EFFECTIVE ASSISTANCE

Newsletter for CJA Panel Attorneys · Volume 2 Number 1 · January - March 2003

CJA/Federal News

DAVID BENEMAN, ESQUIRE
CJA RESOURCE COUNSEL

United States Sentencing Commission approved an emergency plan on January 8, 2003 that will lengthen prison sentences for corporate criminals. The upward guideline revisions are criticized by the Justice Department as "not go(ing) far enough."

The guideline increases were motivated by the rash of fraud and corporate scandals last year at Enron and other major corporations. The new guidelines increase the penalties faced by corporate offenders in many federal cases by 25 percent or more.

A person convicted of securities fraud who had faced up to six and a half years in prison can now be sentenced to as much as eight years under the new guidelines. If the offender was an officer or director of a publicly traded company, the sentence could grow to 10 years.

The commission approved the new guidelines by a vote of 5 to 0. The emergency plan goes into effect January 25, 2003, and will last at least through November. The commission expects to forward to Congress a refined and permanent plan in April.

Congress ordered new the sentencing guidelines last year when it passed a corporate cleanup measure, known as the Sarbanes-Oxley Act, which was intended to help restore consumer confidence after the exposure of widespread accounting scandals in publicly traded companies.

Retrieve the amendment language from: www.ussc.gov/FEDREG/fedr0103b.htm.

Halfway House Eligibility

The Ashcroft Justice Department has come down on BOP claiming BOP is too liberal in the use of halfway houses!

According to a memorandum from the BOP Community Corrections Manager in New York dated December 23, 2002, the BOP has recently changed its practice of designating short-sentenced offenders directly to a halfway house to serve their entire sentence. According to the memorandum, the Justice Department's Office of Legal Counsel has determined that the BOP's long-standing practice of using community corrections facilities as a substitute for imprisonment contravenes case law and the sentencing guidelines. From now on, halfway house placement will be limited to the last 10% of an offender's sentence, not to exceed 6 months, pursuant to 18 U.S.C. 3624(c). The recipient of the memo will be predesignated to a camp within 30 days.

On the front end of a sentence a judge can **only** order halfway house as a condition of probation. Halfway house as a condition of supervised release is **only** possible after there has been jail time. To order halfway house as a condition of supervised release would only be on a violation of supervised release, and as a modification of supervised release.

Attention!!
BOP/DOJ change of CCC rules

The BOP and DOJ recently announced a radical change to the use of CCC's (community correction centers) indicating that CCC placement may not be substituted for imprisonment. While a plan of attack is being formulated, in the meantime, any clients awaiting surrender for sentences imposed after December 15, 2002, who have sentences in excess of 150 days, or 150 days remaining on sentences they are already serving, will NOT be designated to the CCC, and, if already at CCC, will be sent to prison. If you have a client awaiting surrender affected by this

Federal Rules of Criminal Procedure

As of December 1, 2002, the entire Federal Rules of Criminal Procedure took on a new "plain English" style which maintains most of the rule numbers but changes many subsection designations.

Continued on next page

INSIDE THIS ISSUE

When your client is here on a writ

Concurrent sentencing and the unimposed sentence

K. LYN HILLMAN CAMPBELL
ASSISTANT FEDERAL DEFENDER

Due to the increase in federal prosecutions, especially for firearm offenses, more clients are being brought into federal court on writs of habeas corpus ad prosequedum, so they may be prosecuted federally prior to the completion of another pending matter. This purely prosecutorial decision results in the circumvention of the usual concurrent sentencing rules found at U.S.S.G. §5G1.3. Solutions to this quandary equate to legal gymnastics.

First and foremost, each defense attorney should be aware from the outset that a federal writ eliminates, in the current opinion of the local bench and the United States Probation Office, the application of §5G1.3, when the client faces an as yet unimposed sentence resulting from an incomplete prosecution by another authority. In other words, if your client faces state charges for an armed robbery,

Continued on page 3

Use of standard motion forms which refer to rules by number and subsection after 12/1/02 may cause embarrassment until checked and updated. Very few changes of substance were intended, but some unintentional ones may have crept in — check the advisory committee notes carefully before assuming that any change of meaning was intended to any rule.

The amendments are of three kinds: stylistic changes to all the rules, substantive changes to eight rules, and changes meant to conform two rules to the 2001 USA PATRIOT Act. They were sent to Congress by the U.S. Supreme Court April 29. Congress having done nothing to disturb the amendments as proposed, they will become effective automatically.

Teleconferencing

Changes to Rules 5 (initial appearance), 10 (arraignment), and 43 (defendant's presence), give judges discretion to conduct initial appearances and arraignments by video teleconferencing, with the defendant's consent. The Justice Department and others wanted to go further and allow these proceedings to be conducted by teleconference even if the defendant did not consent. The Judicial Conference, which sent the amendment package to the high court, noted considerable opposition to the whole idea and took the more limited route, concluding that requiring consent answered critics' concerns. Proposals of this nature have been in the works for more than a decade.

Courts have sought authority to conduct preliminary proceedings by teleconferencing because of increasing caseloads, especially in districts with international borders. The hope is that the new system will increase efficiency and ease security problems that arise when courtrooms are packed with numerous prisoners awaiting summary pretrial proceedings. Many federal courts already have the necessary equipment for implementing the new system, according to the report of the Judicial Conference's Committee on Rules of Practice and Procedure.

The committee also acknowledged problems that may be raised by teleconferencing, such as substandard equipment in some holding facilities, the possibility that defendants will not appreciate the importance of the proceeding, lost opportunities that might facilitate early plea negotiations, and questions about the voluntariness of the consent when made in the holding facility outside the judge's presence. However, it said that many of these concerns are obviated by giving the district judge discretion to decide whether to allow teleconferencing or not.

Other Substantive Changes

Under amended Rule 5.1, a preliminary hearing may be continued by a magistrate judge even if the defendant does not consent, so long as a showing is made that extraordinary circumstances exist and justice requires the delay. This change sets up a conflict with 28 U.S.C. 2072(b), but under 18 U.S.C. 3060, Congress's agreement to the rule change supersedes the statutory provision.

Rule 10 is amended to allow waiver of presence at arraignment. The waiver must to be in writing, and waiver will not be permitted when the defendant is charged with a felony information, is standing mute, or is entering a conditional plea or plea of guilty or nolo contendere.

Rule 12.2, concerning the insanity defense, is amended to make clear that a court may order a defendant to submit to an mental examination once the defendant indicates an intention to raise a defense of mental condition bearing on guilt. Other changes to that rule go to situations in which the defendant intends to present expert evidence—testimonial or otherwise—of his mental condition at capital sentencing. In such a case, the court may require the defendant to give notice of that intent and order a mental examination of the defendant. The results of such an examination will not be available to the government unless the defendant is convicted of a capital crime and reaffirms the intent to introduce expert mental-condition evidence at sentencing.

Rule 12.4, new, governing disclosure of two kinds of information: the identity of a corporate party's parent corporation, and the identity of organizational victims.

Rule 30, covering jury instructions, is changed to allow the court to ask for proposed jury instructions before trial.

Rule 35, on correcting or reducing a sentence, is changed to expand the situations under which a defendant may obtain a post-conviction reduction of sentence to reflect his substantial assistance in prosecuting another. A reduction is available (1) when the defendant provided information within the one-year time limit, but the information did not become useful to the government until the one-year deadline passed, and (2), when the defendant could not reasonably anticipate the significance of information he had until after the deadline passed, and he provided it to the government as soon its significance became reasonably apparent to him.

Responding to PATRIOT Act

Amendments to the rules on grand juries and search warrants, Rules 6 and 41, reflect changes made to those rules by the USA PATRIOT Act, which became law in late October 2001; see 70 CrL 93.

In the statute, Congress authorized grand jury information involving terrorism to be shared with certain law enforcement entities. It also provided authority for magistrate judges to issue search warrants for property in other districts in cases involving terrorism.

