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APPELLATE AND 2255 FAVORABLE UPDATE

The Federal Criminal Law Center and the Law Office of Marcia G. Shein want to let you know what areas of legal relief are available for 2255 and appellate review. Not every case will be viable, but if your case falls within these areas of possible relief, you may want to have our specialists in appellate and post-conviction law represent your interests.

5th Circuit excludes weight of liquid used to transport cocaine. Defendant was arrested at the airport carrying two bottles containing a thick liquid which had cocaine distilled in it. The 5th Circuit held that the district court should not have considered the weight of the transport liquid. Under the market-oriented approach adopted by Congress, culpability should be based on the amount of usable drug mixture that a defendant brings to the market. Here, the liquid transport medium was to be separated out before distribution. This decision did not conflict with 5th Circuit decisions holding that the weight of toxic liquid by-products from the manufacture of methamphetamine should be considered at sentencing. Both methamphetamine and PCP were singled out for different treatment under the guidelines, and the market-oriented approach was not intended to apply. Moreover, the liquids involved in the methamphetamine cases were precursor chemicals or by-products of the manufacturing process. *U.S. v. Palacios-Molina*, 7 F.3d 49 (5th Cir. 1993).

7th Circuit excludes waste water from weight of cocaine base. The 7th Circuit held that the district court improperly considered the weight of water left over from the cocaine base manufacturing process, in calculating defendant's base offense level. The decision in *Chapman v. U.S.*, 111 S.Ct. 1919 (1991) does not require the waste water to be included. The waste water did not serve as a dilutant, cutting agent or carrier medium for the cocaine base, and did not facilitate distribution. The liquid was merely a by-product with no use or market value. Under a

market-oriented approach, when the mixture is not ingestible and therefore not marketable, there is no reason to base a sentence based on the entire weight of a useless mixture. Judge Ripple concurred to emphasize that the opinion did not address whether the waste water could have been included had the defendant been charged with manufacturing, rather than distributing, crack cocaine. *U.S. v. Johnson*, 999 F.2d 1192 (7th Cir. 1993).

10th Circuit says *Chapman* did not overrule cases requiring consideration of weight of unusable by products. Under 10th Circuit cases decided before *Chapman v. U.S.*, 111 S.Ct. 1919 (1991), the weight of unusable waste by-products containing a detectable amount of P2P are to be included for sentencing purposes. Defendant argued that *Chapman* overruled these cases and adopted a market-oriented approach under which waste by-products should be excluded. The 10th Circuit rejected this argument, reaffirming that so long as a mixture or substance contains a detectable amount of a controlled substance, its entire weight, including waste by-products of the drug manufacturing process, may be properly included in defendant's base offense level. The focus on *Chapman's* reference to a "market-oriented" approach ignores other language in the opinion stating that Congress intended the penalties for drug trafficking to be based on the weight of drugs in whatever form they were found. *United States v. Killion*, 7 F.3d 927 (10th Cir. 1993).

11th Circuit excludes weight of discarded by-product in methamphetamine manufacturing case. Under Section 2D1.1(c), the weight of a controlled substance refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. In *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), the 11th Circuit held that the term "mixture" in Section 2D1.1 does not include unusable

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mixtures. Here, the 11th Circuit held that under Rolande-Gabriel, unusable and discarded "sludge" from the methamphetamine manufacturing process should not be considered at sentencing. The sludge in question was toxic and unusable. It makes no sense to sentence defendants based on the weight of materials that would never find their way to methamphetamine consumers. U.S. v. Newsome, 998 F.2d 1571 (11th Cir. 1993).

9th Circuit says relevant conduct must show similarity, regularity, and temporal proximity. Defendant argued that amounts of methamphetamine in her prior drug arrests should not have been considered in determining her base offense level. The 9th Circuit agreed, relying on its decision in U.S. v. Hahn, 960 F.2d 903, 907 (9th Cir. 1992), which held that before such prior acts can constitute "relevant conduct" under Section 1B1.3(a)(2), the government must show, in "sufficient proportions," the similarity, regularity and temporal proximity of the prior acts to defendant's conduct here. Since the record did not contain the required findings, the sentence was vacated. U.S. v. Soyland, 3 F.3d 1312 (9th Cir. 1993).

9th Circuit reverses for failure to ask whether defendant wished to speak at sentencing. In U.S. v. Mejia, 953 F.2d 461, 468 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1983 (1992), the 9th Circuit held that when the defendant's sentence is as short as it could possibly be under the guidelines, the failure to offer the defendant the opportunity to speak before sentencing may be harmless. Here, although defendant's sentence was at the lowest end of the range, the 9th Circuit was not convinced that the district court used all the discretion it had available. The "*possibility that [defendant] might have said something to prompt the court to impose a different sentence is admittedly remote.*" Nevertheless, since the court could not foreclose the possibility that the court might have granted a further downward adjustment or departed downward, defendant's sentence was vacated. United States v. Medrano, 5 F.3d 1214 (9th Cir. 1993), *vacating earlier opinion at 986 F.2d 299* (9th Cir. 1993).

