

EFFECTIVE ASSISTANCE

Newsletter for CJA Panel Attorneys · Vol. 1 number 9 · April - June 2002

The High-Tech Issue

CHRIS FEASTER
COMPUTER SYSTEMS ADMINISTRATOR

Don't be surprised in your next hearing by an attorney educating you while using the new high-tech equipment in the 2nd floor courtrooms against you! In case you aren't aware, Chuck Diard's, the U.S. District Clerk for the Southern District of Alabama, renovations to the 2nd floor courtrooms making the rooms high-tech are almost completed. If you missed our annual CJA seminar last month where we presented the updates, you will want to read on.

The juror boxes now have an LCD screen for every two jurors to allow viewing of information presented from the computer, document camera, VCR, or other video device. An LCD projector installed in the courtroom will simultaneously project the same information onto a large screen for viewing by everyone in the courtroom. For

the hard-of-hearing, the new audio system will provide for wireless headphones that not only can amplify, but also provide the audio from a translator in both ears or just one ear, allowing for listening to either or both languages simultaneously.

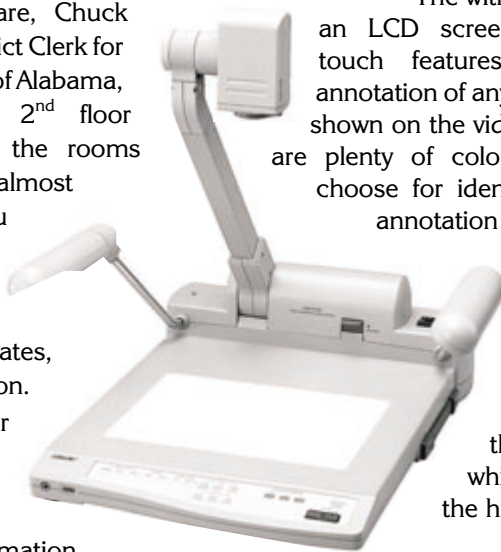
The witness stand now has an LCD screen which includes touch features that allow for annotation of any information being shown on the video screens. There are plenty of colors from which to choose for identifying the printed annotation of a particular witness. For the record, any information displayed on the screens can be printed with the video printer which is housed in the high-tech lectern.

Counsel will enjoy new features which include many connections for their computer. This new connectivity allows for the computer to play audio/video clips, display TrialDirector or PowerPoint style presentations, perform Westlaw or

Lexis research, and also receive real-time court reporting, all from counsel table. For Westlaw/Lexis access you will need to request access in advance of your hearing date. For real-time court reporting, you will need to make payment arrangements in advance. LCD screens and microphones are also provided at counsel tables.

For the attorney who wants to operate a laptop from the lectern, there is a new high-tech lectern that provides ample space for a laptop and case materials. Built into the lectern is a VCR (including S-VHS format), video printer,

Continued on next page



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. 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 258 F.3d through 281 F.3d and 122 S. Ct.

United States Supreme Court

Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726, 152 L. Ed. 2d 670 (2002)(Defendant was entitled to a jury instruction under Simmons that the only alternative punishment to death is life without parole.)

Lee v. Kemna, 534 U.S. 362, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002)(Denial of petitioner's continuance motions due to

Continued on page 3

Who Has The Body?

How to accomplish concurrent federal and state sentences

K. LYN HILLMAN CAMPBELL
ASSISTANT FEDERAL DEFENDER

Over the years, lawyers and judges struggled with the proper mechanics for achieving concurrent sentences when one sentence is a state sentence and one sentence is a federal sentence. The easiest way to determine the proper mechanics rests on which jurisdiction has actual

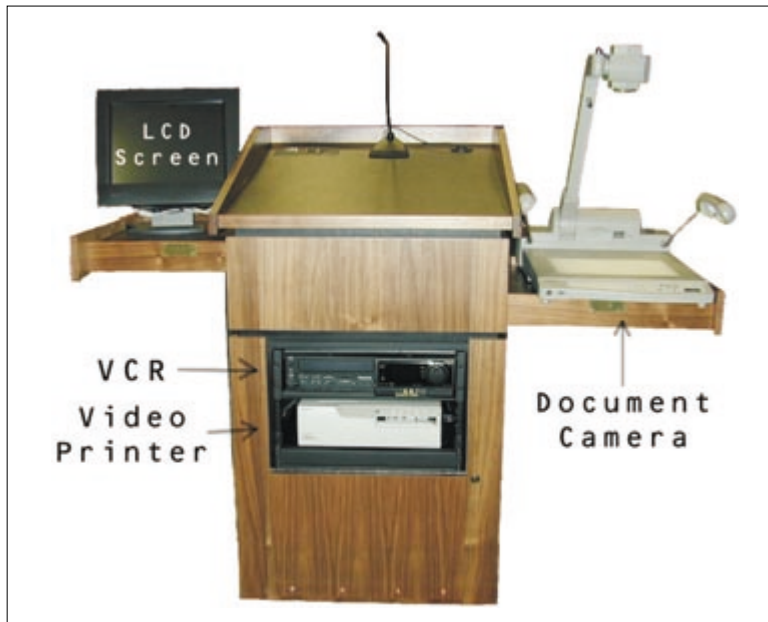
custody of the inmate. In other words; Who has the body?

If the inmate is in state custody, a federal judge must explicitly state that the sentence is to run concurrently with a state sentence in order to achieve that result. If the federal judge does not so state, the Bureau of Prisons treats the sentences as consecutive sentences, even if the state judge ordered the sentences to run concurrently.

Continued on next page

and all of the necessary connections for the audio & video system. The drawers on the sides of the lectern hold an LCD screen and a document camera. For you that are unfamiliar with the document camera, you can think of it as functioning similar to an overhead projector, but providing much more functionality. The document camera, as shown on the front page and on the lectern, has a camera mounted above the surface where you can place documents, or even bulky items, which can be displayed on all of the screens throughout the courtroom. In addition to the side-mount lights, there is a light in the base of the unit for displaying x-ray charts on the screens. The document camera is easy to operate, and is something you should become familiar with first.

The Judge and Courtroom Deputy have touch panels which control the complete audio & video system. From this panel they have access to microphone/speaker volume levels, VCR controls, video printer, computer input, large screen raising & lowering, and the all important "kill switch."



