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The Defender

Newsletter for CJA Panel Attorneys

IDES OF MARCH ISSUE*

Conflict Procedure

In our office and the U.S. Attorneys Office the following situation frequently arises: A lawyer has been scheduled for an 8:30 a.m. sentencing (or other proceeding). As the sentencing date approaches, it turns out that the lawyer will also be in a jury trial that morning in another courtroom, beginning at 9:00 a.m. On several occasions the sentencings ran over, and the Judge did not know that another Judge, and a jury, would be inconvenienced.

If you encounter this situation, please do the following: Call the Courtroom Deputy for the sentencing Judge to advise the court of the potential conflict. Do it as soon as you realize a potential conflict exists. That Judge can decide whether to reset the case, start earlier, or just make sure the lawyer is back to the trial court by 9:00 a.m.

* "Beware the ides of March." Shakespeare: Julius Caesar, act I, sc. *ii*, l. 18.

Habitual

CONTENTS

Offender Provisions in Federal Court

There are three federal habitual offender provisions that defense lawyers should always look out for. They are: (1) the "Career Offender" provisions (U.S.S.G. §4B1.1, 4B1.2 & 28 U.S.C. 994 (h)); (2) the "Armed Career Criminal" provisions (U.S.S.G. §4B1.4 & 18 U.S.C. §924 (e)); and (3) the "Three Strikes" provisions (18 U.S.C. §3559 (c)).

Career Offender

Requirements. (1)The defendant must be at least 18 years old; (2) the instant offense must be a felony for a "crime of violence" or a "controlled substance offense"; and (3) the defendant must have two prior convictions for crimes of violence, controlled substance offenses, or any combination thereof.

Predicate Offenses. A "crime of violence" is any felony for burglary of a dwelling, arson, extortion, or any other conduct involving serious risk of physical injury, or the use or threatened use of force. A "controlled substance offense" involves any state or federal offense for the manufacture, importation or distribution of drugs, or possession with the intent to do any of those.

Enhancement. The defendant's Criminal History Category is automatically raised to "VI." The offense level increases dramatically (see the chart under U.S.S.G. §4B1.1).

Restrictions. Prior convictions more than 15 years old may not be used.

Caveat. The government need not give you notice. Unprepared lawyers may learn of the enhancement upon receiving the PSI.

Armed Career Criminal

Requirements. (1) The defendant must be charged with being a felon in possession of a firearm (18 U.S.C. §922 (g)); and (2) the defendant must have three prior convictions for "violent felonies" or "serious drug offenses."

Predicate Offenses. A "violent felony" is any felony involving physical force, a threat of physical force, or attempted physical force, against another; is a burglary, arson, extortion, or use of explosives. A "serious drug offense" is either a federal or state drug case with a maximum punishment of ten years or more.

Enhancement. The defendant's Criminal History Category is automatically raised to "VI." The Offense Level becomes 33 or 34. There is a mandatory minimum statutory punishment of 15 years.

Restrictions. The prior convictions

must result from three distinct transactions. Prior convictions should be examined to see if they meet "generic" definitions. See Taylor v. United States, 495 U.S. 575 (1990).

Caveat. Juvenile priors may be used. Formal, charging notice of the enhancement is not required. Prior convictions of any age may be considered.

Three Strikes

Requirements. (1) The instant offense must be a "serious violent felony," and (2) the defendant must have two prior convictions for "serious violent felonies," or one prior "serious violent felony" and one prior "serious drug offense."

Predicate Offenses. A "serious violent felony" is a murder, sex crime, kidnaping, arson, use of firearms, or any attempt or conspiracy of those. This also includes any crime punishable for more than ten years imprisonment containing physical force. A "serious drug offense" is any crime equivalent to those punished by a mandatory minimum of ten years under federal law.

Enhancement. Mandatory life imprisonment.

Restrictions. Written notice is required before a trial or plea. Robberies and arsons without a firearm or threat to life do not count.

Caveat. There are no time limits on prior convictions used.

[Credit goes to the Chicago Defender Office's newsletter, where much of the preceding was taken.]