9th Circuit finds judge's reasons for sentencing at top of range were inadequate. As an armed career criminal, the defendant's guideline range was 262-327 months. The district court imposed 327 months plus 60 months consecutive. Afterward, the district court explained that the sentencing guidelines and the Armed Career Criminal Act reflect Congress' judgment that some people in society cannot adjust and that "*there comes a time in a person's criminal career when the person is to be exempted from society under all conditions.*" The 9th Circuit held that his statement was insufficient to satisfy

the requirements of 18 U.S.C. Section 3553(c). Nor was it adequate for the judge to circle the only justification available for a high end sentence on a written form attached to the judgment, which stated that "*criminal history and other criminal conduct supported sentence in top range of guidelines.*" The district court made no statement pertaining to defendant's individual conduct, character, and criminal background. United States v. Wilson, 7 F.3d 828 (9th Cir. 1993).

2255 HABEAS CORPUS MOTIONS

1st Circuit remands where defense counsel was unaware of notice requirement in Section 851. The district court imposed the mandatory minimum six-year supervised release term prescribed by 21 U.S.C. §841(b)(1)(C) for repeat offenders. This was an increased punishment which required the filing of a notice under §851, which the government failed to file. Defendant did not object below and he did not appeal his sentence. On appeal from the denial of his 28 U.S.C. § 2255 motion, the 1st Circuit remanded for reconsideration. There may have been both cause for, and prejudice from, the procedural default. Defense counsel, apparently unaware of the notice requirement in Section 851, invited the court to apply the enhanced recidivist penalties. Such an oversight could constitute insufficient cause to excuse the procedural default. Since this issue was not considered below, remand was required. Suveges v. United States, 7 F.3d 6 (1st Cir. 1993).

8th Circuit grants relief from illegal term of supervised release despite procedural default. In a 2255 motion, defendant argued that his four-year term of supervised release exceeded the maximum authorized by law. The 5th Circuit agreed. Defendant was convicted of violating Section 21 U.S.C. Section 841(d), which is a Class C felony. Unless a statute authorizes a longer term, the authorized supervised release term for a Class C felony is not more than three years. Although defendant had procedurally defaulted this claim, Section 2255 makes relief available if the sentence was in excess of the maximum authorized by law. Relief should be granted to avoid "manifest injustice." United States v. Wilson, 997 F.2d 249 (8th Cir. 1993).

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The following outline is recommended for the purpose of identifying both ineffective assistance of counsel, as well as appellate issues.

FAILURE TO INVESTIGATE OR PREPARE

- In general
- Expert witnesses
- Prosecution witnesses
- Alibi witnesses
- Impartial witnesses
- Intoxicated witnesses
- Character witnesses
- Potentially corroborating witnesses
- Purported admission by someone else
- Defendant's background and/or priors
- Codefendant's background
- Defendant's prior statements
- Codefendant's prior statements
- Defendant's sanity
- For Sentencing
- Mitigating evidence
- Discovery materials
- Exculpatory evidence
- Information given the defendant by the prosecutor
- Defense to be presented
- Possible defenses
- The only conceivable defense
- Identification defenses
- By attorney's investigator
- Informant witnesses
- Entrapment witnesses
- Because the necessary testing was expensive
- Failure to investigate because the defendant said not to
- Interstate agreement on detainers/speedy trial defense
- Police reports
- Voice exemplar
- Transcripts of previous testimony
- Atomic absorption test (neutron activation test, gun powder residue test)
- Community characteristics (in re: jury panel composition)
- Count to which plea is made
- Basic criminal procedure
- Recent developments in the law
- Cause and prejudice for failure to investigate the law may lie in the very novelty of the law
- Prosecutrix
- Scene of the crime
- Fingerprint evidence
- For penalty phase
- Disposition of earlier cases (charges, probation or parole)
- Insufficient time for retained counsel to prepare

- Non-strategic decision not to investigate
- Pre-trial claim of failure to investigate made by the defendant
- Last minute appointment of counsel
- Failure to listen to the defendant's version of the case
- Following improper procedures to secure the presence of a witness
- Counsel told the defendant that neither the defendant nor his lawyer was authorized to interview prosecution witnesses

FAILURE TO INTERVIEW

- Prospective defense witnesses
- Alibi witnesses
- Expert witnesses
- Expert witnesses on voluntary intoxication
- Expert witnesses on impotency
- Impartial witnesses
- Informant witnesses
- Prosecution witnesses
- Self-defense witnesses
- Entrapment witnesses
- The defendant

PLEA BARGAINING AND RELATED ISSUES

- Failure to communicate a plea offer
- Failure to give defendant a copy of the plea offer
- Extraordinary efforts by counsel at plea hearing to elicit an admission of guilty from his client
- Failure to communicate a counter-offer
- Failure to tell defendant of an offer of immunity