New High-Tech lecterns installed in both 2nd floor federal courtrooms

expensive equipment sometimes required to adequately represent their client. Counsel may now arrive in the courtroom with their complete case on their computer, which may include audio clips, video clips, opening/closing

arguments, and various case documents that have been scanned. General rules still apply. Prepare yourself for malfunctioning equipment by having printouts, charts, etc. By all means, do not wait until it is time for your hearing to get trained on the use of the equipment.

As soon as the courtrooms are completed, there will be training sessions on the use of the equipment. You may check with the courthouse for the training dates or visit our web-site as we post information on available training.

www.federaldefender.org

For additional insight into effective use of the new courtroom technologies, get a copy of the book entitled, "Effective Use of Courtroom Technology: A Lawyer's Guide to Pretrial and Trial." This book is a how-to book discussing the use of the newer courtroom equipment and

also discusses what the real issues are, and suggests considerations in making motions or responding to objections. For more information, visit www.nita.org and supply the product ID# 1-55681-728-2.

Who Has The Body continued

Because federal judges lose jurisdiction over a sentence after 7 days, the ideal situation is to resolve the state case first, so that the attorney can inform the federal judge whether the state judge approved a concurrent sentence so that the federal judge can enter the appropriate order at sentencing.

For the client, this means that she will serve her time in the state system until her state sentence expires or until she paroled, whichever occurs first. At that time, if the Bureau of Prisons determines a portion of the federal sentence remains unsatisfied, the federal authorities will take the inmate into federal custody, so that she may satisfy the remaining time in a federal institution. Credit for time served on the federal sentencing will be given only from the date of the federal sentencing forward, as the BOP will only allow pretrial detention (detention until sentencing) credited toward one sentence, which, in this case, would be the state sentence.

In this situation, especially where the client has been writted into federal custody from another jurisdiction, an "adjusted concurrent sentence" may be given for time spent on a related state case, where the cases should run concurrently under the guidelines and the BOP would not generally give credit for time served. See U.S.S.G. §5G1.3, Commentary, Application Note 2.

If the inmate is in federal custody, the federal judge need not specifically state whether the sentence will run concurrently or consecutively, but the state judge must. In this situation, it is not necessary to resolve the federal case first. However, in order for the Alabama Department of Corrections to recognize the concurrent sentence, the judgment from the state judge must so state.

For the client, this arrangement means the state sentence will be served in federal custody, and any remaining state

sentence would then be served in state custody.

Other odd situations abound regarding concurrent/consecutive sentencing. For example, a client is produced on a writ from another state prior to the entry of any state sentence. In that situation, the federal judge would have no state sentence with which the federal sentence would run. The best option there is to try to arrange bond or some other type of release in the jurisdiction who has primary custody so that the inmate becomes a federal inmate and the decision of a concurrent state sentence may be made by the state judge at the appropriate time.

A practitioner can usually determine whether a prisoner is in federal or state custody by contacting either the United States Marshal or the state charging authority (for example, the docket rooms at the Mobile Metro or Baldwin County jails).

absent witness violated due process and did not rest on independent and adequate state law ground.).

United States v. Vonn, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002)(Defendant who lets Rule 11 error pass in district court must satisfy Rule 52(b)'s plain error requirements.).

Mickens v. Taylor, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)(Allegation of ineffective assistance of counsel due to conflict of interest must be supported by proof that conflict affected counsel's performance.).

Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)(Child Pornography Prevention Act is unconstitutionally overbroad to the extent that it proscribes possession of material that "is, or appears to be, of a minor engaging in sexually explicit conduct.").

United States Courts of Appeals

Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001)(Life sentence for delivery of .238 grams of cocaine base violated 8th Amendment.).

United States v. Laskie, 258 F.3d 1047 (9th Cir. 2001)(Defendant's honorable discharge operated to set aside prior felony conviction and required reversal of conviction under 18 U.S.C. § 922(g).).

United States v. Taylor, 258 F.3d 1065 (9th Cir. 2001)(Public component to disorderly conduct regulation required to sustain conviction.).

United States v. Jimenez Recio, 258 F.3d 1069 (9th Cir. 2001)(insufficient evidence of drug conspiracy; counsel's failure to move for acquittal on drug possession charge was ineffective assistance).

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

United States v. Schwarz, 259 F.3d 59 (2nd Cir. 2001)(limited remand to consider Brady claims).

United States v. Campbell, 259 F.3d 293 (4th Cir. 2001)(Sentence in excess of statutory maximum violated Apprendi.).

United States v. Randle, 259 F.3d 319 (5th Cir. 2001)(Sentence in violation of statutory maximum was plain error under Apprendi where no jury determination of drug quantity.).

United States v. Gonzalez, 259 F.3d 355 (5th Cir. 2001)(plain error under Apprendi where sentence imposed was in excess of statutory maximum).

United States v. Longoria, 259 F.3d 363 (5th Cir. 2001)(Where indictment does not specify drug quantity, court lacks jurisdiction to impose sentence under Apprendi.).

United States v. Shy Heath 259 F.3d 522 (6th Cir. 2001)(illegal detention under 4th Amendment where initial stop failed to produce evidence of criminal activity).

Boyko v. Parke, 259 F.3d 781 (7th Cir. 2001)(evidentiary hearing warranted to determine if state withheld transcript of hearing held before his case was waived from juvenile court).

United States v. Morris, 259 F.3d 894 (7th Cir. 2001)(remand to consider ineffective assistance claim where attorney misinformed defendant of consequence of plea).

United States v. Villalpando, 259 F.3d 934 (8th Cir. 2001)(grant of motion for new trial due to ineffective assistance affirmed where defense counsel elicited evidence of threats by defendant and evidence that defendant had ordered a murder).

United States v. Poocha, 259 F.3d 1077 (9th Cir. 2001)(Uttering words "fuck you" or "that's fucked" to park ranger was protected by First Amendment and did not violate federal disorderly conduct regulation.).

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

United States v. Holloway, 259 F.3d 1199 (9th Cir. 2001)(evidence insufficient to prove armed bank robbery and carrying a firearm in relation to a violent crime).

Green v. United States, 260 F.3d 78 (2nd Cir. 2001)(*Pro se* motion for extension of time to file 2255 motion may be construed as 2255 motion; 60 day extension of time proper remedy for time miscalculation.).

United States v. Desena, 260 F.3d 150 (2nd Cir. 2001)(insufficient evidence to sustain conviction for conspiracy to assault with dangerous weapon in aid of racketeering).

United States v. Watson, 260 F.3d 301 (3rd Cir. 2001)(Prosecution could not ask expert witness if defendant had requisite mental state constituting element of charged crime.).