The amendments to Rules 6 and 41 make technical changes in Congress's language so as to conform the rules to the comprehensive stylistic revision of the criminal rules, discussed below. As the previous article notes in the portion headed "Grand Jury Information," the stylistic revision has frustrated, for the time being, Congress's recent attempt in the 2002 Homeland Security Act to make additional changes to Rule 6.

Stylistic Changes

Although change to other rules have been dubbed "stylistic," the report of the Committee on Rules of Practice and Procedure noted that they may affect practice in some districts. According to that report, the most significant of the stylistic changes include the following:

Rule 4, covering arrest warrants and summonses based on complaints, is conformed to a recent law authorizing arrest warrants to be executed outside the United States on military and Defense Department personnel.

Rule 5, covering the initial appearance, is conformed to the same law, which authorizes a magistrate judge to conduct such proceedings by overseas telephone. Amended Rule 5 also provides increased flexibility as to the district in which the initial appearance may be held.

Rule 7 makes clear that charges of criminal contempt need not be initiated by indictment.

Rule 9, governing arrest warrants and summonses based on indictments and informations, give a court discretion not to issue an arrest warrant if the defendant has not responded to a summons and the government does not request a warrant.

Rule 12, which covers pleadings and pretrial motions, gives individual judges exclusive authority to set deadlines.

Rule 16's requirement that defendants disclose reports of examinations and tests they intend to "introduce" is amended to require disclosure of examinations and tests defendants intend to "use."

Rule 17, covering subpoenas, is changed to reflect an amendment to 28 U.S.C. 636(e), which authorizes a magistrate judge to hold a person in contempt for disobeying a subpoena.

Rule 24 is amended to remove language that could be construed as authorizing a represented defendant to voir dire prospective jurors.

Rule 26 is amended to accommodate witnesses who are unable to speak, by replacing the phrase "oral testimony" with "testimony."

Rule 31 is changed to clarify that juries may return partial verdicts, either as to multiple defendants or multiple counts.

Rule 32, which covers sentencing and judgment, is amended in two ways. Victims of child pornography are included as victims of "crimes of violence or sexual abuse," and the court will be obliged to give notice to the parties of a possible departure on a ground not identified in the presentence report.

Rule 32.1 establishes a procedural framework for prosecuting a defendant charged with violating probation or supervised release.

Rule 42 is amended by the addition of procedures for appointing an attorney to prosecute a contempt. That rule is also changed to recognize the authority of a magistrate judge to summarily punish a criminal contemnor.

Rule 46 is amended by deletion of the requirement that the government file bi-weekly reports with the court concerning the status of defendants in pretrial detention.

Rule 49 is amended to allow courts to use electronic means to issue notice of an order on any post-arraignment motion.

Rule 52's reference to "plain error or defect" is changed to "plain error" so as to eliminate ambiguity,

Rule 54 is amended to move the definitions previously set forth there to Rule 1.

When Your Client is Here on a Writ - Continued from front

which is pending, and the feds indict for felon in possession stemming from the exact same charge, bring your client here from another jurisdiction and proceed with the prosecution prior to the resolution of the pending state case, it is legally impossible to achieve a concurrent sentence.

The legal impossibility argument presented by probation and the bench stems from the application of a the statute that gives rise to §5G1.3, which is 18 U.S.C. §3584. The statute indicates that a federal judge may run a sentence concurrently, consecutively, or in another other fitting manner, to an undischarged term of imprisonment. Four circuits interpret this language to prohibit a court from ordering a federal sentence concurrently or consecutively to an as yet unimposed sentence.

However, one federal circuit court stands alone in holding that a court may run a sentence consecutively to an as yet unimposed federal sentence. That circuit is the Eleventh: the Court that controls here. The open question currently being examined is whether the converse is true, that a court may run a sentence concurrently with an as yet imposed sentence under the Eleventh Circuit's opinion in United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993).

While this issue is currently being appealed, in the meantime, what can a practitioner do to guarantee a concurrent sentence where a client is in state custody pretrial, and receives a federal sentence that is ordered to run consecutively?

The first option would be for the state to determine the total amount of time it wishes the Defendant to serve, and sentence him to that amount of time less the amount of the federal sentence, with credit for time served. This will achieve the overall sentence objective, and will insure that the federal sentence will not stack.

If the state court is not amenable to the previous option, it may state on the record that it wishes for the Defendant's sentence to run concurrently and request that the state department of corrections designate a federal institution as the place of service for the federal portion of the sentence. The Bureau of Prisons may or may not honor this request.

Another option is for the sentencing judge to indicate clearly in writing that he wishes the state case to run concurrently. If the practitioner makes sure that statement is placed in the Defendant's file with federal probation, the Defendant can request, upon entering federal custody that the Bureau of Prisons reduce his sentence nunc pro tunc for time served in the state institution (a discretionary decision on the part of the Attorney General, the federal probation office, and the federal court). By placing the state judge's statements regarding concurrent sentencing in the federal probation file, the state court's opinion would be clearly represented.

∴

Recent Significant U.S. Supreme Court Decisions

CHRISTOPHER KNIGHT
ASSISTANT FEDERAL DEFENDER

The United States Supreme Court was active in the last part of the 2001 term in death penalty litigation. First, in Atkins v. Virginia, 122 S. Ct. 2242 (2002), the Court held that the death penalty contravened the Eighth Amendment's excessive punishment clause with respect to its application to the mentally retarded. Writing for the majority (joined by O'Connor, Kennedy, Souter, Ginsburg and Breyer), Justice Stevens, quoting Chief Justice Warren's opinion in Trop v. Dulles, 356 U.S. 86 (1958), stated that "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ... The Amendment must draw meaning from the evolving standards of decency that mark the progress of a maturing society." The majority concluded that executing the mentally retarded would not measurably advance the deterrent or retributive purpose of the death penalty. In another death penalty case, Ring v. Arizona, 122 S. Ct. 2428 (2002), the Court struck down Arizona's death penalty statute, following the mandate of Apprendi v. New Jersey, 530 U.S. 455 (2000), that juries must make factual determinations regarding aggravation. Quoting Justice Scalia's concurrence in Apprendi, the Court stated that "all the facts which must exist in order to subject the Defendant to a legally-described punishment *must* be found by a jury." 2002 WL at 9.

In addition to the two important death penalty decisions, the Court also issued opinions in two important cases construing Apprendi. In Harris v. United States, 122 S. Ct. 2406 (2002), the Supreme Court refused to apply Apprendi to 18 U.S.C. § 924(c), federal statute which enhances punishment by requiring consecutive sentences for use and carrying a firearm in connection with a drug trafficking crime. The Court held as a matter of statutory interpretation that the statute defines a single offense, in which brandishing and discharging are sentencing factors to be found by the judge, not offense elements to be found by the jury. 122 S. Ct. 2411-2414. Reaffirming McMillian v. Pennsylvania, 477 U.S. 79 (1986), Justice Kennedy, writing for a five-judge majority, concluded that in enacting Section 924(c), Congress simply dictated the precise weight to be given to one traditional sentencing factor. A motley alliance of Thomas, Souter, Stevens, and Ginsburg dissented, opining that Harris's sentencing range was increased based upon facts neither charged in the indictment nor proved at trial beyond a reasonable doubt.

In another important decision construing Apprendi, United States v. Cotton, 122 S. Ct. 803 (2002), also from the Fourth Circuit, the Court, in a unanimous decision, upheld a conviction and sentence despite the fact that a judge determined drug quantity by a preponderance of the evidence and despite the fact that quantity was not alleged in the indictment. Although the defendant did not object on this ground below, the Court of Appeals, relying on Apprendi, held that omission of drug quantity from the indictment was a jurisdictional defect. The Supreme Court held that the omission of quantity from the indictment did not deprive the Court of jurisdiction to adjudicate the case. Applying the plain error standard of review, and assuming that the defendant's substantial rights were affected, the Court concluded that the omission did not affect the fairness, integrity, or public reputation of the judicial proceedings. The evidence that the conspiracy involved in excess of 50 grams of cocaine base was overwhelming and essentially uncontroverted. [Ed. note: Although this decision appears to be a severe blow to post-Apprendi litigation, there is still room to argue, especially in cases where the evidence is not overwhelming and strenuously controverted.].

