The BACK BENCHER

Seventh Circuit Federal Defenders

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DEFENDER'S MESSAGE

Our Court of Appeals continues to express concern about the quality of appellate advocacy by court-appointed lawyers in criminal cases. Indeed, Chief Judge Posner is so concerned that he saw fit to discuss this problem in his state of the Circuit address at the Circuit Judicial Conference. As we all know, the Sixth Amendment to the Constitution guarantees effective assistance of counsel to the citizen-accused. This guarantee, of course, includes appeals. There can be no good reason why we cannot, as lawyers, make good on this promise by our founding fathers. We must, as a group, continually ask ourselves how we can do better.
I offer the following means through which appellate advocacy can be improved:

1. APPELLATE WORKSHOP - It's not too late to sign up for the Seventh Circuit's Introductory Workshop for the Court-Appointed Attorney to be held on May 24, 2000. The program begins with remarks by Chief Judge Posner at 8:45 a.m. at the John Marshall Law School and concludes with a reception from 5:00 to 6:30 p.m. There is no charge for CJA attorneys. A copy of the program is attached to this issue of *The Back Bencher*, and it provides a complete listing of the sessions and faculty members. Of special note is the fact that certain Circuit Court Judges will give you insight into what they look for on appeal. Two years ago, a similar program was held, and the members of our office who attended found it to be of great use. We encourage you to attend. The Workshop is not only a good occasion to hone your appellate skills, but also a rare opportunity to hear the thoughts and insights of the judges before whom we practice.

2. ASSISTANCE IN BRIEF PREPARATION - Call me. My staff and I will review your briefs. We can offer suggestions on draftsmanship and research. We will give you the applicable Seventh Circuit law. We will assist you in organizing your brief so that it will meet the qualifications set out by the Seventh Circuit Rules. This service is free. We want to help. We expect your calls. It is part of our mission. Do not be too prideful to ask for this assistance.

3. MOCK HEARINGS - We will provide you with a mock oral argument before your trip to Chicago. Present us your brief and the government's brief. We will schedule a hearing for you before three of our experienced appellate lawyers, listen to your arguments, ask you questions that we think the Court may ask, then critique the argument, and listen to a revised one, if necessary - however long it takes.

If none of the above appeals to you (pun definitely intended) and you do not believe that you can give your client the representation on appeal to which he is entitled, then, as a last resort, see me about the possibility of substituting my office as counsel on appeal. Circuit Rule 51(c) allows an attorney to "withdraw for good cause" within 10 days of the filing of the notice of appeal. However, I hope all of you will both accept the challenge of fighting for your clients on appeal and take advantage of the programs available for appellate advocates.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CONGRATULATIONS!

In what is becoming a regular feature of *The Back Bencher*, we again extend our sincere congratulations to Community Defender Terry MacCarthy for receipt of yet another well-deserved, prestigious award. At the Seventh Circuit Judicial Conference's Annual Banquet held on May 2, 2000, Terry received the American Inns of Court Professionalism Award for the Seventh Circuit. This award is bestowed each year, on a federal circuit basis, upon a lawyer whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law.

Fifth Circuit Judge Patrick Higgenbotham, President of the American Inns of Court Foundation, presented the award to Terry, and in doing so noted some of Terry's many talents and previous awards. Some of the awards amassed by Terry during his over 30 years as Community Defender include: Defender of the Century; NACDL's Distinguished Service Award; the ABA's Harrison Tweed Special Award; and the joint ABA/NLADA Regional Heber Smith Award. At the conclusion of Judge Higgenbotham's remarks, Terry thanked the judge for what he called "his perjury." However, United States Supreme Court Justice John Paul Stevens came to Judge Higgenbotham's defense and confirmed that Terry was worthy of his praise.

We, too, would like to praise Terry for his innumerable talents and years of service to the citizen-accused. Terry is not only a consummate professional and excellent lawyer, but also a true friend. The standing ovation you received upon receipt of the award was much deserved. Congratulations!

BOOK REVIEW

Seventh Circuit Criminal Handbook, 2000 Ed.

By: Michael D. Monico and Barry A. Spevack
LEXIS Publishing

Reviewed by Richard H. Parsons

This book is a learned and illuminating study of criminal practice and the law in the Seventh Circuit.

Veteran defense lawyer (and former President of the IACJ) Mike Monico and his co-author, Barry Spevack, have, in this reviewer's opinion, written the definitive handbook for criminal defense lawyers practicing in this circuit. The authors are partners in the Chicago law firm of Monico, Pavich & Spevack. Both are well known lecturers. Mr. Spevack is also an adjunct Professor at Loyola University School of Law in Chicago.

The old adage "from soup to nuts" applies to this "must have" book. The authors cover every legal topic from search and seizure to appeals. For example, the chapter entitled "*Offenses"* provides an overview of Seventh Circuit law on nearly every offense that a criminal practitioner is likely to encounter, from Misprison of a Felony (18 U.S.C. § 4) to Environmental offenses. Moreover, for the most commonly encountered offenses such as conspiracy, fraud, and narcotics, detailed subsections address topics which will almost always arise in any such case. The handbook also walks the reader through every stage of a criminal case in the pretrial, trial, sentencing, and appeal chapters. Within each of these chapters is a wealth of Seventh Circuit blackletter law with citations to case authority on nearly 100 different issues. Although there are numerous handbooks on the market, this is the first which comprehensively devotes itself entirely to Seventh Circuit law–a devotion which is long overdue.

Indeed, this book provides a starting place for every practitioner, new and old, when he or she embarks on the monumental task of defending the citizen accused of committing a federal offense. The time to be saved on needless research alone, makes this manual a must.

This book will be readily kept on your desk and will be referred to often. Its organization and learned explanations of the law will prove to be an invaluable addition to your law library.

It is indeed the thinking person's guide to Seventh Circuit practice.

Dictum Du Jour

"A true friend stabs you in the front."

Oscar Wilde

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"In order to succeed, you must know what you are doing, like what you are doing, and believe in what you are doing."

Will Rogers

* * * * * * * * * *

"[W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest.

"We also have some judges, fortunately not many, who impose savage penalties on minor drug dealers with obvious relish, and who in thereby enlisting in the 'war against drugs' may remind readers of Hitler's Justice of the German judges' self-description as fighters on the internal battlefront.

"[J]udges on the one hand should not be eager enlisters in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects - - and not with the innocent purpose of facilitating academic analysis."

Richard A. Posner
Overcoming Law

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"So frequently I sit here alone. I wonder of what use is our prison system - as I have often wonders when I was seeking an alternative to this inhuman manner of restraining those who have violated the law. The waste of man power - both by the restrainers and the one restrained. Removing the individual from the outside world really accomplishes nothing of a positive nature. The restraint builds up frustrations and a smothering of the will. It kills motivation and completely removes decision ability."

Otto Kerner
Kerner: The Conflict of Intangible Rights
By: Bill Barnhart and Gene Schlickman

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For the great Gaels of Ireland -
The men that God made mad,
For all their wars are merry
And all their songs are sad.

Chesterton

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Conservatives, especially, should draw this lesson from the book [Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted]: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.

George Will, column, Frightening facts in "Actual Innocence" published April 6, 2000.

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Williams next argues that the "crack" seized from him should be suppressed because it was found when Officer Lewis "strip searched" him at the scene subjecting him to great humility and indignity. The district court, however, construed the search as a search incident to an arrest, not a strip search.

. . . . .