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

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

United States v. Robertson, 260 F.3d 500 (6th Cir. 2001)(Criminal history calculation could not include convictions more than 15 years before commission of current offense; improper determination of whether defendant entitled to additional one point reduction for acceptance.).

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

Koste v. Dormire, 260 F.3d 872 (8th Cir. 2001)(Writ of habeas corpus granted where state court held that defendant could obtain post-conviction relief on claim that his trial counsel had been ineffective due to conflict of interest only if he showed actual prejudice; state court failed to conduct inquiry when defendant gave notice of possible conflict of interest.).

Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001)(Defense counsel's failure to object to prosecutor's comment during closing argument was ineffective assistance of counsel, prejudicing petitioner, and was sufficient cause to warrant habeas relief.).

Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001)(As a matter of first impression, district court erred in sua sponte dismissing habeas petition without giving petitioner notice and opportunity to be heard.).

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

Pavel v. Hollins, 261 F.3d 210 (2nd Cir. 2001)(In child abuse case, counsel was ineffective for failing to prepare a defense, failing to call important fact witnesses, failing to conduct adequate investigation, and failing to present medical expert in child.).

United States v. Titchell, 261 F.3d 348 (3rd Cir. 2001)(error to treat potential loss from fraudulent scheme as intended loss without deeper analysis to explain why the two were the same).

United States v. Cotton, 261 F.3d 397 (4th Cir. 2001)(Imposition of sentences for crimes with which defendants were never charged, which resulted from failure to charge a threshold drug quantity in indictment and submit it to jury was reversible plain error under Apprendi). [Ed. Note: The Supreme Court reversed this decision in a unanimous decision on May 20, 2002, holding that neither error, nor any other indictment defect, deprives a court of jurisdiction.]

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

United States v. Singh, 261 F.3d 530 (5th Cir. 2001)(Improper joinder was prejudicial.).

Hunt v. Mitchell, 261 F.3d 575 (6th Cir. 2001)(Petitioner was deprived of counsel during pre-trial period so as to give rise to presumption of ineffective assistance of counsel under Cronic).)

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

United States v. Baker, 262 F.3d 124 (2nd Cir. 2001)(Since jury was only instructed on lesser included offense, sentence for offense of murder to obstruct justice violated Sixth Amendment's right to trial by jury and Due Process Clause of Fifth Amendment.).

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001)(Presumption of prejudice arose from fact that defense counsel slept repeatedly during trial; Sixth Amendment claim not barred by retroactivity principles of Teague).)

United States v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001)(Texas criminal mischief statute was not crime of violence and thus not an "aggravated felony" for sentencing purposes.).

United States v. Wells, 262 F.3d 455 (5th Cir. 2001)(Oral testimony regarding destroyed drug ledgers was inadmissible hearsay; and because rest of evidence was less than overwhelming, admission of hearsay evidence was not harmless beyond a reasonable doubt.).

United States v. Osborne, 262 F.3d 486 (5th Cir. 2001)(Convictions for which defendant had had his civil rights restored were not prior felonies in possession of ammunition prosecution.).

United States v. Emeron Taken Alive, 262 F.3d 711 (8th Cir. 2001)(Character evidence of officer's reputation for aggressiveness and violence was not unfairly prejudicial to prosecution.).

Green v. United States, 262 F.3d 715 (8th Cir. 2001)(Indigent defendant was entitled to appointment of counsel for post-conviction motion, and denial of appointed counsel is not subject to harmless error analysis.).

Moore v. Luebbbers, 262 F.3d 757 (8th Cir. 2001)(Since failure to seek discretionary review in Missouri Supreme Court pre-dated

Supreme Court decision in O'Sullivan v. Boerckel, and since Missouri's prior position had been that discretionary review was not necessary to exhaust state remedies, petition was not barred by failure to exhaust.).

United States v. Olson, 262 F.3d 795 (8th Cir. 2001)(Indictment which omitted element of use of force, violence or intimidation was insufficient in bank robbery prosecution.).

Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001)(reasonable probability of different sentencing outcome resulting from government's withholding evidence).

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

United States v. Scarfo, 263 F.3d 80 (3rd Cir. 2001)(Gag order was appealable, involved issue capable of repetition, yet evading review, and was erroneous.).

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

Murphy v. Ohio, 263 F.3d 466 (6th Cir. 2001)(Denial of COA was unwarranted where petitioner did not request COA from district court and where district court did not analyze whether defendant made substantial showing of the denial of a constitutional right.).

Magana v. Hofbauer, 263 F.3d 542 (6th Cir. 2001)(Petitioner was denied effective assistance of counsel by counsel's giving erroneous advice at plea hearing regarding estimated prison sentence.).

United States v. Shabazz, 263 F.3d 603 (6th Cir. 2001)(insufficient factual findings to support base offense level determination).

Boss v. Pierce, 263 F.3d 734 (7th Cir. 2001)(State unreasonably applied federal law under Brady when it held that evidence suppressed by state which was favorable to defendants was not material.).

Dixon v. Dormire, 263 F.3d 774 (8th Cir. 2001)(Exhaustion doctrine was not applied to petitioners who were lulled into not seeking discretionary review in Missouri Supreme Court where petitioners reasonably believed that state procedural rules did not present bar and were not fairly apprised that state would change its firmly-held position of not asserting exhaustion defense on this basis.).

Coleman v. Kemna, 263 F.3d 785 (8th Cir. 2001)(Because petitioners bypassed discretionary review prior to Supreme Court's Boerckel decision and because state's prior and consistent position before Boerckel was that discretionary review was not necessary to exhaust state remedies, dismissal of habeas petition with prejudice would be reversed.).

United States v. Lapsley, 263 F.3d 839 (8th Cir. 2001)(District court erred in not hearing testimony of government informant on defendant's motion to reveal identity of informant to determine if testimony was relevant to the defense.).

United States v. Hitchcock, 263 F.3d 879 (9th Cir. 2001)(Resentencing required where defendant sentenced under provision recently held unconstitutional.). [Ed. Note: However, the Ninth Circuit has since vacated United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001), in which the statute was declared unconstitutional.]

Gunn v. Ignacio, 263 F.3d 965 (9th Cir. 2001)(State court determination that government did not breach plea agreement when it concurred in presentence report that recommended four consecutive sentences involved unreasonable determination of the facts in light of the evidence presented and warranted grant of habeas relief.).

Woodward v. Williams, 263 F.3d 1135 (10th Cir. 2001)(Amendment to habeas petition related back to filing of original petition but only with respect to argument that was merely clarified or amplified by amendment.).