ERRONEOUS ADVICE TO INDUCE ACCEPTANCE OF PLEA AGREEMENT

- Lying to the Defendant
- As to parole or probation
- As to sentence to be imposed
- Rushing into plea without investigation
- Plea not knowingly and intelligently made
- Improper pressure on defendant to plead guilty
- Despite a double jeopardy defense
- Plea urged by counsel biased against defendant
- Plea urged by counsel for the sake of a contingent plea agreement for a codefendant
- Failure to fully explore plea possibilities
- Failure to advise defendant of the judge's change of mind
- Failure to advise of effect of plea on outstanding petition for habeas corpus
- Conflict of interest affecting plea negotiations
- As to ability to withdraw guilty plea afterward
- Misrepresentation of material facts
- Withholding material facts from defendant

- Failure to seek a plea agreement in Washington when efforts to deal with local U.S. Attorney fails
- Because counsel is unprepared for trial
- Failure to explain the *mens rea* element of crime
- Erroneous advice to *refuse* plea agreement
- Failure to seek a plea bargain
- Failure to advise as to deportation consequences
- Failure to seek a judicial recommendation against deportation at sentencing
- Failure to research the law before plea
- Failure to realize the defendant was eligible for Young Adult Offender Treatment
- Inducement of guilty plea for the sake of counsel's relationship with the "federal people"
- Age and cultural differences between client and counsel
- Emotional involvement in the case as a reason for recommending against plea
- Pursuit of plea agreement as reason for lack of trial preparation
- Threat to pull bail as pressure on defendant to plead
- Attorney frustrated efforts to withdraw plea
- Failure to investigate defendant's competency before plea
- Delay by state in appointing counsel
- Failure to understand the consequences of withdrawing a plea
- Colorable claim of innocence required to vacate plea
- Judge in off-the-record plea discussions during trial
- Counsel's mistaken belief about the existence of a plea agreement with the prosecutor
- Failure to accurately calculate federal sentencing guidelines when advising defendant as to plea offer
- Failure to appreciate the significance of a plea offer
- Attorney misinterpreted the indictment
- Failure to explain the risk and benefits of a plea offer

PRE-TRIAL PROCEEDINGS

- Failure to explain the risks and benefits of a plea offer
- Failure to seek defendant's release on bail
- Failure to request time in which to review *Jencks* material
- Putting defendant on the stand at the detention hearing
- No counsel at preliminary hearing
- Failure to file a timely motion for substitution of counsel
- Failure to notify the court when differences arise between the defendant and counsel
- Failure to request independent voluntariness hearing
- Failure to give notice of alibi defense
- Failure to secure expert testimony at government expense

- Counsel publicly chastised his client to the media
- Denial of a continuance as contributing to ineffectiveness of counsel
- Failure to advise co-counsel of the facts (which merited suppression of the confession)
- Improper waiver of the defendant's right to be present at a pre-trial deposition
- Failure to allege facts to establish standing at suppression hearing
- Erroneous legal advice resulting in loss of an absolute defense
- Failure to request a continuance
- Failure to challenge veracity of a search warrant application
- Failure to inform defendant that the judge knows of his criminal history before waiving jury trial
- Failure to move for a severance of defendants
- Failure to move for a severance of charges
- Improper procedures to secure a witness' presence
- Photo lineups
- Prejudicial publicity
- Competency hearings:
 - Standby counsel for a pro se defendant is ineffective assistance of counsel
 - Failure to cross-examine state's witnesses
 - Failure to present rebuttal witnesses
- Defendant has a right to other counsel at a competency of counsel hearing
- Failure to attempt to enforce an agreement to admit polygraph results at trial
- Last minute substitution of appointed counsel

MOTION PRACTICE

- Failure to file motion for or to:
 - Dismiss
 - New Trial
 - Severance of Defendants
 - Suppression of Evidence
 - Continuance
 - Mistrial
 - Severance of Charges
 - Suppression of Priors
 - Suppression of Confessions
 - Suppression of Witness Identification
 - Recess in which to review *Jencks* material
 - Fundamental motions under local practice
- Failure to request rulings on pending motions
- Failure to move to suppress evidence on double jeopardy grounds

JURY SELECTION PROCEEDINGS

- Failure to challenge jury selection procedure:

- In general
- For race and/or sex composition
- Failure to challenge jurors who are related to the prosecution team
- Failure to challenge jurors who are related to the victim
- Failure to move for exclusion of the jury pool during the presentation of irrelevant and prejudicial information
- "Perfunctory approach" to jury selection
- Failure to voir dire
- Failure to object to jurors who sat on an earlier jury in the same case

