

# The Defender

Newsletter for CJA Panel Attorneys

## Reversible Errors - 1995

This issue reflects the editor's goal of presenting the most informative newsletter...with the least amount of effort. Therefore, below you will find a recycling of the previous year's "Reversible Errors" columns, cataloged by subject.

This collection will be a continuing and cumulative process. In time, we hope to produce a tome so weighty it will injure your toe if dropped from a sufficient height.

### Discovery

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995) (Prosecutor withheld exculpatory evidence).

Kyles v. Whitley, 115 S.Ct. 1555 (U.S. 1995) (Prosecution failed to turn over material and favorable evidence).

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United States v. Camargo-Vergara, 57 F.3d 993 (11th Cir. 1995) (Government failed to disclose defendant's postarrest statement).

### Search and Seizure

United States v. Adams, 46 F.3d 1080 (11th Cir. 1995) (Suppression of evidence seized from motor home, upheld).

Wilson v. Arkansas, 115 S.Ct. 1914 (U.S. 1995) ("Knock and announce" rule implicates fourth amendment).

United States v. Tovar-Rico, 61 F.3d 1529 (11th Cir. 1995) (Possibility that surveillance officer was observed, did not create exigency for warrantless search of apartment).

### Procedure

United States v. Ramos, 45 F.3d 1519 (11th Cir. 1995) (Trial judge refused deposition without inquiring about testimony or its relevance).

Cochran v. Herring, 43 F. 1404 (11th Cir. 1995) (Batson claim - race).

United States v. Cash, 47 F.3d 1083 (11th Cir. 1995) (Defendant could not waive counsel without proper findings by court).

United States v. Verderame, 51 F.3d 249 (11th Cir. 1995) (Trial court denied repeated, unopposed motions for continuance in drug conspiracy case, with only 34 days to prepare).

United States v. Casallas, 59 F.3d 1173 (11th Cir. 1995) (Trial judge became involved in plea bargaining during colloquy).

United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995) (Court amended charging language of indictment during trial).

United States v. Tenorio, 69 F. 3d 1103 (11th Cir. 1995) (Improper admission of post-Miranda statements).

### Jury Instructions

United States v. Ruiz, 59 F.3d 1151 (11th Cir. 1995) (Defendant has right to have jury instructed on theory of defense).

Smith v. Singletary, 61 F.3d 815 (11th Cir. 1995) (Failure to give mitigating instruction in capital case).

### Guns

United States v. Lopez, 115 S.Ct. 1624 (11th Cir. 1995) ("Gun-free school zone" law found

unconstitutional).

United States v. Walker, 59 F.3d 1196 (11th Cir. 1995) (Conviction under "gun-free school zone" law was plain error).

Bailey v. United States, 116 S.Ct. 501 (U.S. 1995) (Passive possession of firearm was insufficient to prove "use" of firearm during drug trafficking crime).

## Drugs

United States v. Horsley, 56 F.3d 50 (11th Cir. 1995) (Distribution of cocaine is lesser included offense of distribution of cocaine within a 1,000 feet of a school, and the jury should be charged accordingly).

United States v. Witek, 61 F.3d 819 (11th Cir. 1995) (Mere buyer-seller relationship did not satisfy management requirement for conviction of engaging in continuing criminal enterprise).

United States v. Lopez-Ramirez, 68 F.3d 438 (11th Cir. 1995) (Insufficient evidence of possession and conspiracy as to defendant who was present in home where 65 kilos of cocaine was delivered and then seized).

## Fraud / Theft

United States v. Lluesma, 45 F.3d 408 (11th Cir. 1995) (Proof of conspiracy to export stolen vehicles was insufficient against defendant who did odd jobs for midlevel conspirator).

United States v. Cannon, 41 F.3d 1462 (11th Cir. 1995) (Proof of false documents to elicit payment on government contracts was insufficient when documents did not contain false information).

Hubbard v. United States, 115 S.Ct. 1754 (U.S. 1995) (A federal court is neither a "department" nor "agency" within the contemplation of the false statements statute-18 U.S.C. §1001).

## Miscellaneous Crimes

United States v. Newton, 44 F.3d 913 (11th Cir. 1995) (Proof of aiding and abetting money laundering conspiracy was insufficient against defendant who leased house on behalf of conspirator).

United States v. Gilbert, 47 F.3d 1116 (11th Cir. 1995) (Proof of failure to comply with directive of federal officer was in variance with the original charge).