Morris v. Reynolds, 264 F.3d 38 (2nd Cir. 2001)(Double jeopardy attached upon acceptance of guilty plea so that New York Court of Appeals determination that double jeopardy bar could not arise until imposition of sentence was contrary to clearly established federal law and warranted habeas relief.).

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

Nara v. Frank, 264 F.3d 310 (3rd Cir. 2001)(State court motion to withdraw guilty plea nunc pro tunc was properly filed application for collateral review under tolling limitations provision and ceased to be pending only when state supreme court denied petition for allowance of appeal challenging denial of motion; evidentiary hearing warranted on issue of equitable tolling.).

United States v. Smith, 264 F.3d 518 (5th Cir. 2001)(District court plainly erred by failing to submit drug quantity issue to jury.).

United States v. Lopez, 264 F.3d 527 (5th Cir. 2001)(District court erred in determining that downward departure below statutory minimum sentence was not allowed once safety valve applied.).

United States v. Fix, 264 F.3d 532 (5th Cir. 2001)(Defendant who successfully moved to set aside sentence of probation following arson conviction had not been convicted of a felony making it unlawful for him to possess a firearm.).

United States v. Baptiste, 264 F.3d 578 (5th Cir. 2001)(Failure to allege drug quantity in indictments and to submit issue to jury precluded enhancements in excess of statutory maximums.).

United States v. Schulte, 264 F.3d 656 (6th Cir. 2001)(Application of 1996 MVRA violated ex post facto clause.).

Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001)(Evidentiary hearing necessary to determine if appellate counsel was ineffective in failing to assert ineffectiveness of trial counsel.).

United States v. Bishop, 264 F.3d 919 (9th Cir. 2001)(admission of illegal traffic stop evidence not harmless beyond a reasonable doubt).

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

United States v. Busekros, 264 F.3d 1158 (10th Cir. 2001)(Denial of federal benefits was error because defendant assisted with two state prosecutions.).

United States v. Rodriguez Aguirre, 264 F.3d 1195 (10th Cir. 2001)(Where no civil forfeiture is sought, limitations period begins to run at conclusion of criminal proceedings.).

United States v. O'Malley, 265 F.3d 353 (6th Cir. 2001)(inadequate factual findings to prove foreseeability by defendant that co-conspirators would take illegal weapon from gun store).

United States v. Sumner, 265 F.3d 532 (7th Cir. 2001)(Defendant was prejudiced by court's plain error in not explaining connection between uncharged conduct and offense of conviction.).

United States v. Lynch, 265 F.3d 758 (9th Cir. 2001)(Crimes directed toward an individual, as opposed to a business, have the requisite interstate commerce nexus to provide federal jurisdiction under the Hobbs Act if (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in

interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce, following Fifth Circuit Collins decision.).

United States v. Sparks, 265 F.3d 825 (9th Cir. 2001)(Because Alaska's burglary statute had broader definition than that of the ACCA, defendant's prior burglary conviction could not be counted.).

United States v. Ochoa-Gaytan, 265 F.3d 837 (9th Cir. 2001)(Denial of acceptance of responsibility based on defendant's failure to plead guilty and on his having moved to suppress custodial statements was error.).

Campbell v. Rice, 265 F.3d 878 (9th Cir. 2002)(Trial court's failure to investigate possible conflict of interest warranted habeas relief because state court's determination that defendant was not entitled to relief was contrary to clearly established federal law.).

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001)(Failure to make factual findings regarding amount of loss and failure of Government to show Medicare program suffered loss resulted in reversal of restitution order.).

United States v. George, 266 F.3d 52 (2nd Cir. 2001)(Constitutional error resulted from erroneous jury instructions which allowed jury to convict based on reasonableness of defendant's behavior and not based on specific intent.).

United States v. Knight, 266 F.3d 203 (3rd Cir. 2001)(plainly erroneous miscalculation of guideline range based on incorrect criminal history).

Wenger v. Frank, 266 F.3d 218 (3rd Cir. 2001)(Claim that sentence violated petitioner's due process and Eighth Amendment rights was exhausted.).

Jermyn v. Horn, 266 F.3d 257 (3rd Cir. 2001)(Failure to investigate severe abuse during defendant's childhood and present evidence during sentencing phase of capital trial was ineffective assistance of counsel warranting habeas relief.).

United States v. Bass, 266 F.3d 532 (6th Cir. 2001)(District court should have received evidence on defendant's selective prosecution claims that race played a role in deciding which cases to select as death-eligible.).

Ruth v. United States, 266 F.3d 658 (7th Cir. 2001)(Defendant's motion for new trial was not properly characterized as motion to vacate.).

Ashley v. United States, 266 F.3d 671 (7th Cir. 2001)(Limitations period under AEDPA begins to run on date of retroactivity determination and not on date of underlying Supreme Court decision; prisoner may seek determination that Supreme Court decision upon which he relies has retroactive application.).

United States v. Panaro, 266 F.3d 939 (9th Cir. 2001)(insufficient evidence to support conviction on one count of money laundering).

United States v. Lomow, 266 F.3d 1013 (9th Cir. 2001)(receiver's expenses incurred after defendant's assets were seized improperly included in restitution order).

United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001)(Use of defendant's prior nonjury juvenile adjudication to increase the statutorily mandated maximum punishment violated due process and was not harmless error.).

United States v. Ali, 266 F.3d 1242 (9th Cir. 2001)(evidence insufficient as a matter of law to show bank was federally insured at time of robbery).

United States v. De La Mata, 266 F.3d 1275 (11th Cir. 2001)(Applying bank fraud statute retroactively violated ex post facto clause.).

United States v. Barrie, 267 F.3d 220 (3rd Cir. 2001)(Whereas defendant was organizer or leader, there were not five participants so that enhancement should have been 2 levels, not 4.).

United States v. Johnson, 267 F.3d 376 (5th Cir. 2001)(Order prohibiting defendant from discussing case with counsel during overnight recess violated defendant's Sixth Amendment right to counsel.).

United States v. Valadez, 267 F.3d 395 (5th Cir. 2001)(Illegal detention pending completion of computer check, after officer became aware that defendant had not committed traffic violation, violated defendant's Fourth Amendment rights.).

United States v. McGiffen, 267 F.3d 581 (7th Cir. 2001)(abuse of discretion to require, without an evidentiary hearing and findings, funds used from seizure of home to pay public defender; inadequate findings to support obstruction enhancement).

