy.).

United States v. Bush, 252 F.3d 859 (8th Cir. 2001)(victims who did not purchase unregistered securities from Defendant not entitled to restitution).

United States v. Hutton, 252 F.3d 1013 (8th Cir. 2001)(Under prior version of guidelines, concealed inoperable replica of revolver was not "brandished, displayed, or possessed" during robbery.).

United States v. Odom, 252 F.3d 1289 (11th Cir. 2001)(insufficient evidence that church was used in or affected interstate commerce so as to bring it within purview of federal arson statute).

Lainfiesta v. Artuz, 253 F.3d 151 (2nd Cir. 2001)(In 28 U.S.C. § 2254 habeas action, state court determined that refusal to permit defendant's co-counsel to conduct cross-examination did not violate defendant's right to counsel of choice; federal appeals court concluded that this determination was unreasonable but was harmless error.).

United States v. Vasquez-Zamora, 253 F.3d 211 (5th Cir. 2001)(Because government failed to state quantity of drugs in indictment and prove it beyond a reasonable doubt to jury, Apprendi limits sentence to sixty months in prison and a three-year supervised release term.).

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.).

Fowler v. Collins, 253 F.3d 244 (6th Cir. 2001)(Petitioner entitled to writ of habeas corpus on ground that state court's acceptance of his waiver of right to counsel was an unreasonable application of established Supreme Court precedent.).

United States v. Martinez, 253 F.3d 251 (6th Cir. 2001)(Prosecutor's eliciting from a narcotics deputy testimony that information provided by informant had always been accurate and truthful was improper bolstering but was not prejudicial error; sentences of 210 and 240 months in prison for marijuana conspiracy were plain error under Apprendi.).

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.).

Tillema v. Long, 253 F.3d 494 (9th Cir. 2001)(In 28 U.S.C. § 2254 action, district court committed prejudicial legal error when it dismissed prisoner's habeas petition without affording him the opportunity to abandon his sole unexhausted claim as an alternative to suffering dismissal of petition; district court's error equitably tolled statute of limitations.).

Shepard v. United States, 253 F.3d 585 (11th Cir. 2001)(Having determined that evidentiary hearing was needed on prisoner's 28 U.S.C. § 2255 petition, district court must appoint counsel; failure to appoint counsel not subject to harmless error analysis.).

Hall v. Moore, 253 F.3d 624 (11th Cir. 2001)(absence of counsel at re-sentencing hearing violated petitioner's Sixth Amendment right to counsel).

United States v. Johnson, 254 F.3d 279 (D. C. Cir. 2001)(district court's issuance of a 12-page combined decision and order denying prisoner's motion to vacate did not satisfy the Rule 58 separate-document requirement and thus prisoner's time to appeal from denial of his motion had not yet run).

Zarvela v. Artuz, 254 F.3d 374 (2nd Cir. 2001)(Habeas petition should have been treated as if stayed, for purposes of determining timeliness of re-filed petition, where petitioner's entry into state courts to exhaust previously unexhausted claims and his return to federal court occurred promptly.).

United States v. Angle, 254 F.3d 514 (4th Cir. 2001)(en banc)(remanded for drug quantity findings as required by Apprendi).

United States v. Jones, 254 F.3d 692 (8th Cir. 2001)(Defendant's acts of walking around phone bank, looking behind him, traveling without luggage, and arriving from Los Angeles were

not sufficiently suggestive of crime to constitute reasonable suspicion, and officer's touching of bulge on defendant's person during consent search did not provide probable cause for arrest, where defendant explained that bulge was from recent surgery.).

United States v. Alvarez, 254 F.3d 725 (8th Cir. 2001)(sentence in excess of 20 years for drug conspiracy conviction vacated because jury made no drug quantity finding).

Ordonez v. Johnson, 254 F.3d 814 (9th Cir. 2001)(pro se inmate constructively filed amended complaint in civil rights action against U.S. attorneys and FBI agents, even though complaint did not comply with local rule).

United States v. Pierre, 254 F.3d 872 (9th Cir. 2001)(jury instruction on self-defense impermissibly shifted burden of proof to defendant and constituted reversible error).

Hasan v. Galaza, 254 F.3d 1150 (9th Cir. 2001)(Limitations period for filing habeas claim alleging ineffective assistance of counsel did not begin to run until petitioner knew or should have known of relationship between prosecution witness and person who possibly engaged in witness tampering.).

Johnson v. Gibson, 254 F.3d 1155 (10th Cir. 2001)(trial court's inappropriate response to jury question regarding meaning of life imprisonment without parole warranted federal habeas relief).

United States v. Iiland, 254 F.3d 1264 (10th Cir. 2001)(evidence insufficient to support conviction for firearm possession in furtherance of drug trafficking activity).

United States v. Audain, 254 F.3d 1286 (11th Cir. 2001)(District court erred in sentencing defendants to life imprisonment for conspiracy to commit money laundering because statute carries a maximum sentence of twenty years.).

