

# The Defender

Newsletter for CJA Panel Attorneys

## Halloween/Thanksgiving Issue

### Calculating Loss

I really intended to write a completely original article about calculating loss under the sentencing guidelines. However, upon receiving my copy of *The Champion* yesterday, I found an excellent article by John D. Cline of Albuquerque, New Mexico, on the very issue.

Needless to say, I was not going to write a lengthy piece with 55 endnotes, anyway. So, with great deference to Mr. Cline, this article will briefly summarize the law of "loss" under the guidelines.

The definition of loss became of interest to our office recently in a series of prosecutions of current and former HUD tenants who were accused of making false statements in their yearly rental applications. These applications are used by HUD to calculate the rental price of the property and the discounted rent that the tenants are to pay. HUD admits that neither the rental prices, nor the discounted rent charged, have any relationship to market value.

The problem was that HUD claimed their loss was the difference between their rental price and the discounted rent. The rental price was in some cases was absurdly high (i.e. \$900 a month for a two-bedroom in a neighborhood where comparable rates were around \$350). More importantly, HUD never expected to rent the property for the rental price, so the difference between the figures did not reflect an actual or potential loss to HUD.

These cases were set before all of the District Judges. In no case, did the result cause any defendant to be imprisoned. One Judge did not accept the HUD claimed loss. One Judge followed it as to loss, but not as to restitution. In some cases, the issue was not raised because it would have had no practical effect.

Is loss what the victim lost, or what the defendant gained? If loss is what the victim lost, how far does causation go? If loss is what the defendant gained, are investments of the amounts also counted? Can the defendant reduce the amount of loss?

Generally, if the greater of either the actual or intended loss to the victim is known, that should be the measure of loss. However, if that method cannot determine loss, the measure of the defendant's gain may be used. That gain does not include any value added by the defendant.

In most cases, the market value of the actual or intended loss to the victim will control. United States v. Goldberg, 60 F.3d 1536 (11th Cir. 1995). Except in procurement fraud

and product substitution cases, the loss will be limited to the value taken, plus interest. See United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995) (Consequential damages are not counted).

There is a split in the circuits over whether the loss must have a basis in "economic reality." In other words, some courts hold that if there was actually no potential for loss (i.e. a government sting, or impossibility), then the loss is zero. Other courts hold the intended loss controls even if it is only the subjective intent of the defendant. United States v. Toussaint, 84 F.3d 1406 (11th Cir. 1996).

The guidelines once refused to take into account other causation for a victim's loss beyond the defendant's conduct. That language was removed in 1991. Defendant's can now presumably argue that loss caused by other reasons should be excluded from the calculations.

There is a split in the circuits about whether a defendant can reduce the loss after detection of the crime. Some circuits say that repayment before sentencing will reduce the loss, others say no. United States v. Norris, 50 F.3d 959 (11th Cir. 1995) (No). However, previously pledged security or collateral will reduce the loss.

Loss is a complicated issue. The circuits are split on many important areas. Expect that the guidelines will be amended once again for clarification. See 59 Crim. Law Rptr. 1571 ("Sentencing Commissioners Discuss Effort to Simplify Guidelines - Areas for Study:

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'...Chapter II provisions on loss in theft and fraud cases'...").

## Reversible Errors

Expert testimony that the defendant had a disorder that may have caused him to make a false confession should have been admitted. United States v. Hall, 93 F.3d 1337 (7th Cir. 1996).

A court did not have the statutory authority to order a mental evaluation of a defendant who wished to raise the defense of diminished capacity. United States v. Davis, 93 F.3d 1286 (6th Cir. 1996).

A cooperating defendant has the right to have counsel present when attending a presentence debriefing session. United States v. He, 94 F.3d 782 (2d Cir. 1996).

Exclusion of a witness' failed polygraph results at the death penalty phase of trial denied due process. Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1996).

A car may not be impounded for a later search unless the arrestee cannot provide for its removal. United States v. Duguay, 93 F.3d 346 (7th Cir. 1996).

Carjacking is a specific intent crime, to cause death or serious bodily injury. United States v. Randolph, 93 F.3d 656 (9th Cir. 1996).

A court committed plain error by giving a "deliberate ignorance" instruction when there was no evidence that the defendant knew, or avoided learning, of secreted drugs. United States v. Baron, 94 F.3d 1312 (9th Cir. 1996).

When "sentencing entrapment" occurs, the quantity of drugs should be based on those the defendant was actually predisposed to buy or sell. United States v. Castaneda, 94 F.3d 592 (9th Cir. 1996).

A court failed to make factual findings regarding objections to the amount of drugs attributable and the defendant's role. United States v. Gutierrez-Hernandez, 93 F.3d 582 (9th Cir. 1996).

(1) In calculating criminal history, the court erroneously twice counted a single probation revocation to increase two prior convictions; (2) the court wrongly denied credit for acceptance because it misinterpreted the defendants allocution. United States v. Flores, 93 F.3d 587 (9th Cir. 1996).

A court did not sufficiently explain to a defendant the dangers of pro se representation. United States v. Keen, 96 F.3d 425 (9th Cir. 1996).