Singleton v. Norris, 267 F.3d 859 (8th Cir. 2001)(Forcing inmate to take antipsychotic drugs warranted permanent stay of execution.).

Summerlin v. Stewart, 267 F.3d 926 (9th Cir. 2001)(Petitioner's claim that trial judge's alleged use of and addiction to marijuana deprived him of due process merited evidentiary hearing.).

Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001)(Petitioner's two colorable claims—that counsel was ineffective for presenting alibi defense and not "shootout" defense and that petitioner's due process rights were violated by prosecution witness's false testimony that she had not been offered a deal in return for her testimony—warranted evidentiary hearing in death penalty case.).

Welch v. Newland, 267 F.3d 1013 (9th Cir. 2001)(Limitations period under AEDPA was tolled during pendency of state habeas petition even though there was delay of four years between dismissal of initial petition and filing of petition in Supreme Court.).

Spears v. Stewart, 267 F.3d 1026 (9th Cir. 2001)(Arizona was not entitled to benefit from procedural benefits of its counsel-appointment provision which facially complied with Chapter 154 of AEDPA because appointment of counsel did not comply with timeliness requirement.).

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

United States v. Smith, 267 F.3d 1154 (D.C. Cir. 2001)(Use of preponderance standard to determine predicate offense for conspiracy during sentencing was plain error; upward departure based on prior uncharged conduct was not warranted.).

Weinberger v. United States, 268 F.3d 346 (6th Cir. 2001)(Defendant could raise ineffective assistance of counsel claims where issues properly preserved; court abused discretion in not considering financial needs and earning ability of disbarred attorney defendant in ordering restitution.).

Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001)(ineffective assistance in death penalty case for failing to develop and present mitigating evidence regarding petitioner's background).

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

United States v. Chavez-Valenzuela, 268 F.3d 719 (9th Cir. 2001)(Officer lacked reasonable suspicion to detain defendant after traffic stop and question him regarding drug possession; unlawful search not vitiated by defendant's consent.).

United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001)(abuse of discretion to deny defendant's motion to substitute counsel where attorney threatened to "sink him for 105 years so he wouldn't be able to see his wife and children").

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001)(Counsel's deficient performance during penalty phase of capital trial in failing to develop and present mitigating evidence was prejudicial to defendant under Strickland test.).

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

United States v. Hutchinson, 268 F.3d 1117 (D.C. Cir. 2001)(District court failed to determine whether the government had met its burden to show that seizure of defendant lasted no longer than was necessary to effectuate the purpose of the stop.).

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

Eagle v. Linahan, 268 F.3d 1306 (11th Cir. 2001)(Trial judge's statement that he believed both parties were using peremptory challenges in discriminatory manner should have caused trial judge to require prosecution to give race neutral reasons for excluding black venirepersons; appellate counsel's failure to raise *Batson* issue on direct appeal was ineffective assistance of counsel.)

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

United States v. Dinnal, 269 F.3d 418 (4th Cir. 2001)(30 year sentence in excess of statutory maximum was plain error where drug quantity not alleged in the indictment.).

In re Byrd, 269 F.3d 585 (6th Cir. 2001)(Court of Appeals had jurisdiction to order rehearing of request for leave to file second petition for writ of habeas corpus, and case would be remanded where factual basis was not clearly set out in petition.).

Brumley v. Wingard, 269 F.3d 629 (6th Cir. 2001)(Admission of incarcerated witness's videotaped deposition without prior finding of unavailability was unreasonable application of clearly established Supreme Court precedent in Ohio v. Roberts.).

Manning v. Huffman, 269 F.3d 720 (6th Cir. 2001)(Since failure to raise ineffective assistance of counsel on direct appeal was not

ground relied on by state court, the claim was not procedurally barred; trial counsel's failure to object to procedure where alternate jurors were allowed to participate in deliberations was prejudicial.).

United States v. Shepard, 269 F.3d 884 (7th Cir. 2001)(Where hospital was not victim of mail fraud and money laundering, it was improper to order restitution to the hospital under the MVRA.).

United States v. Jones, 269 F.3d 919 (8th Cir. 2001)(no reasonable suspicion of narcotics trafficking to justify continued detention after traffic stop).

United States v. Follet, 269 F.3d 996 (9th Cir. 2001)(Order of restitution to psychological counseling center which provided free counseling was improper.).

United States v. Elias, 269 F.3d 1003 (9th Cir. 2001)(sentence vacated to correct improper restitution order in hazardous waste case).

United States v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001)(Admission of police officer's testimony about defendant's lack of emotional reaction when confronted with a large amount of marijuana in a gas tank violated defendant's Fifth Amendment privilege against self-incrimination.).

United States v. Scott, 270 F.3d 30 (1st Cir. 2001)(Trial court violated Speedy Trial Act by taking a motion to suppress evidence under submission for more than 120 days; appropriate remedy was dismissal without prejudice.).

United States v. Bailey, 270 F.3d 83 (1st Cir. 2001)(Failure to submit drug quantity issue to jury was error under Apprendi and was not harmless.).

Davis v. Strack, 270 F.3d 111 (2nd Cir. 2001)(Failure to give justification charge in case where petitioner was robbed at gunpoint three times, raped, and had life threatened was violation of due process warranting habeas relief.).

United States v. Danser, 270 F.3d 451 (7th Cir. 2001)(District court could not impose higher sentence after initial sentencing.).

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

Ortega v. United States, 270 F.3d 540 (8th Cir. 2001)(Mere fact that defendant failed polygraph exam did not warrant sentence enhancement for obstruction of justice.).

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

Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001)(Defendant's sentence under California Three Strikes law to life in prison with no possibility of parole for 50 years for two counts of petty theft for shoplifting 9 video tapes was so grossly disproportionate to his crime, so that, as applied, the law violated defendant's right under the Eighth Amendment to be free from cruel and unusual punishment and was unreasonable interpretation by state court of Supreme Court's decision in Solem v. Helm.).

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001)(Deficient performance by counsel at penalty phase of death penalty case prejudiced petitioner and warranted habeas relief.).

United States v. Davis, 270 F.3d 977 (D.C. Cir. 2001)(District court should have considered overall purpose of municipal program under which traffic checkpoint was established.).

United States v. Higgins, 270 F.3d 1070 (7th Cir. 2001)(Improper loss calculation in bank fraud case).