CONDUCT OF THE TRIAL

- Ambush by the government
- Failure to make an opening statement
- Failure to allow defendant to testify
- Failure to ask questions in proper form
- Failure to present defense chosen
- Failure to present defense promised in opening argument
- Failure to allow defendant to proceed pro se
- Failure to establish or maintain the requisite confidential relationship with client
- Failure to ask defendant critical questions on direct
- Failure to use impeachment evidence as directed by defendant
- Failure to raise collateral estoppel
- Failure to know the law
- Failure to exercise professional judgment on behalf of client
- Failure to notify the court when differences arise between defendant and counsel
- Failure to call witnesses:
 - In general
 - Character, Critical, or Expert witnesses
- Failure to appreciate impact of prejudicial evidence
- Failure to interview prosecution witnesses so that they would be nervous during cross examination
- Failure to review *Jencks* material
- Failure to present medical testimony as to sanity
- Failure to impeach a witness
- Failure to request a mistrial
- Failure to obtain civilian clothing for the defendant
- Failure to request a continuance
- Failure to make an objection specifically requested by the defendant
- Failure to invoke the rule (excluding witnesses)
- Failure to correct prosecution's use of false statistics
- Failure to inquire into causal connection
- Failure to correct judge's response to jury query
- Failure to move for a severance

- Failure to subject prosecution's case to meaningful adversarial testing
- Failure to object based on currently evolving changes in the law
- Failure to move for mistrial when judge instructs as to parole consequences
- Failure to note, object to, or argue, lack of corroborating evidence to an aggravating felony
- Calling a witness knowing he will invoke the 5th Amendment
- Counsel sleeping through trial
- Counsel inattentive during trial
- Counsel intoxicated during trial
- Counsel removed himself in mid-case
- Counsel failing to participate in trial
- Counsel prevented from conferring with defendant
- Counsel lost important evidence
- Counsel did not understand only viable defense
- Counsel absent during part of trial
- Counsel absent during deliberations and verdict
- Counsel as prosecution witness
- Counsel concerned about his personal reputation
- Counsel concerned about his personal embarrassment
- Telling jury counsel is appointed
- Telling jury defendant is testifying against the advice of counsel
- General attitude of counsel
- Counsel misled defendant as to his intentions
- Counsel underpaid by the state
- Using a bizarre, insane, or incredible defense
- Counsel deliberately made a sham and mockery of the trial
- Introduction of priors by defense counsel
- Opening the door for admission of defendant's confession
- Ignorance of the elements of the crime
- Eliciting needless but gruesome testimony
- Mere appearance of in-court effectiveness not enough
- Counsel ordered not to speak to client during recess
- Counsel ordered not to disclose identity of informant to defendant
- Counsel argued an inappropriate defense
- Cross-examination:
 - Denial of right to
 - Inadequate
 - Extensive cross is not automatically effective cross
 - Failure to object to limitation on
- Failure to properly preserve error
- Failure to ask defendant where he was at time of crime when presenting an alibi defense
- Stipulating to non-existent priors
- Use of uncounseled priors as evidence
- Informing jury of sentence already imposed

- Failure to stipulate to a prior
- Lack of devotion to the interests of the accused
- Deliberate "screw up" in order to create error
- Putting defendant on the stand and having him admit to the elements of the offense
- Knowingly presenting false alibi witnesses
- Failure to attempt to enforce agreement to admit polygraph results at trial
- Agreeing to an instruction which advises the jury that the defendant was previously convicted of the same crime
- Requesting an instruction which constructively amends indictment
- Government conduct affirmatively misled the defense
- Counsel provided the evidence necessary to fill in the gaps in the prosecution's case

FINAL ARGUMENT

- Incompetent summation
- Use of obscenities in final argument
- Counsel prevented from giving final argument
- Denial of the right to summarize
- Crucial misstatement of the evidence by defense counsel during final arguments
- Admission of guilt by counsel without defendant's consent
- Counsel admitted elements of the crime
- Telling the jury of the defendant's priors
- Allowing the prosecutor to describe the defendant's priors
- Telling jury the defendant is also accused of another crime
- Government "ambush" in final argument
- Failure to recognize the import of the jury's questions
- Failure to object to prosecutorial illusions to defendant's failure to testify

FAILURE TO OBJECT TO

- Intent shifting instruction
- Erroneous instructions
- Doyle violation
- Introduction of priors by prosecution
- Introduction of priors by the judge
- Introduction of priors in an exhibit
- Disclosure of details of priors
- Defective prior felonies
- Based on currently evolving changes in the law
- Ex parte information provided to the court (before sentencing)
- Improper questions by the prosecutor
- Hearsay evidence
- Inadmissible evidence
- Jury instruction adding offense not in indictment

- Omission from jury charge of an element of the offense
- Lack of corroborating evidence
- Limitation of cross-examination
- Improper comments by the prosecutor
- Surprise witness
- Variation between indictment and jury instructions
- Batson violation
- Beck violation
- Jury selection
- Instruction which advises jury of possible parole consequences of verdict
- Objection specifically requested by the defendant
- Proceeding to trial in defendant's absence
- Prosecutorial misconduct
- Voluntariness hearing in jury's presence
- Portions of the indictment
- Verdict form
- Judge's failure to instruct on separate counts
- Incompetent and damaging evidence
- "Best evidence" objection
- Unduly suggestive photo lineup
- Arrest
- Evidence of pecuniary gain as aggravating circumstance
- Lack of corroborating evidence for an aggravating felony
- Amended information
- Improper cross-examination
- Admission of an extraneous armed robbery
- Admission of a medical report on a different (rape) victim than the one in the case on trial
- Directed verdict of guilty
- Prosecutor's misstatement of the law
- Fingerprint card containing notation of prior arrest
- Motion *in limine* which restricted the defense