Finally, in an important decision originating in Alabama, the Supreme Court held that the Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State failed to provide him counsel during the prosecution of the misdemeanor offense for which he was imprisoned. Alabama v. Shelton, 122 S. Ct. 1764 (2002).

CJA Training Update

Regional Seminars - "**Winning Strategies 2003**"

Portland, Oregon - April 10-11, 2003

Savannah, Georgia - May 29-31, 2003

Denver, Colorado - July 17-19, 2003

Specialty Seminar on Defending Immigration Crimes

Scottsdale, Arizona - September 18-20, 2003

Trial Advocacy Workshop

Williamsburg, Virginia - June 26-28, 2003

Sentencing Advocacy Workshop
"Thinking Outside The Box"

Park City, Utah - August 14-16, 2003

For more information on these seminars and an application form, visit the CLE section of our web-site at:

www.federaldefender.org

Reversed and 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. Opinion 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 282F.3d through 312 F.3d. The summary of recent U.S. Supreme Court decisions usually published in this article is published elsewhere in this newsletter under the heading "Recent Significant U.S. Supreme Court Decisions."

United States Courts of Appeals

In re: Grand Jury Subpoena Dated Oct. 22, 2001, 282 F.3d 156 (2nd Cir. 2002)(Grand jury subpoena for attorney testimony about statements former client made in presence of IRS agents

was quashed because testimony was about attorney's work product.).

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

United States v. Henry, 282 F.3d 242 (3rd Cir. 2002)(District court's determination of drug quantity and identity violated Apprendi and was not harmless.).

United States v. Saenz, 282 F.3d 354 (5th Cir. 2002)(Leave to supplement motion attacking sentence relative to defendant's not receiving plea offer from his trial counsel should have been granted.).

United States v. Fitch, 282 F.3d 364 (6th Cir. 2002)(Plea agreement precluded upward adjustment to base offense level for role as organizer or leader.).

United States v. Jackson-Randolph, 282 F.3d 369 (6th Cir. 2002)(remand to consider appropriateness of $10 million fine, in addition to restitution, for mail fraud and program fraud).

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

United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002)(Proceeds of illegal gambling business were net income or profits of business, not gross income or receipts of business, under money laundering statute.).

Gray v. Klauser, 282 F.3d 633 (9th Cir. 2002)(Arbitrary denial of petitioner's right to present a defense and refusal to admit hearsay statements implicating victim's former boyfriend were constitutional errors and were not harmless.).

United States v. Banks, 282 F.3d 699 (9th Cir. 2002)(Delay of 15-20 seconds after a single knock and announcement by officers executing search warrant was insufficient in duration to satisfy Fourth Amendment safeguards.).

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002)(Defendant's position as a retail store security guard was not a "position of public or private trust" under the guideline provision.).

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

United States v. Lynch, 282 F.3d 1049 (9th Cir. 2002)(Applying Fifth Circuit rule in Collins to facts of case, case would be remanded to determine if evidence supported a finding that defendant stole from a person "directly and customarily engaged in interstate commerce;" created a likelihood that assets of an entity engaged in interstate commerce would be depleted; or victimized a large number of individuals or took a sum so large that there was "some cumulative effect on interstate commerce.").

United States v. Higgins, 282 F.3d 1261 (10th Cir. 2002)(clear error in estimating drug quantity at sentencing).

Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002)(Counsel's deficient performance in failing to investigate, failing to act as reasonably diligent and professional advocate, showing apparent sympathy for state's case, failing to act as loyal advocate, and failing to advance any defensive theory warranted habeas corpus relief.).

United States v. Moyer, 282 F.3d 1311 (10th Cir. 2002)(remand to allow defendant to withdraw guilty plea where defendant not made fully aware of genuine consequences of his plea).

United States v. Schwarz, 283 F.3d 76 (2nd Cir. 2002)(defendant denied effective assistance of counsel by unwaivable conflict of interest; jury exposed to prejudicial extrinsic information; insufficient evidence to support conviction for obstruction of justice).

United States v. Gumbs, 283 F.3d 128 (3rd Cir. 2002)(insufficient evidence in False Claims Act case to prove that defendant knowingly made claim under a federally-funded contract).

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

Cockerham v. Cain, 283 F.3d 657 (5th Cir. 2002)(State convictions became final when out-of-time appeal was decided, not when earlier original direct appeal was decided; Louisiana Supreme Court's validation of "reasonable doubt" jury instruction found to be infirm in Cage v. Louisiana under due process clause was "contrary to established federal law," warranting habeas corpus relief.).

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

Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002)(Arizona's untimely appointment of counsel in capital habeas case warranted relief.).

Brown v. Mayle, 283 F.3d 1019 (9th Cir. 2002)(25 years-life sentence for petty theft violated 8th Amendment proscription of cruel and unusual punishment.).

United States v. Leveque, 283 F.3d 1098 (9th Cir. 2002)(ambiguous mail fraud indictment; insufficient evidence to show that defendant had actual knowledge that elk was taken in violation of Montana law and insufficient evidence to support conspiracy allegations.).

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002)(Failure of counsel to adequately investigate defendant's troubled childhood was deficient and warranted habeas relief.).

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

United States v. Thomas, 284 F.3d 746 (7th Cir. 2002)(insufficient evidence to sustain conspiracy conviction; lack of proof of agreement; no stake in success of conspirator's sales).

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

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

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

United States v. Yu, 285 F.3d 192 (2nd Cir. 2002)(Yu should have been sentenced under 21 U.S.C. § 841(b)(1)(C) since the court, not the jury, made drug quantity determination.).

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

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

United States v. Davis, 285 F.3d 378 (5th Cir. 2002)(Appointment of independent counsel to represent defendant at penalty phase of capital murder case violated defendant's rights under Faretta.).

United States v. Cruz, 285 F.3d 692 (8th Cir. 2002)(insufficient evidence to prove defendant had constructive possession of house where methamphetamine was found and insufficient evidence to prove conspiracy).

United States v. Rodriguez, 285 F.3d 759 (9th Cir. 2002)(Life sentence based on finding at sentencing by preponderance that defendant had distributed in excess of 1000 kg of marijuana was plain error under Apprendi.).

United States v. Molina-Tarazon, 285 F.3d 807 (9th Cir. 2002)(Government failed to justify by showing of diligence and substantial need filing of fat brief.).

United States v. Brown, 285 F.3d 959 (11th Cir. 2002)(Government's pre-trial motion that merely reported on Speedy Trial Act status was not motion resulting in exclusion of time under Speedy Trial Act.).

United States v. Sigmond-Ballesteros, 285 F.3d 1117(9th Cir. 2002)(Defendant's conduct in changing lanes, attempts to obscure face, time of day at which defendant was driving, and absence of rear seat in defendant's truck were insufficient facts upon which to base reasonable suspicion.).

United States v. Mariscal, 285 F.3d 1127 (9th Cir. 2002)(Unsignalled right hand turn was insufficient fact upon which to base reasonable suspicion.).

United States v. Day, 285 F.3d 1167 (9th Cir. 2002)(Counsel's advice that defendant would only be allowed to make sentencing entrapment argument if he proceeded to trial deprived defendant of opportunity intelligently to consider his plea offer and to make informed decision about it and was prejudicial.).

United States v. Howell, 285 F.3d 1263 (10th Cir. 2002)(District court's failure to conduct balancing test between probative value and prejudicial effect of evidence of prosecution witness's prior felony convictions was not harmless error.).

United States v, Aleman, 286 F.3d 86 (2nd Cir. 2002)(remand for court to create record of existence, scope, and effect of immunity agreement).

United States v. Handakas, 286 F.3d 92 (2nd Cir. 2002)(reversed for multiplicitous counts in indictment and for vague "honest services" provision of mail fraud statute; failure of predicate mail fraud counts precluded conviction on money laundering charge).

United States v. Zillgitt, 286 F.3d 128 (2nd Cir. 2002)(Fairness and public reputation of judicial proceedings was seriously affected and warranted reversal for plain error where sentence was in excess of statutory maximum.).