United States v. Rogers, 270 F.3d 1076 (7th Cir. 2001)(Sentence of 70 months for possession of unregistered silencer was not warranted because evidence determined by preponderance cannot result in greater sentence than identical conduct based upon proof beyond a reasonable doubt.).

United States v. Carr, 271 F.3d 172 (4th Cir. 2001)(insufficient factual basis to support guilty plea to arson charge because interstate commerce element not established).

Gibson v. United States, 271 F.3d 247 (6th Cir. 2001)(Lack of jury finding of quantity of marijuana plants was Apprendi violation.).

Littlejohn v. Artuz, 271 F.3d 360 (2nd Cir. 2001)(Amendment of habeas petition allowed where not second or successive.).

Banks v. Horn, 271 F.3d 527 (3rd Cir. 2001)(Jurors could have been misled to believe unanimity was required in determining mitigating factors in death penalty case.).

United States v. Gomez, 271 F.3d 779 (8th Cir. 2001)(Government breached plea agreement by not recommending reduction for acceptance even though defendant requested that wife warn other members of drug conspiracy of the government's investigation.).

United States v. Carpa, 271 F.3d 962 (11th Cir. 2001)(District court's investigation of alleged juror misconduct was inadequate.).

United States v. Novation, 271 F.3d 968 (11th Cir. 2001)(Inadequacies in appellate record required remand for reconstruction relative to defendant's evidentiary claim; continuation of trial for four days during which one of defendants was absent for medical reasons violated that defendant's constitutional rights.).

United States v. Sabretech, Inc., 271 F.3d 1018 (11th Cir. 2001)(Reckless violation of regulations promulgated under Hazardous Materials Transportation Act is not a crime.).

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

United States v. Turner, 272 F.3d 380 (6th Cir. 2001)(insufficient evidence to prove interstate commerce element of Hobbs Act convictions).

United States v. Hunt, 272 F.3d 488 (7th Cir. 2001)(plain error to convert laundered money into rough equivalent of cocaine for drug quantity purposes).

United States v. Kosmel, 272 F.3d 501 (7th Cir. 2001)(Absent evidence of willfulness, defendant could not be held responsible for obstructing justice by providing materially false information to his probation officer.).

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

United States v. Green, 272 F.3d 748 (5th Cir. 2001)(District court's constitutional error in admitting acts which were testimonial in nature and which were made during custodial interrogation was not harmless beyond a reasonable doubt.).

United States v. Seward, 272 F.3d 831 (7th Cir. 2001)(Bare finding of untruthful statement did not support obstruction of justice enhancement; insufficient evidence that deceased's former boarder was vulnerable victim.).

United States v. Taylor, 272 F.3d 980 (7th Cir. 2001)(Shooting in which defendant involved a week after escape was not relevant conduct for purpose of sentencing for the escape.).

United States v. Young, 272 F.3d 1052 (8th Cir. 2001)(uncertain estimate by victim insufficient to support lost profits portion of restitution award).

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001)(Application of amended statutory maximum sentence under Mann Act violated ex post facto clause.).

United States v. Mulder, 273 F.3d 91 (2nd Cir. 2001)(sentences remanded for particularized findings as to scope of agreement of labor leaders to action of murderer in Hobbs Act prosecution).

United States v. Watson, 273 F.3d 599 (5th Cir. 2001)(District court confused voluntariness issue with mere consent to search.).

United States v. Dixon, 273 F.3d 636 (5th Cir. 2001)(Sentences exceeded statutory maximum.).

United States v. Rivera, 273 F.3d 751 (7th Cir. 2001)(insufficient evidence to establish drug conspiracy; erroneous jury instruction).

Morris v. Woodford, 273 F.3d 826 (9th Cir. 2001)(Typographical error in jury instruction during capital penalty phase was nonharmless constitutional error warranting habeas relief.).

United States v. Renick, 273 F.3d 1009 (11th Cir. 2001)(Arbitrary assignment of loss number was abuse of discretion).

Thomas v. Hubbard, 273 F.3d 1164 (9th Cir. 2001)(Cumulative error in admitting triple hearsay, prosecutorial misconduct in admitting evidence in violation of in limine order, and improper truncation of cross-examination warranted habeas corpus relief.).

United States v. Blackmon, 273 F.3d 1204 (9th Cir. 2001)(suppression of wiretap evidence warranted).

Huizar v. Carey, 273 F.3d 1220 (9th Cir. 2001)(Prison mailbox rule, which deems habeas petition filed on day petition is given to prison authorities, applies even if petition is never filed in court.).

United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001)(Improper classification of DUI offenses as aggravated offenses was plain error.).

United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001)(Indictment's failure to allege status of victims in prosecution for arson on Indian reservation was not harmless.).

United States v. Lujano-Perez, 274 F.3d 219 (5th Cir. 2001)(Failure to explain nature of crime charged during guilty plea colloquy in case in which indictments were never read

and there were no written plea agreements was not harmless error.).

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

Bulls v. Jones, 274 F.3d 329 (6th Cir. 2001)(Confrontation clause violation, including admission of nontestifying co-defendant's statements, had injurious effect and warranted habeas relief.).

United States v. Adkins, 274 F.3d 444 (7th Cir. 2001)(Sentence of defendant to more than default maximum of 240 months in violation of Apprendi required remand.).

United States v. Thomas, 274 F.3d 655 (2nd Cir. 2001)(en banc)(Failure to charge drug type and quantity in indictment or to submit question of drug type and quantity to jury is subject to plain error review, overruling United States v. Tran; and if type and quantity of drugs may be used to impose sentence above statutory maximum, then those are elements of offense which must be charged in indictment and submitted to jury, overruling United States v. Monk and United States v. Compuzano.).

United States v. Farmer, 274 F.3d 800 (4th Cir. 2001)(Defendant who lacks funds to hire attorney has due process right to hearing to determine whether seized assets were legitimate and might be used to fund defense.).

United States v. Ortlieb, 274 F.3d 871 (5th Cir. 2001)(District court lacked authority to suspend from practice of law attorney held in contempt for vulgar displays during bench conferences.).

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

United States v. Sabino, 274 F.3d 1053 (6th Cir. 2001)(obstruction of justice enhancements considered improper double counting in tax prosecution).

United States v. Williams, 274 F.3d 1079 (6th Cir. 2001)(improper venue resulting in reversible error for failure to change venue in drug conspiracy prosecution).

United States v. Wiseman, 274 F.3d 1236 (9th Cir. 2001)(abuse of discretion for district court to allow attorney to testify, in violation of attorney-client privilege, that he advised defendants they could not serve as trustees).