In this case, Williams initially consented to the pat-down search. The officer in running his hands up Williams' leg felt a hard object between the cheeks of Williams' buttocks, which was readily identifiable to him as contraband. As the officer went to put on a rubber glove, Williams ran. Lewis had to run after him, tackle him and spray him with pepper spray before he could get him under control. Lewis retrieved the object by sliding his hand under Williams' waistband and down the back part of his pants.

United States v. Arriel S. Williams, slip op. (7th Cir. 03/28/2000).

* * * * * * * * * *

On February 9, 1998, Reginald Miles walked into the Midland Federal Savings Bank in Chicago, Illinois and approached one of the tellers. Miles initially told the teller that he wanted to open a new account, but then drew a gun and exclaimed "this is a bank robbery, nobody move!" Miles pointed his gun at bank security guard Keith Contant, who was standing 25 to 35 feet away from him. Contant responded by drawing his own gun and firing several shots at Miles. Bank employees immediately sought shelter from the gunfire underneath counters and desks; one employee activated an alarm. During the shoot-out, Miles backed towards the bank's exit and then fell to the floor. When Contant saw Miles drop, he concluded that one of his shots must have struck Miles and stopped firing his gun. While Contant went to see whether the bank employees were injured, Miles got up and left the bank.

. . . . .

A day or two after the attempted bank

robbery, Miles called his probation officer and said that he could not keep an appointment for a drug test because he had been shot. [FN1: Miles was on probation for an armed bank robbery. If intended as a rehabilitative tool, the probation was a marked failure.] Miles told his probation officer that he had been kidnaped in a case of mistaken identity and was shot during the kidnaping. The next day, Miles' probation officer saw a newspaper article about the attempted bank robbery and called the FBI because she suspected that Miles may have committed the crime. She told the FBI where Miles lived and provided the agents with his photograph.

FBI agents went to Miles' residence and spotted a vehicle that matched the descriptions of the getaway car provided by eyewitnesses. An investigation revealed that the car was registered to Miles. The FBI agents photographed Miles' automobile and showed the pictures to witnesses who identified the car as the one they had seen the day of the attempted robbery.

When agents arrived at Miles' residence to arrest him, they found Miles on crutches attempting to escape through the back door.

United States v. Reginald Miles, slip op. (7th Cir. 03/29/2000).

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Sticking to the details would have done Moore more good, because it is hard to see why Moore had to tip his hand before trial. Of all the discovery requirements, only Rule 16(b)(1)(A) speaks to materials such as handwritten notes in a defendant's possession. It says:

"If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial."

Because Moore received discovery from the prosecutor, he had to furnish in exchange tangible evidence "which the defendant intends to introduce as evidence in chief at the trial." Yet Moore did not seek to use the note "as evidence in chief at the trial." He tried to use it as a prior inconsistent statement by Michael Wyatt that would undermine his credibility in the jurors' eyes. At oral argument in this court the prosecutor contended that, because either Michael Wyatt or someone else would have to establish the authenticity of the document, this testimony would be "evidence in chief". That assertion sorely misunderstands what it means to offer "evidence in chief" (or evidence in one's "case in chief"). Preliminary issues of admissibility are argued to the court. Fed.R.Evid. 104(a). They are *neither* part of the case in chief nor part of the defense. Rule 16(b)(1)(A) speaks to how the evidence is *used*, not to how it is *introduced*. Moore sought to use the note to impeach the testimony of a witness for the prosecution; it was not properly excludable under Rule 16.

United States v. Gary V. Moore, *et al*, slip op. (7th Cir. 03/29/2000).

* * * * * * * * * *

The government contends that this evidence is irrelevant because it is not true, arguing that Jackson concocted these documents and posted them on the supremacists' web sites in an attempt to cover up her crimes. Under this novel theory of relevance, defense evidence should be excluded whenever the prosecution pronounces it phony. Sorting truth from fiction, of course, is for the jury. "[A] judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight." *Western Indus., Inc. v. Newcor Canada Ltd.*, 739 F.2d 1198,1202 (7th Cir. 1984).

United States v. Jackson, slip op. (7th Cir. 4/3/2000)(bracket in original).

* * * * * * * * * *

Marijuana has a distinctive appearance, taste and odor, and perhaps even a feel, but it doe not have a distinctive sound. This is true regardless of how it is packaged.

United States v. Thomas, 2000 WL 553797 (9th Cir. 5/8/2000) (rejecting "detective's extraordinary statement ... that h heard the distinctive sounds of marijuana packages being loaded into" the back of a vehicle).

CHURCHILLIANA

Lifting of Spirits

In 1951, when Churchill returned to 10 Downing Street as Prime Minister, one of the first trips he took was to France to meet with General Eisenhower, the newly appointed head of the Allied NATO command.

At his chateau outside Paris, General Eisenhower entertained his old war comrade at a luncheon. During the luncheon Eisenhower spoke earnestly of the need for more forces. He continued well after the dessert.

Finally Churchill, noticing an ornate credenza behind Eisenhower on which a decanter of brandy stood,

said, "Dwight, that's a handsome credenza. Is it Louis Seize?"

Eisenhower - despite a nudge by his deputy general, Alfred Gruenther - said, "I guess it is. It was here when I came," and Ike went on speaking about the need for the enlargement of the British contingent.

Then Churchill interjected, "And that's a splendid decanter on the credenza. Is it Austrian crystal?"

Ike replied, "I suppose, but about this manpower problem -"

Whereupon Churchill again interrupted, saying, "More than manpower, it's morale - and the first thing the supreme Allied commander must do is lift the 'spirits' on that credenza."

SEVENTH CIRCUIT JUDICIAL CONFERENCE

The Seventh Circuit recently held its annual Judicial Conference on May 1 to May 2, 2000 in Chicago at the Drake Hotel. This years' conference was focused on the impact of technology on the practice of law.

To demonstrate the benefits of technology on courtroom presentations, a mock trial was held in which real-time transcription, power point presentations, and video conferencing were demonstrated to those in attendance. Much of this new and powerful technology will soon be available here in the Central District of Illinois. Judge Mihm's and Judge Scott's courtrooms will soon be fully equipped with the latest in courtroom technology, and the other judges' courtrooms are slated for the equipment in the near future.

A CD-Rom containing helpful information for Seventh Circuit practitioners was also distributed to the attendees. This CD contains: the Practitioner's Handbook; the Circuit Rules; the Seventh Circuit Annual Report; Links to 7th Circuit Web sites; the 7th Circuit Bar Association Directory; CJA Educational Presentations; and Forms & Handouts. Although much of this information is contained on the Seventh Circuit's web-site, the CD has a search function not available on-line. Contact the Clerk's Office at the Seventh Circuit if you would like to obtain a copy for yourself.

Circuit Clerk, Gino Agnello, stressed the usefulness of web-sites to practitioners. He noted that many attorneys are unaware that the Seventh Circuit has a web-site. In addition to the items contained on the CD mentioned above, the circuit's web-site contains docket sheets and opinions. It can be found on the world wide web at www.ca7.uscourts.gov. One especially useful function is the daily listing of opinions filed that day. This feature is a fast and free way to stay abreast of recent case law. All of the districts within the Seventh Circuit likewise have their own web-sites. The Central District's web-site is located at www.ilcd.uscourts.gov. This site also contains helpful information, including the local rules, forms and handouts, and selected orders entered by the various district judges.

Finally, at the annual luncheon, Chief Judge Posner delivered the annual State of the Circuit Address and reported that things were, in his words, "good." Unfortunately, the one area he singled out for criticism was the quality of representation on appeal provided by CJA attorneys. Lastly, of interest to appellate attorneys is that although the average criminal case in 1999 took 9.2 months from the filing of the notice of appeal to a final disposition, the Seventh Circuit reversed 9.4% of the criminal appeals which it decided on the merits. This number is up from last years' 6.7% reversal rate. According to Chief Judge Posner, this is the second highest reversal rate among the circuits, the D.C. Circuit being the only circuit with a higher reversal rate.