A court's erroneous denial of a defendant's proper peremptory challenge required automatic reversal. United States v. Annigoni, 1996 WL 536490 (9th Cir. 9/23/96).

A court failed to charge a jury that a machine gun must be fully automatic for a conviction for use during a drug trafficking crime, in order for a 30 year sentence to apply. United States v. Alerta, 1996 WL 535047 (9th Cir. 9/23/96).

A defendant did not "carry" a firearm found in the back of a pickup truck. United States v. Foster, 1996 WL 515557 (9th Cir. 9/12/96).

An in-house investigation by attorneys associated with the defendant/lawyer was covered by the attorney-client privilege. United States v. Rowe, 1996 WL 547823 (9th Cir. 9/27/96).

A defendant who was the sole contact between a buyer and a seller was not an organizer. United States v. Avila, 95 F.3d 887 (9th Cir. 1996).

Counsel was ineffective for failing to follow up on lab reports suggesting that the defendant was not the rapist. Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996).

A lawyer's failure to raise a suppression issue may be grounds for

habeas relief. Huynh v. King, 95 F.3d 1052 (11th Cir. 1996).

A jury improperly considered a transcript, rather than the actual tape, in convicting a defendant. United States v. Berry, 92 F.3d 597 (7th Cir. 1996).

The government must prove a defendant knew he possessed a fully automatic weapon in order to obtain a conviction for possession of a machine gun. United States v. Rogers, 94 F.3d 1519 (11th Cir. 1996).

(1) Under the ex post facto clause, an appellate court refused to use a substantive change to the guidelines to uphold a sentence that was improper at the time imposed; (2) Persons' desire to adopt children did not make them vulnerable victims of adoption agency. United States v. Stover, 93 F.3d 1379 (8th Cir. 1996).

A finding that an aggravated assault occurred was inconsistent with a finding that there was no serious bodily injury. United States v. Tavares, 93 F.3d 10 (1st Cir. 1996).

The value of "rented assets" bore no reasonable relationship to the victim's loss for sentencing calculation. United States v. Krenning, 93 F.3d 1257 (4th Cir. 1996).

A leadership role must be based upon leadership, and not the defendant's importance to the success of the conspiracy. United States v. Albers, 93 F.3d 1469 (10th Cir. 1996).

If a defendant timely accepts responsibility, he must be given the additional one-level downward adjustment. United States v. Atlas, 94 F.3d 447 (8th Cir. 1996).

The government violated its plea agreement not to oppose credit for acceptance of responsibility. United States v. Hawley, 93 F.3d 682 (10th Cir. 1996).

A court failed to inquire whether the defendant had notice of the government's intent to seek an enhanced sentence with a prior drug conviction. United States v. Ruiz-

Castro, 92 F.3d 1519 (10th Cir. 1996).

Failure to debrief the defendant, thus preventing him from benefiting from the "safety valve," violated the plea agreement. Beltran-Ortiz, 91 F.3d 665 (4th Cir. 1996).

The court's estimate of drug quantity lacked a sufficient indicia of reliability. United States v. Copus, 93 F.3d 269 (7th Cir. 1996).

A court failed to make a finding as to the scope of the defendant's agreement. United States v. Hernandez-Santiago, 92 F.3d 97 (2d Cir. 1996).

Each §924 (c) conviction must be tied to a separate predicate crime. United States v. Atcheson, 94 F.3d 1237 (9th Cir. 1996).

Just because victims were almost "vulnerable," did not justify an upward departure. United States v. Sherwood, 1996 WL 499230 (9th Cir. 9/5/96).

A court failed to provide adequate reasons to bar a defendant from seeing his son while on supervised release. United States v. Edgin, 92 F.3d 1044 (10th Cir. 1996).

(1) The court failed to fully consider the defendant's ability to pay restitution; (2) Remorse may be considered as grounds for a downward departure. United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996).

Adoption of the Presentence Report does not resolve disputed matters. United States v. Farnsworth, 92 F.3d 1001 (10th Cir. 1996).

Simple possession of drugs is a Grade C, not a Grade A violation, of supervised release. United States v. Wright, 92 F.3d 502 (7th Cir. 1996).

An appeal waiver may not bar claims of ineffective assistance of counsel. United States v. Baramdyka, 95 F.3d 840 (9th Cir. 1996).

## More Hope

In response to last month's issue, listing New Hope Home of Gulf Breeze, Florida, as a potential source for drug treatment, we received a call about another resource. The Mission of Hope is located in Mobile. Call Lonnie Miller at 649-0830 for information.

## Ideas Solicited

We have tried to serve the needs of the federal criminal defense bar, as best we can. Please let me know if there are any topics you would like to see discussed in this newsletter.

We will also try to put together a continuing legal education seminar next year. Topics and ideas are appreciated.

When I started this job in January, 1995, I was 35 years old. (I only look 60). Please help me from becoming complacent.

## Next Issue

This is a double issue (October 15 / November 15, 1996). In December, you will receive a publication of collected "Reversible Errors." That publication will include previously collected cases and many other opinions. The collection will be categorized by topic.

The next regular issue of "The Defender" will be Volume 3, Number 1, January 15, 1997.

## Quote

"I think crime pays. The hours are good, and you travel a lot." Woody Allen, *Take the Money and Run*.

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