Smith v. Duncan, 274 F.3d 1245 (9th Cir. 2001)(Habeas petition was improperly dismissed because filed within AEDPA limitations period.).

United States v. McGowan, 274 F.3d 1251 (9th Cir. 2001)(inadmissible to admit testimony regarding structure of drug trafficking organizations in a non-conspiracy importation case).

United States v. Ward, 274 F.3d 1320 (11th Cir. 2001)(district court had authority to rule on motion for new trial; case remanded for that purpose).

United States v. Clark, 274 F.3d 1325 (11th Cir. 2001)(plain error for district court to impose sentence that was two-thirds the mandatory statutory minimum).

United States v. Soler, 275 F.3d 146 (1st Cir. 2002)(failure of government's proof that defendant possessed with intent to distribute heroin within 1,000 feet of school).

United States v. Antico, 275 F.3d 245 (3rd Cir. 2001)(Extortion scheme did not involve five or more participants so as to justify increase in base offense level.).

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

United States v. Jenkins, 275 F.3d 283 (3rd Cir. 2001)(improper enhancement for obstruction of justice for defendant's failure to appear at state court hearing; federal proceedings must be impeded).

United States v. Runyan, 275 F.3d 449 (5th Cir. 2001)(Search of child pornography images removed from home by defendant's wife was private search and did not implicate Fourth Amendment unless police searched files not examined by wife and unless warrants would have been obtained based on police conduct exceeding private search; remanded for further factual findings.).

Fields v. Bagley, 275 F.3d 478 (6th Cir. 2001)(Absence of counsel during state's interlocutory appeal of suppression order was ineffective assistance of counsel warranting habeas corpus relief.).

United States v. Graham, 275 F.3d 490 (6th Cir. 2001)(Concurrent 30 year sentences on basis of conspiracy involving not more than 100 marijuana plants violated Apprendi.).

Garceau v. Woodford, 275 F.3d 769 (9th Cir. 2001)(Jury instruction allowing jury to draw inference of criminal propensity from other crimes evidence violated Due Process and was not harmless.).

United States v. Gallaher, 275 F.3d 784 (9th Cir. 2001)(error to enhance defendant's sentence as armed career criminal based on discharged offense).

United States v. McElhiney, 275 F.3d 928 (10th Cir. 2001)(Allen charge was impermissibly coercive.).

Blair v. Crawford, 275 F.3d 1156 (9th Cir. 2002)(Petitioner's application for extraordinary writ from Nevada Supreme Court was properly filed as required by tolling provision of federal habeas statute.).

Sallahdin v. Gibson, 275 F.3d 1211 (10th Cir. 2002)(Petitioner was prejudiced by absence of proposed steroid testimony, and counsel's reasons for not presenting testimony would be addressed on remand.).

United States v. Syme, 276 F.3d 131 (3rd Cir. 2002)(Constructive amendment to indictment was plain error.).

United States v. Akins, 276 F.3d 1141 (9th Cir. 2002)(Defendant did not waive right to counsel before pleading guilty to underlying misdemeanor domestic violence charge, precluding conviction of possession of firearm after conviction of misdemeanor domestic violence crime.).

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001)(District court abused its discretion by punishing defendant for failing to cooperate in an unrelated case.).

United States v. Guevara, 277 F.3d 111 (2nd Cir. 2001)(Under Apprendi, it was plain error to sentence defendant to a statutory minimum term 30 months greater than he otherwise could have received as a result of failure to present drug quantity issue to jury.).

United States v. Nelson, 277 F.3d 164 (2nd Cir. 2002)(impermissible race and religion-based reconstruction of jury by district court).

Riley v. Taylor, 277 F.3d 261 (3rd Cir. 2001)(habeas corpus granted for Batson and Caldwell violations).

United States v. Gricco, 277 F.3d 339 (3rd Cir. 2002)(no coherent basis for calculation of tax loss).

United States v. Zimmerman, 277 F.3d 426 (3rd Cir. 2002)(Warrant application did not support determination by magistrate that there was probable cause to believe that defendant possessed child pornography in his home; evidence that defendant possessed adult pornography was stale; good faith exception did not apply.).

Hill v. Braxton, 277 F.3d 701 (4th Cir. 2002)(Before district court dismisses habeas petition for untimeliness, it must first give

petitioner notice that petition will be dismissed absent sufficient explanation.).

United States v. Taylor, 277 F.3d 721 (5th Cir. 2001)(Government bears burden of proving that drug amounts listed in pre-sentence report came from source independent of information provided under use immunity plea agreement.).

United States v. Andis, 277 F.3d 984 (8th Cir. 2002)(Standards of release did not bear reasonable relationship to defendant's conduct or characteristics; defendant may appeal illegal sentence despite waiver.).

United States v. Patzer, 277 F.3d 1080 (9th Cir. 2002)(no probable cause to arrest under state DUI statute; consent tainted by unlawful arrest; statements fruit of poisonous tree despite Miranda warnings).

Packer v. Hill, 277 F.3d 1092 (9th Cir. 2002)(trial judge's statements and actions during jury deliberation unduly coercive; requiring defendant to wear leg brace during trial due process violation).

United States v. Ruiz-Rodriguez, 277 F.3d 1281 (11th Cir. 2002)(Magistrate judge does not have authority to conduct fact-finding and evidentiary portion of sentencing hearing in felony case.).

Garcia v. United States, 278 F.3d 134 (2nd Cir. 2002)(deficient performance in telling defendant he could not appeal when no waiver of appeal in plea agreement).

Valansi v. Ashcroft, 278 F.3d 203 (3rd Cir. 2002)(no requisite showing of intent to defraud in embezzlement case so as to justify removal of alien for aggravated felony).

United States v. Rodriguez, 278 F.3d 486 (5th Cir. 2002)(Discrepancy between defendant's earned income and assets did not justify enhancement of money laundering sentence absent showing that unaccounted money was laundered.).

United States v. Smith, 278 F.3d 605 (6th Cir. 2002)(District court could have departed downwardly for over-representation of actual criminal history.).

Prior v. United States, 278 F.3d 612 (6th Cir. 2002)(§ 2255 motion filed within one year of Supreme Court's Bousley decision declaring Bailey retroactive to cases on collateral review was timely.).

United States v. Barnes, 278 F.3d 644 (6th Cir. 2002)(Failure of government to request expressly that

defendant be sentenced at low end of guideline range was breach of plea agreement and reversible error.).