SPEAKING OF THE WORLD WIDE WEB ...

This issue of *The Back Bencher* - along with several past editions - can be accessed via the internet at www.ca7.uscourts.gov and then clicking on the link marked "Federal Defenders".

U CHECK IT OUT!

Questioning Consistent Police Reports

By David Mote
Deputy Chief Federal Defender

Generally speaking, police reports are inadmissible hearsay. While the police reports themselves are seldom admitted into evidence, the police reports normally portend and lock in the officer's testimony. If the reports of the police officers are all consistent, then their testimony is likely to be consistent. If several officers give consistent testimony, their consistency makes them appear credible unless you can explain how they could be both consistent and wrong. One wonders about the sometimes surprising consistency of police reports. Is it because they are all incredibly attentive to detail and have their watches synchronized? Probably not.

In a recent case, I had the opportunity to delve a little bit into local procedure regarding police reports. The results were interesting. I share them in the hope that information I gained from this foray into local procedure may give you some new ideas for cross-examination of police officers regarding their reports and report-writing methods.

I had received discovery in a drug case in which a purported drug house was searched after midnight pursuant to a warrant. None of the police reports mentioned a "knock and announce" and neither my client, nor his co-defendant who was already cooperating, had heard the police knock and announce. Accordingly, I filed a motion to suppress on the basis of the apparent failure of the police to "knock and announce." This generated some digging by the case agent who located more than a half-dozen additional reports, several of which discussed the "knock and announce." Interestingly, however, while all the reports initially turned over listed the "time of occurrence" as 11:45 p.m., only one of the reports in the second batch gave the same time, the rest all listing the time of occurrence as 12:40 a.m.

In questioning the case agent about the reports, I allowed myself to take a detour into another way of recording events, namely videotaping:

— Okay. Did you discuss with him what is their standard practice – when they make a tape, what is their standard practice to tape and not to tape?

— I know from past experience that they will attempt to make a tape after the residence is secure and the tactical team exits. Before they go in to do a search, they will use the video camera to walk through the house, videotape the condition of the house when they entered; and then after the search, they will again walk through the house in roughly the same pattern to show the house at the time that they leave to show the difference in condition or that, in fact, there was no damage done or if there was damage done to show that also.

Trans. at 14-15.

This was an interesting exchange as no videotapes had been mentioned in any of the police reports.

In response to questions I had raised regarding the times listed on the reports, the prosecutor sought to clarify the source of the different times in the different batches of reports:

Q. In fact, the reports that you received first were the reports of the various members of the search team rather than the reports of those members who only participated in the execution of the warrant as part of the ERT team, is that correct?

A. Correct.

Q. And the reports that you got from – the supplemental reports that you received in the second batch were those reports of members of the ERT team who did not participate in the search as members of the search team, is that correct?

A. Yes, it is correct.

Q. Now, the first group of reports generally indicated a date of occurrence of May 5th at 11:45 p.m., is that right?

A. Yes.

Q. The second group of reports, those of the ERT team [(Emergency Response Team)], indicate a date of occurrence of May 6th at 40 minutes after midnight, the morning of May 6th, is that right?

A. Yes, with one exception of Paul Carpenter who was on both the drug narcotics investigation group and was part of the emergency response team. His report was completed – or the date at the top and time was the initial time that you mentioned, which was May 5th at 11:45 p.m. Other than that, all of the search team reports differed from the entry reports in that the search team had the reports time prior to when the search warrant was actually executed.

Q. Now, you've talked to Paul Carpenter, is that correct?

A. Yes.

Q. He's also the person who prepared the evidence log relating to the search that night, is that correct?

A. Yes.

Q. And Officer Carpenter indicated to you that the evidence log recorded accurately the time in and time out of the search team. The time they actually entered the residence, and the time they actually left the residence, is that correct?

A. Yes, that's correct.

Q. And the time in reflected on the evidence log was 40 minutes after midnight on May 6th, is that right?

A. Yes.

Q. Now, the other date, the May 5th at 11:45, that was the time you learned from speaking to the officers involved that was used when they called in and got this – when the case was initiated or when they were preparing to make the entry, is that correct?

A. Yes.

Q. Is there anything about that that differs from the standard practice of the Springfield Police Department in your experience?

A. No.

Trans. at 17-19.

In re-direct, I explored why the reports were consistent with their differing times of occurrence:

Q. Do officers normally – do officers who are involved in an incident normally talk to one another before or while preparing their reports?

A. Yes, they do. They make sure – they discuss who's going to cover what angle. There has been instances where one report would be sufficient to explain what happened and other times when someone might have been in back of the house and, therefore, could have had no knowledge of what happened in the front of the house, so they might have to prepare a separate report on their own. So, yes, they discuss who is going to document what facts.

Q. Do they talk about what time they – in a case of a search warrant, what time they entered? Do they talk about that?

A. Not generally, no. Generally, you – the caption at the top of the report is just kind of a fill-in-the-blank format. And you commonly will – somebody will write it on a chalkboard. They call it the file and time. That's the file number and the time the report was generated.

And, technically, Springfield Police protocol is to record that at the top of the report. Even if the report you're writing is generated six days later, you would put that in the body of the report technically to document what time you performed whatever function you're documenting. And then at the top of the report, it would have the exact date and time of the original generation of the case.

Q. Okay. On the reports, there's a place for time of the occurrence with the date and time, correct?

A. In the top left corner area?

Q. Yes.

A. Yes. (Nodding head up and down.)

Q. If officers working together have the time of occurrence identical to the minute, would that indicate to you that they had talked about – talked about what happened when they went in prior to writing their reports?

A. Either that or else, like I said, *they write it on a big piece of paper on a chalkboard* so that everybody knows when they write their reports this is the case number of the file number and this is the date and time of when it was generated. That is most usually how it's done. *It's just common. Everybody knows where to look to.*

Trans. at 20-22.

My questioning of another officer revealed that it was not just date, time and file number being posted for the officers' use in preparing reports:

Q. When you prepared your report, was there information put on the blackboard for everybody to put in their reports?

A. Yes, sir. *They always put kind of a brief – you know, like a little bit of criminal history, who we may be dealing with. They draw the house where it's at and the street and some things that might be of help to us.*

Q. Okay. So that information is provided. Everybody has access to it as they write up their reports.

A. Yes, sir.

Trans. at 103.

In addition to exploring how things end up so consistent among the reports of numerous officers, I also summarized the information I then knew that was *not* in the reports:

Q. You wrote a report of this incident, correct?

A. That's correct, sir.

Q. Your report doesn't indicate any knock or announce, does it?

A. No, it does not.

Q. Nor does it indicate that any type of a flash grenade was thrown in the residence.

A. That's correct.

Q. And it doesn't indicate that the officers, including yourself, who did the initial entry were wearing masks and dark clothing.