United States v. Mathews, 49 F.3d 676 (11th Cir. 1995) (Certification of contempt was not filed by the judge who witnessed the alleged contempt).

## Sentencing - General

United States v. Remillong, 55 F.3d 572 (11th Cir. 1995) (Restitution order reversed for a defendant with no ability to pay and no future prospects).

United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995) (Case remanded to determine retroactive effect of favorable guideline, that became effective after sentencing).

United States v. Ledesma, 60 F.3d 750 (11th Cir. 1995) (Restitution order could only be applied to charges of conviction).

United States v. Jenkins, 58 F.3d 611 (11th Cir. 1995) ("Rule of lenity" precluded counting money laundering transactions under \$10,000.00).

United States v. Rivera, 53 F.3d 600 (11th Cir. 1995) (Defendant sentenced on wrong count).

United States v. Mullens, 64 F.3d 909 (11th Cir. 1995) (Record lacked findings to support restitution).

United States v. Oboh, 65 F.3d 900 (11th Cir. 1995) (Defendant denied opportunity to respond to recommendation that he be deported).

United States v. Knowles, 66 F.3d 1146 (11th Cir. 1995) (No proof conspiracy extended to 11/1/1987, when Guidelines became effective).

Page v. United States, 69 F.3d 482 (11th Cir. 1995) (Failure to require parties to state objections at sentencing hearing).

## Sentencing - Enhancements

United States v. Spell, 44 F.3d 936 (11th Cir. 1995) (Judgement is the only conclusive proof of prior convictions).

United States v. Tapia, 59 F.3d 1137 (11th Cir. 1995) (Using phone to call codefendant was not "more than minimal planning").

United States v. Cole, 61 F.3d 24 (11th Cir. 1995) (Insufficient evidence of child pornography depicting minors under 12).

United States v. Mullens, 64 F.3d 909 (11th Cir. 1995) (Improper application of "abuse of trust").

## Sentencing - Drugs

United States v. Butler, 41 F.3d 1435 (11th Cir. 1995) (Insufficient findings to support drug quantities).

United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995) (Same as Butler).

United States v. Foree, 43 F.3d 1572 (11th Cir. 1995) (Seedlings and cuttings do not count as marijuana plants).

United States v. Shields, 49 F.3d 707 (11th Cir. 1995) (Harvested root systems are not marijuana plants).

United States v. Smith, 51 F.3d 980 (11th Cir. 1995) (Weight of wet marijuana improperly counted).

United States v. Hansley, 54 F.3d 709 (11th Cir. 1995) (Individual findings needed to hold defendant responsible for all drugs in conspiracy).

United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995) (Sentenced for D-methamphetamine rather than "L").

United States v. Reese, 67 F.3d 902 (11th Cir. 1995) (Drugs not reasonably foreseeable to defendant, nor within scope of agreed joint criminal activity).

United States v. Lee, 68 F.3d 1268 (11th Cir. 1995) (Inadequate findings to support drug quantities - crack abusers' credibility questioned).

## Sentencing - Departures

United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995) (Downward departure allowed to give credit for "acceptance of responsibility" on consecutive sentences).

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995) (Consequential damages do not justify upward departure unless "substantially in excess" of typical fraud case).

United States v. Price, 65 F.3d 903 (11th Cir. 1995) (When multiple reasons for departure are given, if one is improper, case must be remanded to assess remaining reasons).

## Ineffective Assistance of Counsel

Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995) (Trial counsel presented no mitigation evidence in capital case).

Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995) (Counsel failed to determine that defendant was a "habitual offender" before plea).

Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995) (Counsel failed to correct state trial judge's misstatements that state sentence could run concurrent with potential federal sentence).

Montemoino v. United States, 68 F.3d 416 (11th Cir. 1995) (Failure to file notice of appeal after request by defendant).

## Habeas Corpus

White v. Butterworth, 70 F.3d 573 (11th Cir. 1995) ("In custody" requirement satisfied when the expired sentence was used to enhance a current sentence).

Upshaw v. Singletary, 70 F.3d 576 (11th Cir. 1995) (Claim of ineffective assistance of counsel at plea not waived even though not raised on

direct appeal).

## Future Cases

"Reversible Errors" will be collected again in the Summer. This will be a biannual feature. As soon as length permits, "Reversible Errors" will come out in a booklet format.

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