United States v. Onyiego, 286 F.3d 249 (5th Cir. 2002)(legal fees for defending civil collection action not properly included in restitution order).

Bracy v. Schomig, 286 F.3d 406 (7th Cir. 2002)(Inference of bias occurred during penalty phase of capital trial because of presiding judge's practice of accepting bribes in other cases.).

United States v. Barile, 286 F.3d 749 (4th Cir. 2002)(Erroneous exclusion of prior statements affected defendant's substantial rights.).

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

United States v. Henning, 286 F.3d 914 (6th Cir. 2002)(plain error for district court, when granting judgment of acquittal on charge of conspiracy to commit bank fraud, to consider effect on viability of defendant's substantive convictions of its Pinkerton charge, that jury could convict defendant of substantive counts either based upon his own acts or based on acts of co-conspirators).

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

Fernandez v. Roe, 286 F.3d 1073 (9th Cir. 2002)(prima facie showing of Batson violation where prosecutor struck 4 out 7 Hispanics, 21% of strikes were made against Hispanics, Hispanics constituted only 12% of the venire, prosecutor struck the only 2 prospective African-American jurors, and prosecutor failed to engage in any meaningful questioning of minority jurors).

Valenzuela v. United States, 286 F.3d 1223 (11th Cir. 2002)(Admission at extradition hearing of affidavit containing inculpatory statements made by alleged fugitives to DEA agents, in breach of promise of confidentiality, violated due process.).

United States v. Morris, 286 F.3d 1291 (11th Cir. 2002)(Lack of attorney-client relationship between attorney and victims of conspiracy to defraud precluded enhancement for abuse of position of trust.).

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

United States v. Warnick, 287 F.3d 299 (4th Cir. 2002)(Safety valve applied to conviction for aiding and abetting distribution of cocaine within 1000 feet of school.).

United States v. Humphrey, 287 F.3d 422 (6th Cir. 2002)(Failure to determine drug quantity beyond a reasonable doubt violated Apprendi when it resulted in increase of statutory penalties applicable to defendant even though his sentence did not exceed statutory maximum.).

United States v. Pineda-Torres, 287 F.3d 860 (9th Cir. 2002)(Probative value of expert testimony regarding drug-trafficking organizations was outweighed by danger of unfair prejudice.).

United States v. Brown, 287 F.3d 965 (10th Cir. 2002)(Defendant was entitled to instruction on lesser included offense of involuntary manslaughter in voluntary manslaughter prosecution.).

United States v. Haney, 287 F.3d 1266 (10th Cir. 2002)(District Court erred in failing to allow defendant to assert defense of duress in prosecution for possession of escape paraphernalia in prison.).

United States v. Durham, 287 F.3d 1297 (11th Cir. 2002)(District court abused its discretion in failing to make sufficient findings to justify use of stun gun to restrain defendant at trial.).

United States v. Emmanuel, 288 F.3d 644 (4th Cir. 2002)(Treatment of motion for reduction of sentence as a motion to vacate was improper without notice to the defendant that court intended to treat the motion as such so that movant could amend motion to include all grounds for post-conviction relief the movant wished to raise.).

United States v. Henry, 288 F.3d 657 (5th Cir. 2002)(Treating points in criminal history calculation for related conviction from state court was clear error.).

Calvert v. Wilson, 288 F.3d 823 (6th Cir. 2002)(Admission of custodial statement of non-testifying co-defendant violated Confrontation Clause, since there were no circumstantial guarantees of trustworthiness sufficient to overcome presumption of unreliability.).

Caldwell v. Bell, 288 F.3d 838 (6th Cir. 2002)(Instruction on lesser included offense of second degree murder, that malice was presumed where defendant was shown to have used weapon and death is clearly shown to have resulted from its use, violated due process; instruction had a substantial and injurious effect on verdict.).

Stapleton v. Wolfe, 288 F.3d 863 (6th Cir. 2002)(Admission of co-defendant's taped statement to police violated Confrontation Clause and was not harmless.).

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

Melendez v. Pliler, 288 F.3d 1120 (9th Cir. 2002)(State contemporaneous objection rule did not bar consideration of petitioner's Confrontation Clause claim.).

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

Moore v. Schoeman, 288 F.3d 1231 (10th Cir. 2002)(improper hybrid disposition of unexhausted claims by dismissing one without prejudice and the other on the merits).

United States v. Mulero-Joubert, 289 F.3d 168 (1st Cir. 2002)(failure of proof that defendants had actual or constructive notice that their presence in security zone was prohibited by law).

United States v. Burrell, 289 F.3d 220 (2nd Cir. 2002)(life sentence reversed where trial court made drug quantity finding by preponderance).

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002)(Indictment which failed to specify threshold quantity of drugs violated Apprendi.).

United States v. Herrera, 289 F.3d 311 (5th Cir. 2002)(insufficient evidence to show that defendant was "unlawful user" of cocaine so that conviction of possession of firearm by unlawful user could not stand).

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

United States v. Hardy, 289 F.3d 608 (9th Cir. 2002)(District court improperly used retail value instead of wholesale value to calculate loss.).

United States v. Cano, 289 F.3d 1354 (11th Cir. 2002)(insufficient evidence to prove defendant possessed marijuana during relevant time period).

United States v. Runyan, 290 F.3d 223 (5th Cir. 2002)(inadequate linking of images to internet for purpose of proving distribution of child pornography; improper grouping of three counts of convictions affected defendant's substantial rights).

Tse v. United States, 290 F.3d 462 (1st Cir. 2002)(evidentiary hearing needed to determine what counsel advised movant regarding doctrine of specialty and potential consequences of rejecting plea offer).

Everett v. Beard, 290 F.3d 500 (3rd Cir. 2002)(Trial counsel was ineffective for failing to object to jury instruction which permitted jury to convict defendant , who was charged as an accomplice, of first degree murder if his accomplice intended to cause death of the victim.).

Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002)(Petitioner was entitled to evidentiary hearing on claim that juror was improperly influenced by her husband in voting on death sentence; petitioner entitled to evidentiary hearing to explore whether jury was improperly influenced by consideration that he had received death sentence from another jury.).

United States v. Stricklin, 290 F.3d 748 (5th Cir. 2002)(Counsel's failure to object to drug quantity by insisting upon deduction of amount of by-product was ineffective assistance.).

Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002)(Counsel's failure to investigate petitioner's mental health was deficient and prejudiced petitioner).

United States v. Torres-Palma, 290 F.3d 1244 (10th Cir. 2002)(Use of video teleconferencing for sentencing violated rule that defendant be present for sentencing.).

United States v. Miles, 290 F.3d 1341 (11th Cir. 2002)(Court failed to articulate on record fact that prior burglary convictions were committed on separate occasions for purpose of applying Armed Career Criminal Act.).

United States v. Garcia, 291 F.3d 127 (2nd Cir. 2002)(Prior drug conviction was not admissible to show knowledge and intent; informant's lay opinion that defendant knew and understood

asbestos conversation to be coded conversation was inadmissible; erroneous admission of evidence was not harmless.).

United States v. Gordon, 291 F.3d 181 (2nd Cir. 2002)(Tax evasion and mail fraud counts grouped under wrong guideline was plain error; sentence improperly structured; where total punishment exceeds statutory maximums on some counts, sentence should be structured to impose statutory maximum on all such counts, impose the total punishment on the count with a statutory maximum higher than the total punishment, and run the sentences consecutively only to the extent necessary to achieve the total punishment.).

United States v. Dodson, 291 F.3d 268 (4th Cir. 2002)(One year limitations period for filing motion to vacate did not begin to run until Court of Appeals issued mandate affirming district court's ruling as to counts remanded for resentencing.).

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

Roche v. Davis, 291 F.3d 473 (7th Cir. 2002)(Given considerable evidence of mitigating circumstances, counsel's deficient performance in failing to object to defendant being brought to sentencing phase of capital trial in shackles prejudiced defendant.).