United States v. Descally, 254 F.3d 1328 (11th Cir. 2001)(District court had authority to grant sentencing credit against federal sentence that was imposed concurrently with state sentence arising from same conduct, for period of time defendant spent in state custody on state sentence prior to sentencing by district court, pursuant to U.S.S.G. § 5G1.3, comment. (n. 2), notwithstanding that federal sentence did not exceed that imposed by the state.).

United States v. Scungio, 255 F.3d 11 (1st Cir. 2001)(defendant could not be sentenced under obstruction guideline because his conduct did not satisfy statutory elements of statute covered by that guideline; defendant's skill as a tax lawyer did not facilitate offense so as to justify "special skill" enhancement).

Moore v. Morton, 255 F.3d 95 (3rd Cir. 2001)(Prosecutor's highly prejudicial remarks during summation deprived defendant of fair trial despite state court's curative instructions; petitioner entitled to federal habeas relief because state courts did not reasonably apply Supreme Court precedent in reaching opposite conclusion).

United States v. Moreno-Arredondo, 255 F.3d 198 (5th Cir. 2001)(defendant's offenses of indecency with a child were "related" for sentencing purposes, U.S.S.G. § 4A2.1(a)(2), even though they involved different victims).

Miller v. Anderson, 255 F.3d 455 (7th Cir. 2001)(petitioner charged with murder and rape was denied effective assistance of counsel as result of counsel's failure to adequately investigate or consult hair, DNA, and treadmark and footprint experts).

United States v. Washington, 255 F.3d 483 (8th Cir. 2001)(failure to afford one defendant her right of allocution required resentencing).

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. Wendy G., 255 F.3d 761 (9th Cir. 2001)(juvenile defendant prejudiced by officers failure to inform her mother that she would be given the opportunity to advise and counsel juvenile before custodial interrogation).

Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001)(Instructing jury based on 1978 Calif. death penalty statute, rather than 1977 statute in effect at time of offense, violated ex post facto clause and due process; erroneous instruction was not harmless, thus warranting grant of habeas petition with regard to death sentence.).

United States v. Najjor, 255 F.3d 979 (9th Cir. 2001)(district court erred in failing to consider all evidence prior to ordering restitution).

United States v. Cernobyl, 255 F.3d 1215 (10th Cir. 2001)(sentence in excess of statutory maximum violated Apprendi).

United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001)(District court must base defendants' offense levels for RICO conspiracy conviction solely on predicate acts that either the jury found the defendants committed or acts that the court finds were proven beyond a reasonable doubt.).

United States v. McCulligan, 256 F.3d 97 (3rd Cir. 2001)(District court's failure to submit to jury question of whether defendant committed "simple" or "non-simple" assault precluded it from imposing sentence based on its finding that assault was "non-simple.").

United States v. Pressler, 256 F.3d 144 (3rd Cir. 2001)(conviction vacated because government failed to prove agreement element of heroin conspiracy conviction).

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. Stewart, 256 F.3d 231 (4th Cir. 2001)(Improper venue for money laundering charges since defendant's role was limited to that of a courier, who was responsible for receiving money transfers and packages in California; district court improperly allowed defendant to be convicted on two sets of money laundering charges based upon same financial transactions simply because defendant possessed two different mental states.).

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.).

Bruce v. United States, 256 F.3d 592 (7th Cir. 2001)(prisoner entitled to evidentiary hearing to determine whether defense counsel adequately assessed potential alibi witnesses).

Piaskowski v. Bett, 256 F.3d 687 (7th Cir. 2001)(state's evidence insufficient to convict defendant beyond a reasonable doubt; Double Jeopardy Clause precluded state from retrying defendant).

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

United States v. Johnson, 256 F.3d 895 (9th Cir. 2001)(officer's "gut" feeling fell short of probable cause to search defendant's property for fleeing suspect; exigent circumstances did not exist; standard of review for district court's determination of where curtilage ends is de novo, not clear error).

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. Grant, 256 F.3d 1146 (11th Cir. 2001)(notice of appeal containing only one case number was sufficient to appeal all convictions).

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. Hilton, 257 F.3d 50 (1st Cir. 2001)(Two images used to support "ten or more items" sentencing enhancement for child pornography conviction did not meet statutory definition of "sexually explicit conduct.").

Leka v. Portuondo, 257 F.3d 89 (2nd Cir. 2001)(Eyewitness evidence of an off-duty police officer who observed the crime from the second-floor window of his apartment was material and favorable to defense for Brady purposes; delayed disclosure to defense, who was identified nine days before opening statements and twenty-three days before defense began its case, was "suppression" for Brady purposes.).

Raheem v. Kelly, 257 F.3d 122 (2nd Cir. 2001)(Lineup in which defendant appeared wearing black leather coat was suggestive to two witnesses who had given the police descriptions emphasizing the shooter's black leather coat; identifications were not independently reliable; error not harmless.).