FAILURE TO RAISE AN INDICATED DEFENSE

- Insanity
- Double jeopardy
- Duress
- Extreme emotional disturbance
- Defense promised in opening argument
- Identification (mistaken identity)
- Collateral estoppel
- Alibi
- Lack of premeditation
- Entrapment
- Good faith
- Would have resulted in dismissal of charges with prejudice
- Speedy Trial (I.A.D.)
- Venue
- Impotency

- Intoxication
- Self-defense
- Absence of malice
- Lack of intent
- Evidence pointing to another

FAILURE TO OFFER INSTRUCTIONS

- Lesser included offense
- Accomplice
- Instructing the jury as to parole consequences
- Missing informal
- To disregard irrelevant prejudicial evidence overheard by the jury panel
- On trustworthiness of statements made by defendant
- On voluntary intoxication
- Self-defense
- No instructions at all
- Limiting instruction
- As to a mitigating circumstance
- Entrapment
- Offering an instruction which constructively amends the indictment

SENTENCING

- Admission of aggravating factors by counsel without defendant's consent
- Admission of guilt by counsel without defendant's consent
- Failure to aid at sentencing
- Counsel acted as a mere spectator at sentencing
- Failure to pursue a judicial recommendation against deportation
- Failure to present mitigating evidence
- Failure to advise the court of its options under the Youth Court Act
- Failure to protect the defendant (by revealing his comments to the court)
- Failure to advise the jury that defendant had not prior criminal record
- Failure to advise jury defendant's prior record was minor
- Failure to consult with defendant on Presentence Report
- Failure to object to use of juvenile conviction, obtained without due process, as prior
- Failure to object to an unconstitutional aggravating circumstance
- Failure to know the law with respect to sentencing
- Failure to present mitigating evidence because the defendant said not to
- Failure to attempt to humanize the defendant (in final argument at penalty phase)
- Dehumanizing the defendant (in final argument at penalty phase)

- Failure to object to *ex parte* information provided to the court before sentencing
- Failure to obtain records of defendant's prior incarceration (to rebut prosecutor's argument in penalty phase)
- Failure to object to erroneous instructions at sentencing
- Failure to investigate or prepare for sentencing
- Unprofessional errors at sentencing
- Ineffective representation at sentencing
- Standby counsel does not qualify as assistance of counsel under the Sixth Amendment
- Counsel asked the jury to spare defendant's life to that he could be used for medical experiments

FEDERAL SENTENCING GUIDELINES

- Failure to object to incorrect base offense level
- Failure to argue for a reduction in base offense level
- Failure to tell court of defendant's legitimate income
- Failure to consider prior convictions
- Priors may be challenged during sentencing proceedings

POST-TRIAL PROCEEDINGS

- Failure to help with a Rule 35 motion
- Anders requirements do not apply to state post-conviction proceedings
- Right to record of the evidentiary hearing before a magistrate
- Refusal of the court to appoint a psychiatrist to assist post-conviction counsel
- Failure to file brief in opposition to state's appeal of suppression order
- Defendant has a right to counsel during period after sentencing within which notice of appeal must be given
- Refusal of appointed counsel to advocate defendant's cause
- Counsel acted as a mere spectator at resentencing
- Failure to object to use of a non-qualifying prior conviction

APPEALS

- Failure to give notice of appeal
- Failure to give notice of appeal on time
- Failure to advise defendant of the time limit for filing notice of appeal
- Untimely filing of an appeal which is not of right
- Failure to file a proper Anders brief
- Poorly written brief
- Refusal of counsel to file appeal of Rule 11 FRCP grounds
- Briefing the case against client in Anders brief
- Failure to cooperate with replacement counsel

- Failure to advise defendant of rights concerning appeal
- Failure to advise defendant of right to appointed counsel on appeal
- Failure to file a timely brief because public defender is overworked
- Deceiving the defendant as to the existence of an appeal
- Refusal of trial counsel to turn over case files to post-conviction counsel
- Obligation of counsel to anticipate future developments in law
- Failure to appreciate risk of greater sentence if an appeal is filed
- Failure to advise the defendant of the risk inherent in the appeal
- Erroneous advice as to "risk" in appealing
- Failure to comply with state rules of procedure
- Failure to secure a complete transcript on appeal
- Rule 9(a) following 28 U.S.C. 2254 only applies where the state's ability to respond to the petition is in question, not to the ability to retry the case
- Failure of newly appointed counsel to contact defendant within time allowed to give notice of appeal
- Failure to advise defendant of a change in the law
- Failure to perfect appeal within a reasonable time
- A delayed appeal does not include the right to benefit of superseded state law
- Dilatory prosecution of appeal can create a conflict of interest between defendant and counsel responsible for late appeal