Packer v. Hill, 291 F.3d 569 (9th Cir. 2002)(Trial judge's statements and actions during jury deliberations were unduly coercive in violation of Defendant's Fourteenth Amendment due process rights.).

United States v. Adamson, 291 F.3d 606 (9th Cir. 2002)(Limitation on cross-examination of defendant's brother violated defendant's Confrontation Clause rights and was not harmless; fatal variance between indictment and proof affirmatively misled defendant and obstructed his defense.).

Aron v. United States, 291 F.3d 708 (11th Cir. 2002)(Movant was entitled to evidentiary hearing on issue of whether he exercised due diligence in discovering appellate counsel's allegedly deficient failure to appeal his sentence.).

United States v. Sandlin, 291 F.3d 875 (6th Cir. 2001)(improper aggregation of quantities of methamphetamine manufactured in three batches over a three month period).

United States v. Osborne, 291 F.3d 908 (6th Cir. 2002)(violation of sentencing rule requiring district court to rule on any objections to pre-sentence report and to make, as to each matter controverted, either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing).

United States v. Schaefer, 291 F.3d 932 (7th Cir. 2002)(failure to adequately articulate and justify relevant conduct relied on for loss calculation).

United States v. Jordan, 291 F.3d 1091 (9th Cir. 2002)(Life sentence for offenses involving more than 50 grams of methamphetamine violated Apprendi because drug quantities not determined by jury beyond a reasonable doubt; four-level enhancement for leadership role not justified.).

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002)(Sentence for inducing interstate travel to engage in prostitution exceeded statutory maximum; district court erred by failing to give defendant notice of intent to impose consecutive sentences and of upward departure; determination required of whether one of victims was uniquely vulnerable.).

United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002)(Alien's sentence could not be enhanced on basis of California theft conviction.).

United States v. Snyder, 291 F.3d 1291 (11th Cir. 2002)(In prosecution for making false statements to FDA, district court erred in finding that loss sustained to stockholders of pharmaceutical company could not be determined.).

McKethan v. Mantello, 292 F.3d 119 (2nd Cir. 2002)(Issues were exhausted because determined by state court or procedurally barred because not filed in timely fashion.).

United States v. Spruill, 292 F.3d 207 (5th Cir. 2002)(Court could reverse based on no determination of factual basis for plea despite plea agreement limiting appeal to Second and Fifth Amendment issues; defendant could not be convicted of possessing a firearm while subject to a protective order where federal requirement that order be entered "after a hearing" and no hearing was conducted.).

United States v. Wynn, 292 F.3d 226 (5th Cir. 2002)(remand necessary for findings as to whether attorney was deceptive about filing motion for post-conviction relief).

United States v. Figueroa-Arenas, 292 F.3d 276 (1st Cir. 2002)(Contempt order against attorney was vacated because she did not file motion to dismiss or reassign case in bad faith.).

Rubin v. Gee, 292 F.3d 396 (4th Cir. 2002)(Habeas relief warranted where trial attorneys had actual conflict of interest which adversely affected their performance.).

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

Vincent v. Jones, 292 F.3d 506 (6th Cir. 2002)(Granting motion for directed verdict was grant of acquittal such that jeopardy attached.).

United States v. Descent, 292 F.3d 703 (11th Cir. 2002)(Modified jury instruction violated rule requiring trial judge to inform counsel of its proposed action on requested jury instructions prior to closing arguments.).

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

United States v. Kim, 292 F.3d 969 (9th Cir. 2002)(Defendant was in custody triggering Miranda warning requirement despite fact that she initially came to store voluntarily to check on her son.).

United States v. Sandoval-Venegas, 292 F.3d 1101 (9th Cir. 2002)(defendant improperly treated as career offender because one of the predicate offenses was charged as generic burglary, not burglary of a dwelling).

United States v. Errol D., Jr., 292 F.3d 1159 (9th Cir. 2002)(District court lacked jurisdiction to try juvenile for burglary of a government building under the Indian Major Crimes Act (IMCA), which requires that the offense be against the person or property of another Indian or another person.).

Hall v. Scott, 292 F.3d 1264 (10th Cir. 2002)(Petitioner made substantial and timely showing of denial of a constitutional right so as to require issuance of COA.).

Broadwater v. United States, 292 F.3d 1302 (11th Cir. 2002)(District court was required to provide explanation of

its summary denial of post-conviction motion in order to provide Court of Appeals with adequate basis for review.).

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

United States v. Booze, 293 F.3d 516 (D.C. Cir. 2002)(District Court applied incorrect standard in determining whether attorney's advice to defendant to accept plea was ineffective assistance; standard should have been whether counsel made a "plainly incorrect" estimate of sentence due to ignorance of the law; remanded for evidentiary hearing to determine if plea offer was made.).

United States v. Keresztury, 293 F.3d 750 (5th Cir. 2002)(Plea agreement, including appeal waiver, was voided by government's opposition to reduction for acceptance of responsibility; district court erroneously based offense level on weight of LSD/Vodka mixture and not on pure LSD.).

United States v. Hernandez-Bautista, 293 F.3d 845 (5th Cir. 2002)(Evidence did not support convictions for possession of marijuana with intent to distribute.).

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

United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002)(New trial warranted because expert testimony of secret service agents was not relevant.).

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

United States v. Guerra, 293 F.3d 1279 (10th Cir. 2002)(In counterfeit cigar prosecution, district court erred by relying in part on the value of genuine cigars and by basing the number of "infringing items" on the number of labels found on the premises of each defendant when it had based the value of "infringing items" on the value of cigars, not labels.).

United States v. Hylton, 294 F.3d 130 (D.C. Cir. 2002)(Counsel's failure to make Kastigar objection to co-conspirator's testimony against defendant was ineffective assistance, where defendant's post-arrest debriefing statements made without valid waiver of 5th Amendment rights were a cause of co-defendant's decision to plead guilty and testify against defendant.).

Norde v. Keane, 294 F.3d 401 (2nd Cir. 2002)(Trial court's refusal to allow counsel to consult with her client during period in which defendant was removed from courtroom for disruptive behavior and its communication with him through a court officer rather than through counsel deprived defendant of his 6th Amendment right to counsel.).

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

Davis v. Combes, 294 F.3d 931 (7th Cir. 2002)(Defendant was entitled to withdraw his plea freely and without inquiry where plea had not yet been accepted by the court.).

Cox v. United States, 294 F.3d 959 (8th Cir. 2002)(Where counsel promised to petition for certiorari but failed to, judgment affirming conviction would be vacated and new judgment entered to allow timely filing of the petition.).

United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002)(Exhibit, which was INS officer's notes of his interview with defendant, was not admissible as an admission, as a business or public record, and its admission was not harmless.).

United States v. McCarrick, 294 F.3d 1286 (11th Cir. 2002)(insufficient evidence of specific intent to defraud bank).

United States v. Flaharty, 295 F.3d 182 (2nd Cir. 2002)(Defendants could not be convicted of both CCE and lesser included offense of possession with intent to distribute.).

United States v. Hart, 295 F.3d 451 (5th Cir. 2002)(In false statement prosecution on FSA loan application, district court abused its discretion by allowing government witness to testify as expert witness as to what debts should be reported.).

Moore v. Bryant, 295 F.3d 771 (7th Cir. 2002)(State court did not clearly rely on waiver as independent and adequate state law ground for denying ineffective assistance of counsel claim.).

United States v. Ahumala-Aguilar, 295 F.3d 943 (9th Cir. 2002)(Immigration judge deprived alien of statutory right to counsel at group deportation proceeding; waiver of right to appeal was not knowing and voluntary.).

Barresi v. Maloney, 296 F.3d 48 (1st Cir. 2002)(Habeas petitioner satisfied exhaustion requirement by citing federal cases in support of intermediate state appellate court filings, although he did not specifically highlight federal claims in state court.).

Carpenter v. Vaughn, 296 F.3d 138 (3rd Cir. 2002)(Defendant was denied effective assistance of counsel by counsel's failure to object during penalty phase capital trial to trial judge's misleading response to jury question about availability of parole if defendant received life sentence.).