A. That's correct.

Trans. at 113

From my experience with this case, I would offer the following practice tips:

1. Remember that consistency on minute details among police reports (in this case, to-the-minute agreements on the "time of occurrence") may be as deserving of further inquiry as inconsistencies;

2. Inquire about whether any information was posted or otherwise provided for the use of the officers in preparing their reports;

3. If information was provided for the officers use, inquire about whether the information included dates, times, addresses, alleged statements, criminal history, pictures or diagrams;

4. If a location was searched, inquire about whether any videotapes were made before, during or after the search;

5. If a location was searched, ask about whether a flash grenade (innocently referred to as a "distraction device") was used, what kind of clothing the officers were wearing, and what each member of the entry team was wearing. (Because flash grenades can start "small fires," one member of the response team in our case was carrying a fire extinguisher!);

6. Highlight the fact that information that may be good for the defense was omitted from the police reports.

CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender

RECENT REVERSALS

EVIDENCE

U.S. v. Byrd, No. 99-2480 (7th Cir. 03/31/00). In prosecution for assault on a federal officer, the Court of Appeals reversed the defendant's conviction due to the district court's refusal to allow the *pro se* defendant to admit into evidence the shackles in which he was restrained. Specifically, the government alleged that while shackled, the defendant assaulted the officers who were transporting him in a police vehicle. Central to the defendant's defense was that he could not have committed the assault as alleged while being shackled. When he sought to introduce a pair of shackles similar to those used to restrain him, however, the district judge refused and found that a description of them would be sufficient. The Court of Appeals reversed and found that the shackles used to restrain the defendant were central to his defense, and therefore, the inability to introduce them into evidence affected his substantial rights. Accordingly, the district court abused its discretion and the Court of Appeals reversed the defendants conviction.

GUILTY PLEA

United States v. Fernandez, 205 F.3d 1020 (7th Cir. 2000). On appeal of the district court's denial of the defendant's motion to withdraw his guilty plea, the Court of Appeals held that the district court's failure to comply with Federal Rule of Criminal Procedure 11 required the district court to allow the defendant to withdraw his plea. The defendant, a Mexican who spoke poor English, moved to withdraw his guilty plea after his attorney revealed that he had a conflict in representing the defendant because the attorney already represented a co-defendant in the case. The Court of Appeals found this conflict to weigh heavily in its analysis of whether the defendant's guilty plea was valid. Moreover, the district court made numerous omissions with respect to Rule 11. First, the district court asked only if the defendant had read the indictment. At no time were the charges or their elements recited by the judge or the prosecutor. Likewise, the district court failed to inform the defendant of the mandatory minimum sentence he was facing. Third, although the government provided a detailed factual basis for the plea, the defendant's response was equivocal when asked if he agreed with the government's proffer. Accordingly, under the totality of the circumstances, the Court, in what it called a close call, ruled that the district court erred by not allowing the defendant to withdraw his guilty plea.

IMMIGRATION

Solorzano-Patlan v. INS, No. 99-3310 (7th Cir. 03/10/00). On appeal from the Board of Immigrations (BIA) decision that the petitioner was removable from the United States as an "aggravated felon" because of his Illinois burglary conviction, the Court of Appeals reversed, holding that the burglary conviction was neither a "burglary offense" nor a "crime of violence" under federal law. The petitioner was previously convicted of "knowingly entering a 1994 Ford Explorer belonging to another with the intent to commit therein a theft." Illinois styles such a crime as a burglary, and the BIA therefore sought to remove the petitioner for an "aggravated felony." The Court of Appeals, however, noted that "burglary offense" is a term defined by federal law. Thus, Illinois' classification of the crime as a burglary was not dispositive. Supporting its use of the federal definition of burglary, the Court noted that for the exact same

offense, in both Indiana and Wisconsin the offense is not defined as a burglary. Thus, relying on the state's interpretation or characterization of the offense would result in disparate treatment of persons dependent solely upon where they happened to commit their crime. Looking then to federal law, the Court concluded that a burglary offense which would allow deportation must have as its elements unlawful entry into, or remaining in, a building or structure with intent to commit a crime. Because the petitioner's offense involved the entry into a motor vehicle, it was therefore not a "burglary offense." Moreover, because entry into a motor vehicle does not involve the risk that physical force may be used during the commission of the offense, the crime was not a "crime of violence either." Accordingly, the BIA's order of deportation was vacated.

SENTENCING

U.S. v. Smith, No. 99-3326 (7th Cir. 04/12/2000). In prosecution for conspiring to manufacture methamphetamine, the Court of Appeals reversed the district court's enhancement under U.S.S.G. § 3C1.2 (reckless endangerment during flight). The district court based its enhancement on the fact that the defendant, while being chased by the police, rolled down the window of his car and began releasing anhydrous ammonia from a "thermos." This chemical immediately vaporized into a cloud, and the officers continued to drive through the vapors unharmed. The Court of Appeals held that the facts presented to the district court were insufficient to established a *substantial* risk of death or serious bodily harm. Specifically, no evidence was presented as to how much chemical was released, the concentration of vapors, or the length of the officers' exposure. Analogizing to fire, the court noted that although fire can cause death or serious injury, the tossing of a lighted match out of a car window during a chase would not create a substantial risk of injury. Likewise, without more facts about the amount of anhydrous ammonia released, the government failed to meets its burden of proof.

U.S. v. Cruz-Guevara, No. 99-3043 (7th Cir. 03/23/00). In prosecution for aggravated illegal re-entry, the Court of Appeals reversed the district court's 10 level downward departure based on extraordinary family circumstances due to the fact that the defendant had no connections in Mexico and his family in the United States told the district court that they would sell their home and return to Mexico with the defendant if he was deported. Although the Court of Appeals did not find the departure itself to be unreasonable, the Court nonetheless reversed because the district court failed to link the extent of the departure to the structure of the Guidelines. Specifically, the district court failed to articulate any basis for the extent of its departure, and the extent of the departure was therefore an abuse of discretion.

U.S. v. Lamb, 207 F.3d 1006 (7th Cir. 2000). In prosecution for bank robbery, the Court of Appeals vacated the defendant's sentence for an error in his offense level calculation. Although the defendant only managed to steal and damage $2000 worth of property during his robbery, the district court concluded that the defendant intended to steal all the money in the bank, totaling $215,000, resulting in a three level increase to the defendant's base offense level. The Court of Appeals, however, noted that because the bank robbery was only partially completed (the defendant was apprehended during the course of the robbery) the proper guideline section was 2X1.1 (Attempt). Although that section allows calculation of the base offense level based upon intended conduct, the section also requires a district court to reduce the offense level by three unless the defendant completed all of the acts he thought necessary to success, or he was about to complete them when caught. In the present case, given that the defendant had no way of opening the main vault where most of the money was located (the defendant had only a screwdriver, wire cutters and crow bar), he was not near completion. Thus, although the district court properly used the amount of intended loss, the district court erred by failing to deduct the three levels because the defendant was unsuccessful.

U.S. v. Jackson, 207 F.3d 910 (7th Cir. 2000). In prosecution arising out of a conspiracy to distribute drugs, the Court of Appeals reversed as plain error the district court's sentencing of four conspiracy members. The district court at sentencing first enhanced each defendant's base offense level by three for being managers or supervisors of the conspiracy pursuant to U.S.S.G. 3B1.1(b). However, he then reduced each defendant's sentence by two levels under section 3B1.2(b) for being minor participants in the conspiracy. The Court of Appeals found that because the defendants were part of a small supervisory layer of the conspiracy consisting of only 2% of the 6000 member criminal organization, they were not less culpable than "most" other participants" as required by 3B1.2(b). However, the Court also noted that receiving a manager/supervisor enhancement is not a *per se* bar against also receiving the minor participant downward adjustment.

Romadine v. U.S., 206 F.3d 731 (7th

Cir. 2000). In a 2255 appeal, the Court of Appeals held that a district court may not order that a federal sentence be served concurrently to another sentence which has not yet been imposed. Rather, according to the Court, the only ways to make a federal sentence concurrent to another sentence not yet imposed are to: (1) seek a discount in time from the judge making the subsequent sentence which would have the practical effect of a concurrent sentence; or (2) request the Attorney General to designate the state prison as the place of federal confinement, thereby starting the federal clock running and effectively making the sentences concurrent. Moreover, where a federal sentence is imposed and another sentence is imposed thereafter, the plain language of 18 U.S.C. 3584(a) makes the federal sentence *presumptively* consecutive in all unprovided for cases, and the effective decision then is made by the Attorney General of the state judge imposing the subsequent sentence rather than the federal judge imposing the first sentence.