FAILURE TO RAISE ISSUE ON APPEAL

- Doyle
- Faretta
- Griffin
- Beck
- Ineffective trial counsel
- Because current state law is unfavorable
- Valid issues in general
- "A forgone ground upon which a new trial could have been obtained"
- Mental competency of defendant
- Prosecutorial vouching
- Prejudice is presumed from counsel's failure to file a non-frivolous appeal
- Under certain circumstances, counsel has duty to discuss merits of appeal even though defendant had pled guilty
- Failure to insure that defendant received appointed counsel on appeal
- Failure to advise defendant of right to appointed counsel on appeal

- Failure to raise a state law right on appeal in state courts

ATTORNEY'S PERSONAL PROBLEMS

- Death of counsel in mid-trial
- Disbarment
- Practicing law without a license
- Suspended from practice
- Fraudulent admission to bar
- Criminal exposure
- Counsel forced to give self-exculpatory testimony
- Grand jury subpoena of counsel
- Counsel being prosecuted in same court in another case
- Alzheimer's disease
- Mental instability
- Counsel mentally incapacitated and of unsound mind
- Attorney-client relationship no longer viable
- Lack of devotion to the interests of the accused
- Counsel racially prejudiced against the accused
- Drug usage
- Inattention
- Sleeping during trial
- Intoxication
- Counsel called as prosecution witness
- Fireworks between judge and counsel
- Acceptance of private payment by appointed counsel
- Concern about personal reputation or embarrassment
- Conflict of interest
- Attorney a doormat for the prosecutor's office
- Counsel unqualified to handle a criminal trial
- Lack of performance due to nonpayment of fees
- Counsel claiming his own ineffectiveness
- Counsel had a "grandiose, perhaps even delusional" belief in her own abilities

INVESTIGATOR RELATED PROBLEMS

- Counsel's obligation to independently verify investigator's conclusions
- Disclosure of confidential information by investigator to the prosecution
- Failure of investigator to proceed as directed
- Failure to send an investigator
- Counsel is required to do more than merely accept an investigator's statement that witnesses will not testify

JUDGE RELATED PROBLEMS

- Counsel's obligation to independently verify investigator's conclusions
- Ordering counsel not to disclose identity of informant to his client
- Failure to seek disqualification of the judge
- Interference by judge with counsel's strategy
- Refusal to allow the defendant to proceed pro se

- Failure to inform defendant that the judge knows of his criminal history before waiving jury trial
- Failure to act when circumstances suggest an unseemly desire by the judge to rush resolution of the case
- Failure to prevent a conflict of interest
- Outrageous conduct by the judge
- Failure to correct judge's response to jury query
- Forcing defendant to proceed pro se or be bound by counsel's decision to testify in his own defense
- Judge participating in off-the-record plea discussions during trial
- "Sarcasm and pettiness" of the judge denied pro se defendant a fair trial

DEFENSE COUNSEL'S CONFLICT OF INTEREST

- Previously prosecuted the defendant
- Previously represented the codefendant
- Previously represented a key government witness
- Was influenced by codefendant
- Husband and Wife
- Brothers
- Father and Son
- Actual prejudice must be shown
- District court has wide discretion to refuse waivers from defendants
- Also represented (rape) victim in civil suit
- Was campaign manager for the prosecutor's correct election campaign
- Was executor of the murder victim's estate
- Was sexually involved with the defendant's fiancée
- Advised the defendant on how to avoid the money reporting laws in order to pay his fees
- Advised one client to act against the interests of another
- Failed to withdraw from representation of one of multiple defendants with conflicting interests
- Was also a target of prosecution
- Was preoccupied with preventing his own indictment in another case
- Had his own interest which conflicted with those of the defendant
- Induced a guilty plea for the sake of the lawyer's relationship with the "federal people"
- Was witness against his own client
- Showed partiality to one defendant over another
- Refused to let one codefendant testify he had withdrawn from the conspiracy before others had completed it
- Worked against his client's interests
- Was paid by another target of the investigation who had conflicting interest
- Was an associate of counsel for a codefendant with conflicting interests
- Grand jury subpoenas of defendant's counsel
- Was in collusion with the prosecutor
- Was also counsel to the county where the defendant was being prosecuted
- Was paid by defendant's employer
- Also represented defendant's employer
- Represented government witness in unrelated civil matter
- In his position as Justice of the Peace, issued the arrest warrant for the defendant
- Was told by judge at beginning of trial that he would be given a disciplinary hearing while jury deliberated
- Faced a conflict between surrendering more assets and getting a shorter term for defendant, or a longer term thus preserving assets with which to pay his own fees
- Had the literary rights to client's life story
- Failed to fully explore plea negotiations due to conflict of interest
- Counsel claimed his own ineffectiveness
- Also represented codefendants testifying against his client on trial
- Also represented codefendants testifying against his client at sentencing
- Asked prosecutor to file increased charges against his client in order to motivate client to pay his fees
- Recruited client to sell drugs for him in exchange for legal fees
- Was target of undercover investigation in which government was using his client as informant
- Also represented the prosecutor in an unrelated civil matter
- Previously represented persons defendant is accusing of the crime
- Was partner in law firm defendant blamed for the offense
- Was afraid of liability under Rule 11, F.R. Civ. Proc., if he advocated defendant's cause
- Was placed in a conflict between his own personal interests and those of his clients by the actions of the judge
- Conflict of interest manifested at sentencing
- Was being sued by defendant
- Was waiting for employment by the prosecutor's office
- Was plea-bargaining for his own case as the same time was representing defendant on appeal
- Represented two or more codefendants, one of whom as secretly a government informer
- Was alternate executor (to defendant) of deceased's estate
- Failed to request a continuance in order to cover-up his own lack of pre-trial preparation
- Perjured himself at evidentiary hearings