United States v. Coward, 296 F.3d 176 (3rd Cir. 2002)(remand for district court determination of whether government can present additional evidence in support of claim of reasonable suspicion for stop).

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

United States v. Sayles, 296 F.3d 219 (4th Cir. 2002)(no evidence that defendant functioned as organizer, leader, manager or supervisor so as to justify 4-level enhancement).

Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002)(remanded because district court did not consider national security implications of appointing counsel for Afghanistan war detainee and ordering unfettered access to counsel; however, government's motion to dismiss habeas petition was denied).

United States v. Tankersley, 296 F.3d 620 (7th Cir. 2002)(erroneous upward adjustment for obstructing administration of justice because no evidence that defendant obstructed trial or investigation of the obstruction count).

Bennett v. Mueller, 296 F.3d 752 (9th Cir. 2002)(State has burden to plead and prove defense of procedural default in federal habeas corpus case; question of whether California's untimeliness bar to state habeas relief was adequate to support procedural default defense on federal habeas review required remand for consideration of issue by district court under burden-shifting analysis.).

Majoy v. Roe, 296 F.3d 770 (9th Cir. 2002)(Actual innocence claim, if sustained, overcomes defense based on time-barred claims.).

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

Foster v. Booher, 296 F.3d 947 (10th Cir. 2002)(Federal habeas petitioner is "in custody" where he has completed serving first of two consecutive sentences imposed by two different courts at different times where he is still serving second sentence.).

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

United States v. Palmer, 296 F.3d 1135 (D.C. Cir. 2002)(Successive motion bar under AEDPA does not apply where district court recharacterizes untimely motion for new trial as motion to vacate, set aside, or correct conviction and does not advise defendant of its sua sponte recharacterization without giving defendant opportunity to object.).

United States v. Venske, 296 F.3d 1284 (11th Cir. 2002)(Failure of jury verdict to specify which of two objects of money laundering conspiracy was the subject of the verdict and judge's failure to determine at sentencing beyond a reasonable doubt which offense the defendant conspired to commit was plain error.).

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

United States v. Doe, 297 F.3d 76 (2nd Cir. 2002)(Sentence exceeding statutory maximum for unquantified drug offenses was plain error.).

United States v. Gil, 297 F.3d 93 (2nd Cir. 2002)(remanded for Brady violation).

United States v. Butler, 297 F.3d 505 (6th Cir. 2002)(Delegation by district court to Tax Court or to the IRS for restitution determination in tax evasion prosecution was plain error.).

Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002)(Defense counsel's failure to investigate or introduce evidence that petitioner's brother was actual shooter in attempted murder prosecution was ineffective assistance of counsel warranting habeas relief.).

United States v. Wiseman, 297 F.3d 975 (10th Cir. 2002)(Defendant was not procedurally barred from asserting a Castillo claim, and Teague rule did not bar retroactive application of Castillo, requiring jury determination of weapon type in prosecution for using semiautomatic weapon during crime of violence, because court in Castillo did not announce new rule of criminal procedure.).

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

United States v. Hardman, 297 F. 3d 1116 (10th Cir. 2002)(remand to determine whether the government's exclusion of eagle feather permits to Native American religious practitioners in non-federally recognized tribes is the least restrictive means of advancing the governmental interest to preserve the eagle population).

United States v. Vallejo, 297 F.3d 1154(11th Cir. 2002)(insufficient factual findings to support sentence based upon multi-object conspiracy).

United States v. Pendergraft, 297 F.3d 1198 (11th Cir. 2002)(There is no extortion under the Hobbs Act where there are threats to sue the county unless it settled; no scheme to defraud under the mail fraud statute is present where false affidavits are attached to a motion and mailed to the opponent).

Ching v. United States, 298 F. 3d 174 (2nd Cir. 2002)(Habeas petition was properly treated as a motion to vacate, but the motion should have been construed as a motion to amend pending post conviction motion rather than as second or successive motion).

Hill v. Roe, 298 F. 3d 796 (9th Cir. 2002)(Denial of the federal writ of habeas corpus remanded to determine the adequacy of California's Hill ruling in order to support procedural default of the federal habeas petition).

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

United States v. Lipscomb, 299 F. 3d 303 (5th Cir. 2002)(Conviction was reversed, sentence vacated and remanded where the court abused its discretion by *sua sponte* ordering an intra-district transfer over the defendant's objections and where the federal bribery statute was applicable to the defendant, but the defendant had preserved as-applied constitutional challenges to the statute.).

United States v.Martinez-Espinoza , 299 F. 3d 414 (5th Cir. 2002)(An indictment which was filed prior to the expiration of the speedy trial deadline, but did not charge the same offense as the subsequent indictment, did not toll speedy trial deadline. In accordance with its usual practice, the Court of Appeal would remand for a determination of whether the new indictment should be dismissed with or without prejudice).

United States v. Solis, 299 F. 3d 420 (5th Cir. 2002)(reversed and remanded due to insufficient evidence and Apprendi errors).

United States v. Cleaves, 299 F. 3d 564 (6th Cir. 2002)(Plain error resulted where the district court failed to instruct the jury to determine both the type of drug and drug quantity. Reversible error occurred during the post-verdict determination of the drug amount and following decisions to forego a special verdict as to drug type).

Sawyer v. Hofbaufer , 299 F. 3d 605 (6th Cir. 2002)(By failing to address state's non-disclosure of negative forensic test, the state appellate court engaged in an unreasonable application of federal law resulting in a sufficient ground for relief).

Rios v. Rocha , 299 F. 3d 796 (9th Cir. 2002)(Ineffective assistance of counsel occurred where the defense counsel failed to interview more than one witness to a shooting before deciding to abandon a misidentification defense.).

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

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

United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002)(Proceeding to trial does not *vel non* preclude reduction for acceptance of responsibility.).

United States v. Geston, 299 F.3d 1130 (9th Cir. 2002)(Prosecutor's questions to law enforcement officers were improper because they compelled opinion evidence on veracity of government witnesses.).

United States v. Rivera-Rosario, 300 F.3d 1 (1st Cir. 2002)(Violations of Jones Act requiring that all proceedings be conducted in the English language were plain error as to two defendants.).

United States v. Friedman, 300 F.3d 111 (2nd Cir. 2002)(insufficient evidence to convict of conspiracy in connection with extortion plot).

United States v. Campbell, 300 F.3d 202 (2nd Cir. 2002)(Errors in calculating sentence required remand.).

United States v. Reyes, 300 F.3d 555 (5th Cir. 2002)(plain error for district court not to mention sentencing guidelines).

Hill v. Anderson, 300 F.3d 679 (6th Cir. 2002)(Issue of petitioner's mental retardation raised serious issue regarding voluntariness of his confession, requiring remand for dismissal of unexhausted Atkins claim, stay of exhausted claims, stay conditioned on promptly seeking relief from state court on Atkins claim.).

United States v. Prevatte, 300 F.3d 792 (7th Cir. 2002)(transfer of petition brought under general habeas corpus statute in jurisdiction where petitioner incarcerated to district where he was convicted where there was intervening Supreme Court decision giving rise to colorable claim).

United States v. Rea, 300 F.3d 952 (8th Cir. 2002)(In prosecution under federal arson statute, there was an insufficient factual basis to support conditional plea because of insufficient evidence that church annex was used in interstate commerce or in any activity affecting interstate commerce.).

Gentry v. Roe, 300 F.3d 1007 (9th Cir. 2002)(State court determination that petitioner was not denied effective assistance of counsel was objectively unreasonable application of federal law warranting habeas relief.).

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

United States v. Culliton, 300 F.3d 1139 (9th Cir. 2002)(Questions on medical form for pilot certification were fundamentally ambiguous and could not form basis for conviction of making false statement.).

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

United States v. Melendez, 301 F.3d 27 (1st Cir. 2002)(delinquency adjudications double-counted).

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

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

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

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

United States v. Timmins, 301 F.3d 974 (9th Cir. 2002)(Court erroneously determined that defendant was competent to decline a plea bargain; 294 month sentence for unarmed bank robbery exceeded the 20-year statutory maximum and was reduced to 240 months.).