U.S. v. Lanzotti, 205 F.3d 951 (7th Cir. 2000). In prosecution for participating in an illegal gambling business, the Court of Appeals held that the defendant's sentence was improperly enhanced under the leader/organizer guideline provision, U.S.S.G. 3B1.1(b). The Court explained that the district court's "finding lacks a factual predicate and constitutes clear error" because, although the defendant was the girlfriend of the leader of the gambling business, she was not employed by the co-defendant's illegal gambling front company, never received a paycheck, and only occasionally presented herself at the business office. Accordingly, without any further discussion, the Court of Appeals vacated her sentence and remanded the case to the district court for re-sentencing without the leadership enhancement.

U.S. v. Morris, 204 F.3d 776 (7th Cir. 2000). In prosecution for traveling across state lines for the purpose of engaging in a sexual act with a juvenile, the Court of Appeals vacated the defendant's sentence because he was not given adequate notice that an upward departure was possible. Specifically, at sentencing, the district court upwardly departed on its own motion, resulting in a guideline range almost double that which would have resulted without departure. Defense counsel argued in the trial court that no notice had been given that a departure might be possible, but the district court departed anyway. On appeal, the government asserted that the following boilerplate language contained in the PSR put the defendant on notice regarding the possibility of departure: "Pursuant to U.S.S.G. 5K2.0, the Sentencing Court may impose a sentence outside the range established by the applicable guidelines if the Court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. Pursuant to U.S.S.G. 4A1.3(e), if reliable information indicates that prior similar adult criminal conduct, not resulting in a criminal conviction, exists, the Court could consider an upward departure as the criminal history category does not adequately reflect the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." Unconvinced that this statement provided the defendant with notice, the Court stated that this language "looks for all the world like boilerplate from a word processor's glossary [and] one might as well say that the Guidelines Manual itself notifies defendants about the possibility of departure, and have done with it." Rather, the Court held that notice must specifically identify the ground on which the district court is contemplating departure and refer not only to the rationale, but also to the facts that support the theory of departure. Accordingly, the Court ordered that the defendant be re-sentenced.

RECENT AFFIRMANCES

§ 2255

Potts v. U.S., No. 99-1186 (7th Cir. 04/24/2000). The Court of Appeals in this case affirmed the district court's dismissal of a petition filed under § 2255. The petitioner filed his petition with the assistance of counsel, and the government then made a detailed response. Based on this response, the petitioner moved to voluntarily withdraw his motion. He then sought to file another petition, arguing that it was not a second or successive petition because the first petition had not been rejected on the merits, but rather merely voluntarily dismissed. The Court of Appeals, however, held that the petitioner "had his opportunity to receive a decision on the merits; he flinched, seeing the handwriting on the wall." Thus, the re-filed petition was successive and properly dismissed.

Grey-Bey v. U.S., No. 99-4131 (7th Cir. 04/13/00). In this case, the Court of Appeals denied the petitioner leave to file a second motion under § 2255. The petitioner had directly appealed his conviction, filed a § 2255 petition, appealed the denial of that petition, and sought leave to file a second petition. In this second petition, the petitioner sought to benefit from the Supreme

Court's decision in Bailey v. United States, 516 U.S. 137 (1995), wherein the Court required active employment of firearm in order to be convicted under 18 U.S.C. § 924(c). The Court of Appeals, in denying the petitioner permission to file a second petition, noted that 28 U.S.C. § 2255 ¶8(2) permits the court to authorize a second petition under that section only if the motion identifies newly discovered evidence establishing his innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Notwithstanding this language, the Court of Appeals held that ¶8(2) did not authorize a second petition because the decision in Bailey was not a "new rule of constitutional law." Rather, Bailey was simply a case of statutory interpretation. Thus, permission to file a second petition was denied.

APPEAL

U.S. v. Hirsch, 207 F.3d 928 (7th Cir. 2000). In this case, the Court of Appeals dismissed the appeal for lack of jurisdiction where the notice of appeal was filed more than three months past the 10 day deadline. Counsel's explanation for the late filing was that the clerk of the court was to file the notice of appeal, but failed to do so. Not until over three months later did the attorney discover that no notice of appeal had been filed. He then filed a motion in the district court to take an untimely appeal, which the district court granted. The Court of Appeals, however, held that the district court had no power to allow the untimely notice of appeal. Although Federal Rule of Appellate Procedure 4(b)(4) allows a district court to "extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed" (10 days), the district court's grant of an extension was well beyond the time allowed in the rule. Thus, although the Court held that the appeal must be dismissed, the Court also noted that the defendant was not totally without a remedy, for he could file a 2255 petition alleging ineffective assistance of counsel.

EVIDENCE

U.S. v. Jackson, 207 F.3d 910 (7th Cir. 2000). In prosecution arising out of federal narcotics charges, the Court of Appeals upheld the district court's admission of audiotapes obtained covertly pursuant to a warrant. First, although the defendants argued that the warrant authorizing surveillance was granted by a district judge in the Northern District of Illinois for use in the Southern District of Illinois, the Court held that the statute governing the issuance of such warrants did not limit the issuance of a warrant to the district where the judge sits. Moreover, the most sensible approach is to allow the judge in which the case is being prosecuted to issue the warrant, regardless of where the warrant is to be executed, because the judge presiding over the case is in the best position to determine whether the communications sought to be surveilled are material under the statute.

OFFENSE ELEMENTS

U.S. v. Hardin, No. 99-1175 (7th Cir. 03/30/00). In prosecution for CCE, the Court of Appeals rejected the defendants' argument that pursuant to the Supreme Court's decision in Jones v. U.S., 119 S.Ct. 1215 (1999), the drug quantity and principal requirement portions of the CCE statute are offense elements required to be proved beyond a reasonable doubt at trial rather than sentencing factors. The Court of Appeals, however, applying the analysis used in Jones, concluded that the language of the statute, the structure of the statute, the subject matter of the statute, tradition, context, and legislative history all indicate that the factors set forth in § 848(b) are sentencing factors rather than offense elements.

RECUSAL

U.S. v. Boyd, No. 98-2035 (7th Cir. 04/03/00). On appeal arising out of the prosecution of Chicago's "El Rukn" street gang, the Court of Appeals affirmed the defendants' convictions and sentences over numerous arguments. One issue presented was whether the district judge should have recused himself under Section 455(a) of the Judicial Code because of the judge's involvement with the defendants when he was the head of the Illinois State Police. After the district judge denied the defendants' motion, according to circuit precedent, the defendants then filed for a writ of mandamus which was ultimately denied by the Court of Appeals. On direct appeal, the Court of Appeals refused to reconsider the ruling of the previous panel although it stated that it believed that the previous ruling was wrong, holding that the issue had already been decided and was not appropriate for direct review. Judge Ripple, however, dissented and urged the court to "join the rest of the Country and permit review by appeal of a failure to recuse under § 455(a)." Indeed, Judge Ripple noted that no other court in the country requires that denial of a motion for recusal be pursued by mandamus. Moreover, he noted that mandamus is poorly suited for reviewing such an issue because while a judge may appear unbiased on mandamus review at the beginning of a case, the record after the conclusion of proceedings may reveal such hidden biases more readily. Such was the

case here, according to Judge Ripple, where even the judges affirming the convictions agreed that the district judge should have recused himself.