Moore v. Kinney, 278 F.3d 774 (8th Cir. 2002)(Definition of "exceptional depravity" aggravator in capital case unconstitutionally vague).

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

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

United States v. Geborde, 278 F.3d 926 (9th Cir. 2002)(Defendant lacked intent to defraud in connection with his failure to register drug manufacturing facility, and misbranding of drug did not occur while drug was held for sale.).

United States v. Watkins, 278 F.3d 961 (9th Cir. 2002)(Felony offense of misbranding of drug under Food, Drug and Cosmetic Act (FDCA) requires proof of materiality rather than mere knowledge of falseness of statement.).

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

Beem v. McKune, 278 F.3d 1108 (10th Cir. 2002)(*Vacatur* of sentences for rape and taking indecent liberties with child and instead sentencing for aggravated incest for which defendants were not charged violated due process and warranted habeas relief.).

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

Dilosa v. Cain, 279 F.3d 259 (5th Cir. 2002)(State court incorrectly applied Brady principle and engaged in unreasonable application of Brady materiality rule.).

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

category did not adequately reflect seriousness of past criminal conduct.).

United States v. Humphrey, 279 F.3d 372 (6th Cir. 2002)(Enhancement of offense level for abuse of position of trust did not apply to defendant because as bank vault teller she was not authorized to exercise substantial professional or managerial discretion.).

United States v. Campbell, 279 F.3d 392 (6th Cir. 2002)(Defendant's 120 month sentence after conviction for use of telephone to facilitate a narcotics conspiracy violated Apprendi.).

United States v. Stubbs, 279 F.3d 402 (6th Cir. 2002)(District court plainly erred in sentencing defendant for crime of using or carrying firearm in connection with drug trafficking crime,

which crime was a different offense than the charged crime of conspiracy; misinformation regarding sentencing rendered defendant's guilty plea involuntary so that appeal waiver was not binding.).

United States v. Shaker, 279 F.3d 494 (7th Cir. 2002)(Where district court defers accepting guilty plea, defendant has unfettered right to withdraw it.).

Reagan v. Norris, 279 F.3d 651 (8th Cir. 2002)(Ineffective assistance of post-trial counsel and state appellate counsel were cause and prejudice for procedural default.).

United States v. Hill, 279 F.3d 731 (9th Cir. 2002)(Indictment charging defendant with accessory after the fact failed to plead both underlying offense and accessory offense.).

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002)(Ineffective assistance for failure to investigate mitigating evidence for penalty phase of capital trial warranted habeas relief; abuse of discretion for district court to fail to conduct evidentiary hearing on Brady claim).

United States v. Hardy, 279 F.3d 856 (9th Cir. 2002)(Where two prices are equally good measure of actual or intended loss, court should use price bringing lesser punishment.).

Eagle v. Linahan, 279 F.3d 926 (11th Cir. 2001)(State trial judge erred in not requiring prosecution to provide race-neutral explanation for jury strikes; appellate lawyer was ineffective for failing to raise Batson claim on direct appeal.).

United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002)(plain error to enhance sentence, without factual basis, for possessing sadistic child pornographic images).

United States v. Blueford, 279 F.3d 1084 (9th Cir. 2002)(new trial required when prosecutor asked jury to infer fabrication of defendant's alibi when prosecutor had evidence contradicting same).

Ghent v. Woodford, 279 F.3d 1121 (9th Cir. 2002)(habeas relief warranted for admission of confession in violation of Miranda and for erroneous admission of psychiatric testimony).

Bui v. Haley, 279 F.3d 1327 (11th Cir. 2002)(State failed to articulate race-neutral reasons for striking African-Americans.).

United States v. Garcia-Torres, 280 F.3d 1 (1st Cir. 2002)(insufficient evidence that defendant knew he was aiding drug conspiracy).

Ramirez v. Attorney General, 280 F.3d 87 (2nd Cir. 2001)(Counsel's letter application to highest state court for leave to appeal conviction sufficiently presented issue of ineffective assistance).

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

United States v. Anthony, 280 F.3d 694 (6th Cir. 2002)(Number of participants did not warrant 4-point enhancement for being leader/organizer; person not a knowing and willing participant cannot be counted as participant; in order to apply "otherwise extensive" enhancement, there must be finding that there was the functional equivalent of a crime involving 5 or more participants; district court relied on impermissible factors to conclude cover-up scheme was "extensive.").

United States v. Haywood, 280 F.3d 715 (6th Cir. 2002)(Improper admission of other act evidence, occurring four months after charged event, was reversible error.).

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

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

United States v. Stubbs, 281 F.3d 109 (3rd Cir. 2002)(District court's failure to make adequate inquiry to determine if defendant made knowing and intelligent waiver of counsel during middle of trial was error and was not harmless.).

United States v. Weaver, 281 F.3d 228 (D.C. Cir. 2002)(error to attribute to defendant particular uncharged loss in prosecution for misappropriation of postal funds).

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

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

United States v. Benenhaley, 281 F.3d 423 (3rd Cir. 2002)(life sentence exceeding statutory maximum under drug trafficking statute impermissible under Apprendi).

United States v. Leal-Mendoza, 281 F.3d 473 (5th Cir. 2002)(Additional one point reduction for acceptance of responsibility is mandatory if all statutory requirements are met.).

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

United States v. Yang, 281 F.3d 534 (6th Cir. 2002)(insufficient evidence to support statutory maximum fine).

United States v. Orlando, 281 F.3d 586 (6th Cir. 2002)(Three level enhancement without specific factual findings in money laundering case required remand.).

United States v. Frost, 281 F.3d 654 (7th Cir. 2002)(evidence insufficient to support substantive fraud conviction, and net loss required to be recalculated under loss calculation guideline).

Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002)(Allegation that trial counsel failed to develop and introduce mitigating evidence during penalty phase of capital trial warranted evidentiary hearing.).

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

Garceau v. Woodford, 281 F.3d 919 (9th Cir. 2002)(Teague issue raised by state for first time in petition for rehearing would not be heard.).

Fields v. Woodford, 281 F.3d 963 (9th Cir. 2002)(evidentiary hearing necessary to determine juror bias).

Chia v. Cambra, 281 F.3d 1032 (9th Cir. 2002)(erroneous exclusion of friend's hearsay statements which exonerated petitioner).

Florez v. Williams, 281 F.3d 1136 (10th Cir. 2002)(New Mexico Court of Appeals' determination that failure to request lesser-included offense instruction was not ineffective under Strickland was unreasonable interpretation of federal law.).



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