- Was facing disciplinary proceedings before the Bar
- Had financial interest in successful prosecution of his client
- Conspired with the government to cause client's arrest
- Judge should have prevented the conflict
- Defendant must be given opportunity to intelligently waive a conflict being urged by the government
- Pre-trial waiver of conflict was insufficient
- Pre-trial disqualification of defense counsel is not immediately appealable
- Appellate counsel sued by trial counsel for alleging ineffective assistance
- Dilatory prosecution of appeal caused actual conflict of interest between counsel and defendant
- Ineffective assistance at remand due to conflict of interest caused by suit against counsel
- Must actual prejudice be shown when an actual conflict exists?
- When defendants have timely objected to joint representation, they need not show an actual conflict of interest where the court failed to adequately inquire into the situation
- Collusion between counsel and prosecutor
- Cultural differences between attorney and client
- Cumulative effect of many errors: multiplicity of errors
- Defective prior felonies
- Delay by the state in appointing counsel
- Detention hearing
- Double jeopardy
- Doyle
- Dudley v. Duckworth
- Erroneous information to induce a plea
- Erroneous stipulations
- Evidentiary hearings are required
- Expression of personal opinion of crime by defense counsel at the sentencing proceedings
- Facts are required to support an ineffective assistance claim
- Failure to advise client as to legal alternatives
- Failure to call witnesses because of weak prosecution case
- Failure to consult with the defendant
- Failure to do pre-trial discovery
- Failure to elicit crucial testimony from the defendant
- Failure to make informed evaluation of potentially viable defense
- Failure to prepare for trial
- Failure to research the law
- Failure to review prosecution's instructions
- Failure to utilize 18 U.S.C. 3006A(e) to obtain expert witnesses
- Faire hearings are required
- Fingerprints
- Fundamental miscarriage of justice
- Greedy counsel
- Griffin
- Gun powder residue
- I.A.D. (Interstate Agreement on Detainers)
- Improper argument
- Inattention of counsel
- Inexperience of counsel
- Inference of strategic reasons for trial counsel's failures, in the absence of on-the-record evidence to that effect, is improper
- It is error to decide on basis of competing affidavits without a hearing
- Jencks
- Judicial estoppel
- Lack of diligence in seeking bail
- Lack of instructions as to separate counts
- Last minute appointment of counsel
- Legal standards to be applied in determining effectiveness of counsel
- Lesser included offenses

MISCELLANEOUS LISTINGS

- Ineffective assistance in general
- ABA Code of Professional Responsibility, Canon 7
- Acceptance of private payment by appointed counsel
- Ambush by the government
- Bail
- Barring counsel from disclosing information to client
- Basing strategy on previously overturned law
- Beck
- Claims of off-the-record promises must be resolved
- Collateral consequences justify relief
- Collateral estopped as a bar to use of evidence by prosecution
- Collusion between defense counsel and prosecutor
- Actual innocence: protections available in case of
- Colorable claim of innocence required to vacate plea
- Competency hearing
- Conflict of interest
- Consultation between defendant and counsel: denial of right to
- Corpus Delicti Rule
- Counsel deploring crime and advocating maximum term at sentencing proceedings
- Counsel's testimony at the evidentiary hearing unworthy of belief
- Counsel's willingness to accept government's version of the facts of the case
- Counsel was paid \$11.84 an hour: the state got what it paid for
- Cross-examination