SEARCH & SEIZURE

U.S. v. Richardson, No. 99-1190 (7th Cir. 04/03/00). In prosecution for unlawful possession of a weapon by a felon and distribution of cocaine, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence obtained by police during a warrantless search of his residence. Officers received a 911 call from a man who identified himself and stated that the defendant had raped and murdered a female who was hidden in the defendant's basement. The officers went to the defendant's residence and searched his residence without his consent. Although no body was found, the drugs and gun were. The Court of Appeals affirmed the search under the exigent circumstances exception to the warrant requirement. Although the Court noted that this was "a close case," not only did the caller identify himself, but the officers believed that the alleged victim might still be alive. In their experience, laypersons may not realize that a person is alive rather than dead, and officers therefore assume that anyone reported dead might be alive unless the report comes from qualified personnel such as a paramedic unit. Under these circumstances, the Court found exigent circumstances to exist. Indeed, according to the Court, a 911 call is the most common means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help.

U.S. v. Williams, No. 99-2543 (7th Cir. 03/28/00). On appeal from the district court's denial of the defendant's motion to suppress, the Court of Appeals affirmed the district court. At the hearing on the motion to suppress, the arresting officers testified that after stopping the defendant for a routine traffic violation, the defendant consented to a search of his person. Although the defendant also testified that he did not consent to a search, the district court credited the officers' testimony, and the Court of Appeals did not disturb this determination. The defendant also argued, however, that the officers subjected him to the equivalent of a "strip search." Specifically, during the pat-down search, the officer felt an object lodged in the defendant's buttocks. The defendant then ran and, when officers caught him, one of the officers put his hand down the defendant's pants to retrieve the object. The Court of Appeals held that this search did not exceed the scope of the defendant's initial consent to a pat-down search. The search occurred at night, away from traffic, and neither officer saw anyone in the vicinity. Moreover, the defendant was never disrobed. Accordingly, the Court held that the search was not overly intrusive.

SENTENCING

U.S. v. Swanson, No. 99-3061 (7th Cir. 04/24/00). In prosecution for possession with intent to manufacture marijuana, the Court of Appeals affirmed the district court's inclusion of 1,142 dead marijuana plants when calculating the quantity of drugs for sentencing purposes. Although noting that two circuits have held that dead plants do not count for sentencing purposes (United States v. Stevens, 25 F.3d 318 (6th Cir. 1994) and United States v. Blume, 967 F.2d 45 (2d Cir. 1992)), the Court of Appeals noted that six other circuits held that dead plants are counted for purposes of the 100 gram to 1 plant ratio set forth in U.S.S.G. § 2D1.1(c). Agreeing with the majority, the Seventh Circuit for the first time explicitly joined these circuits and held that dead plants are countable.

U.S. v. Hoogenboom, No. 98-3961 (7th Cir. 04/04/00). In prosecution arising out of a psychologist's Medicare fraud, the Court of Appeals affirmed a sentencing enhancement for vulnerable victim. The defendant fraudulently claimed that she provided counseling to numerous elderly, mentally ill patients and collected thousands of dollars from Medicare. Although the Court of Appeals noted that Medicare was the more likely victim of the defendant's fraud, the vulnerable victim enhancement was nonetheless justified because the patients involved were "so closely involved with the scheme that it does no violence to the guidelines to conclude they were victims." Moreover, given that one of the reasons for increasing a criminal penalty based on the type of victim is that vulnerable ones are less likely to report the crime, the defendant's choice of victim in this case allowed her crimes to go undetected for over a year. Therefore, the vulnerable victim enhancement was properly applied.

United States v. Morrison, 207 F.3d 962 (7th Cir. 2000). In prosecution for the manufacture of methamphetamine, the Court of Appeals affirmed the defendant's sentence over his argument that the district court used unreliable evidence in calculating the quantity of drugs involved with his relevant conduct. The defendant on appeal challenged the district court's reliance upon statements of three witnesses who did not testify at the sentencing hearing. The Court noted that where, as here, the government attempts to load on relevant conduct

through hearsay statements, "it is not a terribly bad idea for individuals to testify because of the effect their statements have on the sentencing calculation." See United v. Robinson, 164 F.3d 1068 (7th Cir. 1999). Indeed, the Court "will not allow the disparity between conduct disclosed at sentencing to enhance a defendant's sentence to the degree that the sentencing hearing becomes a tail which wags the dog of the substantive offense." However, in the present case, notwithstanding the fact that the hearsay statements of the three co-conspirators increased the defendant's drug quantity more than 100 fold, the Court nevertheless held that the information was reliable. Specifically, the Court noted that the testimony of each person corroborated the testimony of the others, as well as testimony of other individuals who did testify at the sentencing hearing. Thus, given this corroboration, the district court was entitled to rely on the information in the PSR without the live testimony.

U.S. v. Jackson, 207 F.3d 910 (7th Cir. 2000). The Seventh Circuit in this case joined the growing number of circuits which have held that, notwithstanding the United States Supreme Court's decision in Jones v. United States, 119 S.Ct. 1215 (1999), the type and quantity of drug involved in an offense under 21 U.S.C. 841 are sentencing factors and not elements of the offense which must be proved beyond a reasonable doubt. According to the Court of Appeals, it adhered to its pre-Jones authority because the division between the elements of the crime and factors relating to how severely to punish offenders is much clearer for drug offenses than in the statute interpreted in Jones.

U.S. v. Isienyi, 207 F.3d 391 (7th Cir. 2000). In prosecution for importation of heroin, the Court of Appeals affirmed the district court's refusal to lower the defendant's base offense level pursuant to the minor participant adjustment set forth in U.S.S.G. § 3B1.2.(a). The defendant argued that he was entitled to the adjustment because he was convicted of importing only a single shipment of heroin into the United States, which was a minor activity relative to the international drug smuggling scheme of which he was a part. However, the Court of Appeals noted that the defendant was held accountable only for the amount of heroin involved in the single shipment, rather than the amount of heroin involved in the entire conspiracy. Accordingly, under circuit precedent, where a defendant's base offense level is determined based upon only those parts of a larger criminal activity in which he was directly involved, he is not entitled to a minor participant adjustment as well. The Court did note, however, that a conflict among the circuit courts exists on this point.

U.S. v. Corry, 206 F.3d 748 (7th Cir. 2000). In prosecution for bank fraud, the defendant argued that the district court improperly concluded that a lack of personal gain was not a proper ground for a downward departure. Specifically, the defendant argued that the Seventh Circuit's decision in United States v. Seacott, 15 F.3d 1380 (7th Cir. 1994), held that a downward departure based on lack of personal gain was an impermissible ground for departure. However, because Koon v. United States, 518 U.S. 81 (1996), was decided after Seacott, the district court improperly relied upon that case. The Court of Appeals, however, held that Seacott, rather than precluding a downward departure based on personal gain, simply concluded that the facts in that case did not fall outside the heartland in Koon terminology. The district court in the present case, according to the Court, came to the same conclusion. Specifically, lack of personal gain from a fraud is not necessarily outside the heartland, where, as here, the defendant committed the fraud to keep the family business afloat. Accordingly, the district court did not err in its analysis.