United States v. Finley, 301 F.3d 1000 (9th Cir. 2002)(Defense expert's testimony was both reliable and relevant; defense did not fail to give notice as to expert's testimony.).

United States v. Pace, 301 F.3d 1034 (9th Cir. 2002)(improper venue in Arizona because no direct or causal connection in Arizona to misuse of the wires).

Weekes v. Fleming, 301 F.3d 1175 (10th Cir. 2002)(Interruption of federal sentence when defendant was returned to Idaho entitled him to credit on the federal sentence.).

United States v. Harris, 302 F.3d 72 (2nd Cir. 2002)(remand of restitution order for consideration of defendant's ability to pay).

United States v. Peppers, 302 F.3d 120 (3rd Cir. 2002)(inadequate inquiry by district court into defendant's Faretta request).

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

United States v. Cordona, 302 F.3d 494 (5th Cir. 2002)(Prejudice was presumed, requiring no showing of actual prejudice, for establishment of Sixth Amendment speedy trial right violation.).

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

Campbell v. Rice, 302 F.3d 892 (9th Cir. 2002)(Exclusion of petitioner from in chambers hearing regarding conflict of interest of his counsel was violation of due process.).

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

United States v. Quach, 302 F.3d 1096 (9th Cir. 2002)(Government required at sentencing to make good faith evaluation of defendant's assistance up to date of sentencing; reassignment of sentencing judge was advisable in order to preserve appearance of justice.).

United States v. Allen, 302 F.3d 1260 (11th Cir. 2002)(Defendant was entitled to have jury instructed that government must prove that defendant was involved with both marijuana and cocaine, in indictment charging conspiracy to possess with intent to distribute both substances, following United States v. Dale, 178 F.3d 429 (6th Cir. 1999) and United States v. Rhymes, 196 F.3d 207 (4th Cir. 1999); Dale-Rhymes violation and Apprendi violation for imposing life sentences in excess of statutory maximum required reversal.).

United States v. Petrie, 302 F.3d 1280 (11th Cir. 2002)(District court lacked jurisdiction to enter preliminary forfeiture order six months after sentencing.).

United States v. Thomas, 303 F.3d 138 (2nd Cir. 2002)(insufficient findings on credibility of prosecution's explanations for peremptory challenges of two jurors).

Ryan v. Miller, 303 F.3d 231 (2nd Cir. 2002)(Police officer's testimony was hearsay implicitly containing codefendant's accusation of the defendant in violation of Confrontation Clause; allowance of testimony was unreasonable application of clearly established federal law and was not harmless.).

Lyons v. Mendez, 303 F.3d 285 (3rd Cir. 2002)(Imposition of additional, retrospective punishment violated ex post facto clause.).

Mendez v. Artuz, 303 F.3d 411 (2nd Cir. 2002)(Suppression of material evidence that third party in custody in another jurisdiction hired hit-man to kill shooting victim was Brady violation requiring habeas relief.).

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

United States v. Casado, 303 F.3d 440 (2nd Cir. 2002)(Search of defendant's pocket during Terry stop was unreasonable.).

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

Beaty v. Stewart, 303 F.3d 975 (9th Cir. 2002)(Where defendant entered into agreement that group sessions would be confidential, he was entitled to evidentiary hearing on claim that confession he gave to psychiatrist was rendered involuntary on ground of breach of confidentiality.).

Scott v. Mullin, 303 F.3d 1222 (10th Cir. 2002)(State's failure to disclose exculpatory evidence provided cause to excuse petitioner's procedural default of Brady claim.).

United States v. Prouty, 303 F.3d 1249 (11th Cir. 2002)(Failure to afford defendant opportunity to allocute was plain error; delegation of restitution payment schedule to probation office was improper.).

Lam v. Kelchner, 304 F.3d 256 (3rd Cir. 2002)(State court's conclusion that petitioner's incriminating statements to officers were voluntary was objectively unreasonable, warranting habeas relief.).

United States v. Reedy, 304 F.3d 358 (5th Cir. 2002)(Prosecution erroneously permitted to group child pornography counts by each individual image instead of by website.).

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

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

Brown v. Sternes, 304 F.3d 677 (7th Cir. 2002)(Failure to investigate petitioner's psychiatric condition and failure to demand action on unexecuted subpoena for medical records resulted in prejudice to petitioner, and state court's determination to the contrary was an unreasonable application of federal law.).

Lott v. Mueller, 304 F.3d 918 (9th Cir. 2002)(Remand required to determine if equitable tolling to limitations period for pro se petitioner's habeas petition applied to petitioner's claim that he was denied access to his legal files.).

United States v. Proffit, 304 F.3d 1001 (10th Cir. 2002)(insufficient evidence for application of vulnerable victim enhancement).

United States v. Ramirez, 304 F.3d 1033 (10th Cir. 2002)(Competency evaluation is required absent findings of an insufficient factual basis for a motion for a competency evaluation.).

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

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

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

United States v. Reyes-Maya, 305 F.3d 362 (5th Cir. 2002)(Prior misdemeanor conviction for criminal mischief should have been excluded from criminal history score, and error was not harmless.).

United States v. Green, 305 F.3d 422 (6th Cir. 2002)(Crime of failure to appear had to be grouped with underlying narcotics conspiracy for sentencing.).

Miller v. Collins, 305 F.3d 491 (6th Cir. 2002)(Habeas statute of limitations was equitably tolled from date of his application to Ohio Court of Appeals to reopen his appeal to date petitioner received notice of the decision; state waived argument to the contrary.).

Ford v. Hubbard, 305 F.3d 875 (9th Cir. 2002)(Dismissal of claim without prejudice was prejudicial error; remand necessary to develop record on claim that appellate attorney's failure to provide petitioner with legal papers rose to level of "extraordinary circumstances" for purposes of equitable tolling.).

United States v. Graham, 305 F.3d 1094 (10th Cir. 2002)(Separate counts for individual sales of explosives from defendant's store were multiplicitous.).

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

United States v. Tolbert, 306 F.3d 244 (5th Cir. 2002)(Factoring-scheme counts should have been grouped with bank fraud count.).

United States v. Tocco, 306 F.3d 279 (6th Cir. 2002)(remand to consider whether defendant participated in Hobbs Act conspiracy).

United States v. Chance, 306 F.3d 356 (6th Cir. 2002)(Evidence did not support conviction for conspiring to obstruct enforcement of state criminal laws.).

United States v. Davis, 306 F.3d 398 (6th Cir. 2002)(error in failing to set restitution schedule).

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

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002)(Capital case penalty phase instruction which directed jury to determine whether murder involved "torture, depravity of mind, or mutilation of the victim" was unconstitutional and not harmless error.).

McQuillon v. Duncan, 306 F.3d 895 (9th Cir. 2002)(Panel rescinding grant of parole erred in ruling that granting panel had not thoroughly considered nature of crimes; mere detailing of prior crimes did not support rescission.).

Luna v. Cambra, 306 F.3d 954 (9th Cir. 2002)(Defense counsel's deficient performance in failing to call alibi witnesses and in failing to interview and obtain inculpatory statement from exonerating witness was prejudicial under Strickland.).

Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002)(Trial counsel's failure to investigate, obtain, or present evidence of mitigating circumstances to sentencing jury was ineffective assistance.).

Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002)(Stay of execution granted to await Supreme Court's forthcoming decision in Abdur'Raham v. Bell, ____U.S. ____, 122 S. Ct. 1605, 152 L. Ed. 2d 620 (2002) on issue of whether every Rule 60(b) motion constitutes a "second or successive" habeas petition as a matter of law.). [Ed. note: The Supreme Court has quashed the writ in Abdur'Raham as improvidently granted.].

United States v. Gallant, 306 F.3d 1181 (1st Cir. 2002)(District court lacked discretion to deny additional point for acceptance of responsibility where defendant was found to have accepted responsibility and was awarded two points.).

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

United States v. Quintieri, 306 F.3d 1217 (2nd Cir. 2002)(Imposition of same fine on remand was plain error where fine amount was no longer appropriate under Sentencing Guidelines, given reduction in base offense level.).