- Limited contact by counsel with defendant and his witnesses
- Literary rights
- Low payment as reason for lack of effort
- Maximum sentence recommended by defense counsel
- *Mens rea*
- Mere appearance of in-court effectiveness
- Mishandling change of venue hearing
- Misleading the defendant on a matter central to defense strategy
- "Money grubbing" counsel
- Multiple representation
- Multiplicity of errors
- Non-motile sperm: failure to explore evidence of
- Not all fatal errors by counsel are Sixth Amendment violations
- Pecuniary gain
- Perfunctory representation
- Photo lineups
- Police statements cannot generally serve as an adequate substitute for a personal interview
- Pre-indictment right to counsel
- Prejudicial publicity
- Preliminary hearing
- Presumption of prejudice
- Private vs. appointed counsel, responsibilities of
- Probation revocation proceedings
- Procedural default
- Prosecutor later representing victim/plaintiff in civil suit
- Refusing to allow the defendant to testify
- Rule 11, Federal Rules of Civil Procedure
- Rule 44(c) FRC&P hearings
- Serious misunderstanding of the law
- Severance
- Sexual relations between counsel and defendant's fiancée
- Sham trial
- Shoe prints
- Single substantive error
- Speedy trial
- Speedy trial rights, insistence upon is not a waiver of effective counsel
- Standby counsel does not meet Sixth Amendment standard for assistance of counsel
- Suit by defendant against counsel
- Suit by trial counsel against appellate counsel for alleging ineffective assistance of counsel
- Summation
- Supreme Court cases
- Transcripts
- Trial in absence of the defendant
- Use of uncounseled prior felonies as proof of prior conspiracy
- Utter perversion of the attorney-client relationship
- Venue
- Voiceprints
- Voluntariness of a confession
- Voluntariness hearing: Mishandling of
- When does the right counsel inure
- Youth of defendant as affecting knowledgeable plea

Pre and Post Conviction Services

Mitigation in troubling times

- Pre-Trial Representation
- Trial Representation
- Plea Negotiation and Representation
- Sentencing Mitigation
- PSR objections
- Creative Departures
- Direct Appeals in all Federal Circuit Courts of Appeal
- Petition for Writ of Certiorari
- Habeas (2255)

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**LOOKING FOR ASSISTANCE WITH YOUR
LEGAL MATTERS?**

When you are looking for answers to your legal problems, the Federal Criminal Law Center is the place to look. The Center provides full representation services as well as national legal research assistance on a *pro se* level. Our attorneys are available to represent individuals on matters dealing with the trial process, plea and sentencing mitigation, objections to the presentence report, appeals, and *habeas corpus* petitions. Lead Counsel, Marcia G. Shein, has been practicing law throughout the country in the Federal Court system since 1992 and has been consulting with criminal defense lawyers throughout the country on issues of sentencing and post-conviction mitigation since 1981. Marcia G. Shein works diligently to mitigate the outcome of every case she is associated with, whether representing an individual, working with an attorney, or assisting an individual in preparing pleadings for *pro se* filing.

The Federal Criminal Law Center is currently seeking questions with potential general impact from criminal defendants. We will try to choose one question to answer that will help as many of you as possible on the issue raised in our future newsletters. We cannot answer every question, so please submit questions regarding important issues that may affect a large portion of the federal criminal justice population.

We also have available for purchase, *The Federal Criminal Law Inmate Handbook*, which gives offenders and their families vital information on the process of our Federal legal system from pre-trial to post-conviction.

**Marcia G. Shein is a member of the
following courts:**

- *United States Supreme Court*
- *Northern, Middle, and Southern Districts of Georgia*
- *Northern, Eastern, Western, and Southern Districts of Texas*
- *Eastern District of Michigan*
- *District of Columbia*
- *Northern District of Oklahoma*
- *District of Nebraska*
- *District of Arizona*
- *Northern District of Florida*
- *Eastern District of Tennessee*
- *District of Colorado*
- *Northern and Southern Districts of Indiana*
- *First Circuit Court of Appeals*
- *Second Circuit Court of Appeals*
- *Third Circuit Court of Appeals*
- *Fourth Circuit Court of Appeals*
- *Fifth Circuit Court of Appeals*
- *Sixth Circuit Court of Appeals*
- *Seventh Circuit Court of Appeals*
- *Eighth Circuit Court of Appeals*
- *Ninth Circuit Court of Appeals*
- *Tenth Circuit Court of Appeals*
- *Eleventh Circuit Court of Appeals*
- *D.C. Circuit Court of Appeals*

- *Georgia Court of Appeals*
- *Georgia Supreme Court*

**Marcia G. Shein has appeared *pro
hac vice* in the following courts:**

- *Middle District of Alabama*
- *Northern District of Alabama*
- *Southern District of Alabama*
- *Western District of Arkansas*
- *Central District of California*
- *District of Connecticut*
- *Middle District of Florida*
- *Southern District of Florida*
- *Northern District of Illinois*
- *Southern District of Illinois*
- *Northern District of Iowa*
- *Southern District of Iowa*
- *Western District of Kentucky*
- *Western District of Louisiana*
- *District of Maryland*
- *District of Minnesota*
- *Southern District of Mississippi*
- *Eastern District of Missouri*
- *District of New Jersey*
- *Eastern District of New York*
- *Northern District of New York*
- *Southern District of New York*
- *Eastern District of North Carolina*
- *Middle District of North Carolina*
- *Western District of North Carolina*
- *Middle District of Pennsylvania*
- *Eastern District of Pennsylvania*
- *District of Puerto Rico*
- *District of South Carolina*
- *Middle District of Tennessee*
- *Western District of Tennessee*
- *Eastern District of Virginia*
- *Western District of Virginia*
- *Western District of Washington*
- *Northern District of West Virginia*