U.S. v. Turner, 203 F.3d 1010 (7th Cir. 2000). In prosecution for conspiracy to distribute controlled substances, the defendant argued that the probation officer who prepared his PSR violated the separation of powers doctrine by not serving as a neutral arm of the court but rather as an advocate for the prosecution. Specifically, the defendant argued that when the probation officer sits at the government's table in court and routinely advocates for the government, the separation of powers doctrine is violated. The Court of Appeals, however, rejected this argument. The Court noted that the defendant's complaint was too general and not particular to the facts of his case. However, the Court did note that "probation officers must gain defense counsel's trust, and defense counsel must not view probation officers as surrogate prosecutors." Thus, the Court "suggested" to district judges, U.S. Attorneys, and probation officers that steps be taken to prevent the perception that probation officers are surrogate prosecutors, such as placing a separate table in the courtroom where the probation officer could sit.

NON-SUMMARIZED CASES

U.S. v. Ward, No. 98-2657 (7th Cir. 04/28/00) (affirming the defendants' drug convictions over numerous

evidentiary and sentencing challenges).

U.S. v. Keith Jones, No. 99-1307 (7th Cir. 04/19/00) (affirming drug conviction over argument that drug quantity determination was based on unreliable evidence and that the government breached the plea agreement by failing to make a 5K1.1 motion for downward departure at sentencing).

U.S. v. Dorsey, No. 98-3163 (7th Cir. 04/12/200) (affirming sentencing enhancements under U.S.S.G. § 2B3.1(b)(2)(C) (brandishing, display, or possession of firearm during offense) and U.S.S.G. § 2B3.1(b)(4)(B) (physical restraint of person during crime) where, although the defendant did not personally participate in the conduct involved in the enhancements, it was reasonably foreseeable to him that such conduct would occur).

U.S. v. Masquelier, No. 99-1865 (7th Cir. 04/12/00) (affirming a conviction for conspiracy to defraud the Department of Defense in violation of 18 U.S.C. § 371, over defendant's argument that the district court improperly excluded evidence regarding misconduct on the part of the Department of Defense).

U.S. v. Roe, No. 99-2541 (7th Cir. 04/11/00) (affirming drug conviction over claims that evidence of prior drug conviction was improperly admitted, that the prosecutor engaged in misconduct during closing argument, and that the district court erred in determining drug quantity).

U.S. v. Brown, No. 99-2738 (7th Cir. 04/07/00) (affirming the defendant's armed bank robbery conviction and sentence over his argument that his four prior armed robbery convictions committed within 60 days of one another were related for criminal history purposes).

U.S. v. Jackson, No. 99-2223 (7th Cir. 04/03/00) (affirming the defendant's fraud conviction over several evidentiary challenges).

U.S. v. Jones, No. 99-2359 (7th Cir. 03/31/00) (affirming the district court's denial of the defendant's motion for a *Franks* hearing and the defendant's motion to suppress evidence).

U.S. v. Avery, No. 99-1523 (7th Cir. 03/31/00) (affirming the defendant's conviction for being a felon in possession).

U.S. v. Moore, No. 98-4296 (7th Cir. 03/29/00) (affirming the sentences of four defendant's convicted of drug related offenses).

Freeman v. Page, No. 99-2825 (7th Cir. 03/28/00) (affirming the district court's dismissal of a petition filed under 28 U.S.C. § 2254 because the petition was filed after the 1-year statute of limitations).

U.S. v. Lilly, No. 98-2991 (7th Cir. 03/17/00) (dismissing an appeal due to an untimely notice of appeal).

U.S. v. Miles, 207 F.3d 988 (7th Cir. 2000) (affirming the defendant's armed bank robbery conviction over his challenge to the district court's exclusion of evidence under Rules 403 and 608(b)).

U.S. v. Poole, 207 F.3d 893 (7th Cir. 2000) (affirming a conviction for making false statements in connection with the purchase of firearms over the defendant's arguments that 404(b) evidence was improperly introduced and that the prosecutor engaged in misconduct during closing argument).

U.S. v. Jocic, 207 F.3d 889 (7th Cir. 2000) (affirming a bank robbery conviction over the defendant's insufficiency of the evidence claim).

Lear v. Cowan, 207 F.3d 886 (7th Cir. 2000) (affirming the denial of a capital habeas petition).

U.S. v Shukri, 207 F.3d 412 (7th Cir. 2000) (affirming the defendant's conviction and finding that the district court properly admitted inculpatory hearsay statements and that the defendant was not denied effective assistance of counsel).

U.S. v. Bragg, 207 F.3d 394 (7th Cir. 2000) (affirming the district court's sentencing enhancements for vulnerable victims, leadership, and reckless risk of serious bodily injury).

U.S. v. Tomasino, 206 F.3d 739 (7th Cir. 2000) (vacating a defendant's sentence for mail fraud in relation to a pension fund and ordering re-sentencing after the Sentencing Commission clarified whether, when it included pension funds under U.S.S.G. 2F1.1(b)(7)(B) (providing a 4-level increase in sentence if the fraud "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense"), the Commission was implementing what it perceived to be a Congressional mandate or whether it was independently making a legislative judgment).

U.S. v. Fischer, 205 F.3d 967 (7th Cir. 2000) (holding that where a defendant is convicted of both CCE and the lesser-included offense of conspiracy, the district court has discretion to dismiss either the CCE or the conspiracy offense).

Reversible Error

[**Caveat**: For those who have not previously seen this column, it is a collection of federal appellate decisions in which a defendant received relief. The summaries are no substitute for reading the opinions. They are merely to draw your attention to cases that may help your own research.]

United States v. Cobb, 185 F.3d 1193 (11th Cir. 1999) (Court erroneously denied severance motion).

United States v. Brown, 186 F.3d 661 (5th Cir. 1999) (Insufficient evidence of money laundering).

United States v. Nathan, 188 F.3d 190 (3rd Cir. 1999) (Statement made after plea agreement was not stipulation).

United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) (Domestic abuse was irrelevant to drug conspiracy).

United States v. Samaniego, 187 F.3d 1222 (10th Cir. 1999) (No foundation for admission of business records).

United States v. Dixon, 185 F.3d 393 (5th Cir. 1999) (Court improperly refused instruction on insanity based upon expert testimony).

United States v. Causey, 185 F.3d 407 (5th Cir. 1999) (1. No federal nexus shown regarding communication; 2. Recommendations did not support death sentences).

United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999) (Admission of codefendant's out-of-court statement violated confrontation).

United States v. Dubon, 186 F.3d 1177 (9th Cir. 1999) (Indictment did not allege *mens rea*).

United States v. Monzon-Valenzuela, 186 F.3d 1181 (9th Cir. 1999) (Absent perjury finding, adjustment for obstruction did not apply).

United States v. Mitchell, 187 F.3d 331 (3rd Cir. 1999) (Court may not draw adverse inference from silence at sentencing).

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (No evidence that defendant knew victims were vulnerable).

United States v. Gomez-Orozco, 188 F.3d 422 (7th Cir. 1999) (Proof of citizenship required withdrawal of guilty plea to illegal re-entry).

United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999) (Proximity to school must be charged in order for enhancement to apply).

United States v. Martinez-Ramos, 184 F.3d 1055 (9th Cir. 1999) (Court had authority to depart downward to remedy sentencing disparity).

United States v. Coleman, 188 F.3d 354 (6th Cir. 1999) (Court must look at case as a whole to see if factors take case out of "heartland" for downward departure).

United States v. Morales, 185 F.3d 74 (2nd Cir. 1999) (Racketeering enterprise did not last for duration alleged in indictment).

United States v. Ford, 184 F.3d 566 (6th Cir. 1999) (Search warrant authorized broader search than reasonable).

United States v. Monger, 183 F.3d 574 (9th Cir. 1999) (Court should have instructed on lesser offense of simple possession).

United States v. Orduno-Aguilera, 183 F.3d 1138 (9th Cir. 1999) (Insufficient evidence that substance was illegal steroid).