McGraw v. Holland, 257 F.3d 513 (6th Cir. 2001)(Petitioner's confession was extracted in violation of her right to remain silent, and repeated statements by petitioner during custodial interrogation that she did not want to talk about the rape were unambiguous invocations of her right to remain silent.).

United States v. McGahee, 257 F.3d 520 (6th Cir. 2001)(insufficient evidence to support money laundering convictions).

Mitchell v. Mason, 257 F.3d 554 (6th Cir. 2001)(petitioner's § 2254 claim not procedurally barred; state court's incorrect analysis of petitioner's claim of complete denial of counsel warranted habeas relief).

United States v. Jolivette, 257 F.3d 581 (6th Cir. 2001)(restitution order for undetermined amount was void and unenforceable 90 days after sentencing hearing).

United States v. Willis, 257 F.3d 636 (6th Cir. 2001)(decision to grant a new trial was not an abuse of discretion).

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001)(necessary factual predicate for a three-level increase in offense level, on ground that defendant was a leader, organizer, manager or supervisor of conspiracy, was not established).

Pennington v. Norris, 257 F.3d 857 (8th Cir. 2001)(petition challenging parole denial was not "second or successive" merely because petitioner had previously filed a petition challenging his conviction).

United States v. Hollingsworth, 257 F.3d 871 (8th Cir. 2001)(imposition of sentence in excess of statutory maximum was not harmless error).

Beck v. Bowersox, 257 F.3d 900 (8th Cir. 2001)(district court had to review transcript of suppression hearing before determining whether state court's determination of facts was reasonable).

United States v. Maynie, 257 F.3d 908 (8th Cir. 2001)(Government's error of not alleging drug quantity in superseding indictment seriously affected fairness and integrity of defendants' sentencing for drug conspiracy.).

United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001)("Fair and just reason" standard, rather than "manifest injustice"

standard, applies to defendant's motion to withdraw guilty plea prior to sentecing but after a codefendant had been sentenced.).

United States v. Hill, 257 F.3d 1116 (9th Cir. 2001)(indictment charging defendant as accessory after the fact had to plead underlying offense as well as accessory offense).

United States v. Gordon K., 257 F.3d 1158 (10th Cir. 2001)(Rule providing that court may correct sentence imposed as result of arithmetical, technical or other clear error applies to juvenile proceedings but failure to order restitution was not clear error that could be corrected under this rule.).

United States v. Desir, 257 F.3d 1233 (11th Cir. 2001)(Magistrate inappropriately exercised authority of an Article III judge without defendant's consent, thus requiring reversal, by making final decision regarding deliberating jury's request for read-back of trial testimony.).

Is there Disaster Around the Corner?

Don't let your firm be guilty of not protecting your computers! With the frequency of viruses working their way into email and file attachments, keeping your virus scanners up-to-date is paramount. Anti-virus updates may be posted to the respective company web-sites as often as every day, so you will want to visit the site daily or configure your virus scanner's "Live Update" feature to check daily. Even if your computer isn't attached to the internet, you could still receive a virus by the sharing of a floppy or zip disk. A couple of popular web-sites offering downloadable anti-virus software are Symantec (http://www.symantec.com) and McAfee (http://www.mcafee.com). Both sites offer information on most viruses, and from the Symantec web-site you can run their free computer security check which will analyze your computer for virus and security holes. If you prefer to test your virus scanner manually, go to www.eicar.com. Eicar allows you to ensure that your scanner is working properly by downloading a harmless virus test file that should display an anti-virus scanner alert.

If you are connecting to the internet through a high-speed phone line (DSL) or cable modem, you will want to invest in firewall software which offers protection from intrusion by hackers and other online threats. Firewall software can be purchased from the previously mentioned web-sites. For questions regarding anti-virus or firewall software, send an email to chris_feaster@fd.org or call our office.

United States v. Johnston, 258 F.3d 361 (5th Cir. 2001)(Consensual delegation of motion to vacate, set aside, or correct sentence to magistrate judge is unconstitutional.).

United States v. White, 258 F.3d 374 (5th Cir. 2001)(Indictment's failure to charge an offense was not waived by guilty plea, waiver of appeal in plea agreement, or failure to raise the argument in initial appellate brief; convictions under Texas statutes proscribing reckless conduct and terroristic threats were not convictions of a "crime of domestic violence," and thus could not serve as predicate convictions for 18 U.S.C. § 922(g)(9).).

Hughes v. United States, 258 F.3d 453 (6th Cir. 2001)(Counsel's failure to strike juror who stated on voir dire that she did not think she could be fair constituted ineffective assistance; given juror's express admission of bias, with no rehabilitation by counsel or the court, actual bias of juror was established, requiring a new trial.).

Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001)(life sentence imposed in state court for first offense involving delivery of .238 grams of cocaine base violated the Eighth Amendment).

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