Marshall v. Hendricks, 307 F.3d 36 (3rd Cir. 2002)(inadequate record to determine if trial counsel's assistance at penalty phase of capital trial was deficient).

Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002)(Excerpts from alleged rape victim's diary were admissible on issues of consent and improper motive, and exclusion from evidence was not harmless; violation of right to confront victim.).

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

United States v. Carbullido, 307 F.3d 957 (9th Cir. 2002)(Second arson prosecution, under doctrine of collateral estoppel, was barred by double jeopardy.).

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

United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002)(Defendants did not commit mail fraud; remand required for court to set restitution schedule.).

McIver v. United States, 307 F.3d 1327 (11th Cir. 2002)(As a matter of first impression, successful motion to file an out-of-time notice of appeal does not render a subsequent collateral challenge "second or successive" under AEDPA.).

United States v. Dixon, 308 F.3d 229 (3rd Cir. 2002)(Concurrent 75 month sentences exceeded 60 month statutory maximum.).

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

United States v. Lawrence, 308 F.3d 623 (6th Cir. 2002)(findings insufficient as to alleged perjury to support enhancement for obstruction of justice).

Griffin v. Rogers, 308 F.3d 647 (6th Cir. 2002)(remand to determine if equitable tolling applied during period of pendency of initial habeas petition).

United States v. Yousif, 308 F.3d 820 (8th Cir. 2002)(Highway checkpoint program violated Fourth Amendment; no reasonable individualized suspicion to justify stop; consent involuntary; remand to determine voluntariness of statements.).

United States v. Barlow, 308 F.3d 895 (8th Cir. 2002)(Court's failure to consider officer's registration check printout, which was admitted into evidence at plea hearing, and which bore on officer's credibility, before denying defendant's renewed suppression motion made at the plea hearing, was error.).

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

United States v. Baptiste, 309 F.3d 275 (5th Cir. 2002)(Imposition of consecutive sentences for multiple uses of firearms to advance single drug conspiracy violated Double Jeopardy Clause.).

United States v. Booth, 309 F.3d 566 (9th Cir. 2002)(Imposition of upward departure for victim's desperation was barred for lack of notice.).

United States v. Gonzalez-Torres, 309 F.3d 594 (9th Cir. 2002)(Lack of proof that defendant entered the United States was fatal to illegal entry counts under 18 U.S.C. § 1325.).

United States v. Holloway, 309 F.3d 649 (9th Cir. 2002)(Offense under Federal Bank Robbery Act is included within Hobbs Act offense for double jeopardy purposes.).

United States v. Sims, 309 F.3d 739 (10th Cir. 2002)(improper extension of criminal history from Category VI to hypothetical Category IX).

United States v. Williams, 309 F.3d 762 (11th Cir. 2002)(Period of continuance was not excludable under Speedy Trial Act because insufficient evidence in record that continuance served ends of justice; violation required dismissal without prejudice.).

Bond v. Moore, 309 F.3d 770 (11th Cir. 2002)(Limitations period for federal habeas petition begins to run when time expires for filing petition for certiorari with U.S. Supreme Court from denial of discretionary review of denial of state postconviction relief.).

United States v. Fenton, 309 F.3d 825 (3rd Cir. 2002)(Where defendant did not possess any firearms when he entered store to

steal firearms and did not use the stolen firearms to commit any crimes after the theft, his sentence for possession by felon of firearm could not be enhanced for use or possession of firearm in connection with another felony offense.).

United States v. Carnes, 309 F.3d 950 (6th Cir. 2002)(Warrantless search and seizure of audiotapes was not supported by probable cause.).

United States v. Bello, 310 F.3d 56 (2nd Cir. 2002)(Ban on watching television during home detention was impermissible condition under facts.).

United States v. Ramon, 310 F.3d 317 (5th Cir. 2002)(District court's question as to whether "there was anything else that you-all want to talk about" did not comply with allocution rule.).

United States v. Bass, 310 F.3d 321 (5th Cir. 2002)(Supervisory relationship was lacking in order to prove CCE count; counsel's failure to raise sufficiency of evidence issue on appeal was prejudicial.).

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

United States v. McLevain, 310 F.3d 434 (6th Cir. 2002)(Alleged drug paraphernalia was not immediately apparent so as to justify seizure based on plain view.).

Manning v. Bowersox, 310 F.3d 571 (8th Cir. 2002)(Use of informants to elicit incriminating statements from defendant after he had already been charged violated defendant's right to counsel.).

United States v. Quarrell, 310 F.3d 664 (10th Cir. 2002)(In prosecution under the Archaeological Resources Protection Act, district court abused its discretion in ordering restitution for loss to architectural value; insufficient findings to support obstruction of justice enhancement.).

United States v. Peter, 310 F.3d 709 (11th Cir. 2002)(Coram nobis lay where defendant's alleged misrepresentations on application for alcoholic beverage licenses did not violate mail fraud statute.).

Castro v. United States, 310 F.3d 900 (6th Cir. 2002)(District court is required to issue or deny COA after defendant files notice of appeal, even though defendant did not move for COA.).

United States v. Bartholomew, 310 F.3d 912 (6th Cir. 2002)(Imposition of sentence in excess of 60 month statutory maximum was plain error.).

United States v. Dominguez Benitez, 310 F.3d 1221 (9th Cir. 2002)(Failure of district court to advise defendant before his plea that he could not withdraw his plea affected his substantial rights, and thus amounted to plain error.).

United States v. Lott, 310 F.3d 1231 (10th Cir. 2002)(Failure to hold hearing on substitution of counsel motion under harmless error standard required remand.).

Wallace v. Nash, 311 F.3d 140 (2nd Cir. 2002)(Pool cue was not inherently a weapon so as to justify conviction for possession of weapon based on striking another inmate with a pool cue.).

United States v. Couto, 311 F.3d 179 (2nd Cir. 2002)(District court had discretion to evaluate defendant's claim of innocence; counsel ineffective for misrepresenting to defendant deportation consequences of his guilty plea.).

United States v. Goldin, 311 F.3d 191 (3rd Cir. 2002)(Special assessment exceeded amount allowed by statute.).

United States v. Silleg, 311 F.3d 557 (2nd Cir. 2002)(Diminished capacity may form basis of downward departure in child pornography case; district court may have misapprehended its authority to downwardly depart.).

United States v. Ho, 311 F.3d 589 (5th Cir. 2002)(clearly erroneous finding that defendant committed an "ongoing, continuous, or repetitive discharge" in Clean Air Act case; remand to determine extent of enhancement for organizer role.).

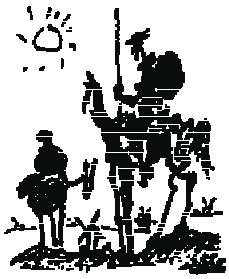
United States v. Portillo-Aguirre, 311 F.3d 647 (5th Cir. 2002)(Extended detention after border stop was unreasonable seizure under Fourth Amendment; government failed to prove that defendant's consent to search was act of free will and not product of extended detention.).

Depew v. Anderson, 311 F.3d 742 (6th Cir. 2002)(Inflammatory and misleading statements by prosecutor during penalty phase of capital murder case violated Eighth Amendment; comment on petitioner's refusal to testify violated Fifth Amendment.).

Jorss v. Gomez, 311 F.3d 1189 (9th Cir. 2002)(Habeas action was timely because equitably tolled during pendency of state collateral proceeding and for 30 days thereafter.).

United States v. Glenn, 312 F.3d 58 (2nd Cir. 2002)(Drug dealer's lay testimony about how drug dealers carry handguns was inadmissible; insufficient evidence to prove flight; false exculpatory statement by accused, standing alone, insufficient to convict.).

United States v. Boyd, 312 F.3d 213 (6th Cir. 2002)(Government failed to prove that defendant distributed material involving sexual exploitation of minors, precluding 5 level enhancement.).



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
(251) 433-0910 / 433-0686 Fax
E-mail: info@federaldefender.org
Web site: **www.federaldefender.org**