United States v. Davis, 183 F.3d 231 (3rd Cir. 1999) (Insufficient evidence of obstruction of justice and conspiracy).

United States v. Meza-Corrales, 183 F.3d 1116 (9th Cir. 1999) (Felon had civil rights restored and could possess firearms).

United States v. Laljie, 184 F.3d 180 (2nd Cir. 1999) (No evidence that checks were altered, that signatures were not genuine, or that they were intended to victimize bank).

United States v. Barajas-Montiel, 185 F.3d 947 (9th Cir. 1999) (Insufficient evidence tying defendant to false identification).

United States v. Rice, 184 F.3d 740 (8th Cir. 1999) (Defendant was entitled to full three-level reduction for acceptance).

United States v. Manske, 186 F.3d 770 (7th Cir. 1999) (Defendant could cross-examine witness about his threats to other witnesses about their testimony).

United States v. Gage, 183 F.3d 711 (7th Cir. 1999) (Defendant's denial that his robbery note mentioned a firearm did not justify obstruction adjustment).

United States v. Tingle, 183 F.3d 719 (7th Cir. 1999) (Venue improper in district where no distribution took place).

United States v. Ramos, 179 F.3d 1333 (11th Cir. 1999) (Defendant denied opportunity to depose witness who was

outside country).

United States v. Brennan, 183 F.3d 139 (2nd Cir. 1999) (Venue for mail fraud permissible only in districts where proscribed acts occurred).

United States v. Torres, 182 F.2d 1156 (10th Cir. 1999) (Prior convictions that are relevant conduct may not be counted toward criminal history).

United States v. Torres-Ortega, 184 F.3d 1128 (10th Cir. 1999) (Admission of grand jury testimony violated confrontation).

United States v. Lindsay, 184 F.3d 1138 (10th Cir. 1999) (Insufficient evidence that bank was FDIC insured).

United States v. Nunez, 180 F.3d 227 (5th Cir. 1999) (Indictment failed to charge an offense).

United States v. Glover, 179 F.3d 1300 (11th Cir. 1999) (Role as organizer or leader must be based on managing persons, not merely assets).

United States v. Mohrbacher, 182 F.3d 1041 (9th Cir. 1999) (There was a variance between charge of transporting child pornography and proof of mere receipt).

United States v. Wilson, 182 F.3d 737 (10th Cir. 1999) (Insufficient evidence of child pornography shipped in interstate commerce).

United States v. Ramirez, 182 F.3d 544 (7th Cir. 1999) (Variance between charge and proof in firearm case).

United States v. Payne, 181 F.3d 781 (6th Cir. 1999) (Parole officer did not have reasonable suspicion to search defendant's trailer and truck).

United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999) (Prior conviction not counted under criminal history cannot be used as career offender predicate).

United States v. Hall, 181 F.3d 1057 (9th Cir. 1999) (Violation of Speedy Trial Act).

United States v. Zendeli, 180 F.3d 879 (7th Cir. 1999) (Enhancement for injury does not apply to codefendant's injury).

United States v. Spinner, 180 F.3d 514 (3rd Cir. 1999) (Indictment failed to allege element of interstate commerce).

United States v. Jackson, 181 F.3d 740 (6th Cir. 1999) (Resentencing did not overcome presumption of vindictiveness).

United States v. Martin, 180 F.3d 965 (8th Cir. 1999) (Insufficient evidence of constructive possession of a firearm).

United States v. Frega, 179 F.3d 793 (9th Cir. 1999) (Court's instruction failed to identify potential predicate acts in RICO case).

United States v. Sorenson, 179 F.3d 823 (9th Cir. 1999) (Defendant's false statements were contained in an unsigned loan application).

United States v. Saenz, 179 F.3d 686 (9th Cir. 1999) (Defendant was entitled to show his knowledge of victim's prior acts of violence to support self-defense).

United States v. Lawrence, 189 F.3d 838 (9th Cir. 1999) (Testimony regarding defendant's marriage was more prejudicial than probative).

United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (Drug quantities not supported by evidence).

United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) (Requiring more proof of paternity from father than mother, to show citizenship, denied equal protection).

United States v. Garrett, 189 F.3d 610 (7th Cir. 1999) (Guilty plea colloquy was not admission to crack, as opposed to powder, for sentencing purposes).

United States v. Riley, 189 F.3d 802 (9th Cir. 1999) (Intentional destruction of notes of interview with informant violated Jencks Act).

United States v. Heath, 188 F.3d 916 (7th Cir. 1999) (Previous arrest was not admissible prior bad act).

United States v. Anderson, 189 F.3d 1201 (10th Cir. 1999) (Titling vehicle in mother's name did not prove money laundering).

United States v. Anderson, 188 F.3d 886 (7th Cir. 1999) (Prior bad act was more than 10 years old).

United States v. Shipsey, 190 F.3d 1081 (9th Cir. 1999) (Court's instruction to jury constructively amended indictment).

United States v. Walker, 191 F.3d 326 (2nd Cir. 1999) (Insufficient proof than defendant was responsible for more than 100 false immigration documents).

United States v. Hernandez, 189 F.3d 785 (9th Cir.), *cert. denied*, 120 S.Ct. 1441 (1999) (Venue was improper for undocumented alien discovered in one district and tried in another).

United States v. Messner, 197 F.3d 330 (9th Cir. 1999) (1. Speedy Trial Act exclusion for arrest of co-defendant did not apply to unreasonably long delay; 2. Coded language did not support money

laundering conviction).

United States v. McSwain, 197 F.3d 472 (10th Cir. 1999) (Conspiracy to manufacture and distribute are lesser offenses of CCE).

United States v. Barnett, 197 F.3d 138 (5th Cir. 1999) (Insufficient evidence of conspiring or aiding and abetting murder for hire).

United States v. Pigee, 197 F.3d 879 (7th Cir. 1999) (Jury instruction constructively amended indictment).

United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999) (Ex post facto application of money laundering conspiracy statute).

United States v. Fowler, 198 F.3d 808 (11th Cir. 1999) (Restoration of rights by state did not prohibit firearms possession).

Prou v. United States, 199 F.3d 37 (1st Cir. 1999) (Counsel failed to attack timeliness of statutory drug enhancement).

United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999) (Government need not consent to departure for stipulated deportation).

United States v. Dortch, 199 F.3d 193 (5th Cir.), *amended*, 203 F.3d 883 (2000) (Continued detention after traffic stop was unreasonable).

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999) (Improper enhancement for use of private plane in drug case).

United States v. Waites, 198 F.3d 1123 (9th Cir. 2000) (Conduct that was regulated federally should not have been prosecuted under Assimilative Crimes Act).

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000) (Insufficient evidence of drug distribution).

United States v. Eustaquio, 198 F.3d 1068 (8th Cir. 1999) (No reasonable suspicion to search bulge on defendant's midriff).

United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999) (Purchase of computers for personal use was not money laundering).

United States v. Johnston, 199 F.3d 1015 (9th Cir. 1999) (Forfeited money should have been subtracted from restitution).

United States v. Guidry, 199 F.3d 1150 (10th Cir. 1999) (Defendant must have relationship of trust with victim for abuse of trust to apply).

United States v. Harstel, 199 F.3d 812 (6th Cir. 1999) (Receipt of mailed bank statements was not a fraudulent use of mails).

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CHARLIEANIA

"Impossible to prepare defense until direction of attack is known.**"**

Charlie Chan

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"Innocent and guilty are harder to separate than Siamese twins."

Charlie Chan

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"Nothing, but the wind, can pass the sun without casting shadow."

Charlie Chan

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"Swallow much but digest little."

Charlie Chan

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