Reversible Errors

United States v. Derose, was a reverse sting drug case.74 F.3d 1177 (11th Cir. 1996). Money and marijuana were never actually exchanged, but the agent did give the defendant a trunk key to inspect the goods, and the defendant did bring $70K. The defendant was arrested after inspecting the marijuana and walking away with the trunk key.

The Court said the defendant never possessed the marijuana. The opinion placed emphasis on the fact that the defendant did not have the ability to drive the trunkful of marijuana away with the trunk key, nor was the money ever handed over to consummate the deal.

This case must have been especially embarrassing to the prosecutor. The original conspiracy charge would have apparently been legally sufficient. However, that count had been dismissed in the district court under the Speedy Trial Act for "gross negligence" by the government.

❒

Cynical defense lawyers complain that prosecutors always get what they ask for. Sometimes that is good.

In a sexual battery trial, the defendant's lawyer attempted to impeach a complaining witness by asking her whether it was true that she had been caught forging notes and telling lies. In a stroke of genius, the prosecutor objected and moved for a mistrial. The mistrial was granted over the defendant's objection.

Although the Eleventh Circuit agreed that the lawyer's question was improper, it had "a very minimal prejudicial impact on the state's case." Thus, the mistrial was not supported by "manifest necessity" and the district court's granting of §2254 relief was affirmed. Venson v. State of Georgia, 74 F.3d 1140 (11th Cir. 1996). The prosecutor got what he or she asked for, but the defendant went home.

❇

In United States v. Henderson, a defendant got a 97-month sentence for drug trafficking and a stacked 60-month gun count. 75 F.3d 614 (11th Cir. 1996). Although the drug guidelines were less than 97 months, the district court departed upwards because the defendant possessed five firearms. (You would have thought a 60-month stacked sentence could cover all ills.)

The Eleventh Circuit reversed. A two-level upward adjustment for possession of a firearm is improper when there is also a §924 (c) gun count. Similarly, there can be no upward departure for multiple firearms.

Civil lawyers usually do not fare well in protecting their clients from criminal investigations. Often, in an effort to protect their clients' pocketbooks, they manage to secure indictments, and even convictions. Here is a case where a civil lawyer, brilliantly (albeit unintentionally), saved his clients from prison.

Even though his clients were the owners of a house in which cocaine, marijuana, and firearms were seized pursuant to a search warrant; and even though they had originally been charged in state court; the lawyer presented them at a deposition taken by an AUSA in a federal civil forfeiture action. The lawyer only balked when he realized the case agent was present.

The civil lawyer and the AUSA went out in the hall to have a discussion. What happened in the hall was disputed, but after the client's subsequent federal indictment, the district court found (after a nine-day

evidentiary hearing) that the AUSA told the lawyer there would be no criminal prosecution.

Based on that finding, the district court ruled that the clients had been given "use" immunity and dismissed the indictment. The Circuit upheld the dismissal. United States v. Holloway, 74 F.3d 249 (11th Cir. 1996). I'm *sure* the lawyer planned it all along.

✏

You should not steal from your neighbor's house, glue his locks shut, pour corrosives on his car, falsely accuse him of putting a pipe bomb in your van, and then soak his house in gasoline and burn it down. However, if you do, you cannot be prosecuted for arson in federal court. United States v. Denalli, 73 F.3d 328 (11th Cir. 1996).

The Eleventh Circuit found the above events had not substantially affected interstate commerce. Relying upon United States v. Lopez, 115 S.Ct. 1624 (1995) (Striking down "Gun-Free School Zone Act"), the Court found that even though the victim did some work out of his house, that did not create federal jurisdiction.

➴

A transaction that takes place completely outside the United States is not money laundering under federal law. United States v. Kramer, 73 F. 3d 1067 (11th Cir. 1996). This case involved a money transfer between Switzerland and Luxembourg.

It was probably not even illegal in Switzerland, though Swiss officials declined comment.

↕

Bailey v. United States, 116 S.Ct. 501 (1995), is alive and well. In two published opinions, the Eleventh Circuit reversed convictions under 18 U.S.C. §924 (c) (firearm used during drug crime), because - although a firearm was present - it was not *actively* used. See United States v. Jones, 74 F.3d 275 (11th Cir. 1996) (a pistol found between mattress and box spring) and United States v. King, 74 F.3d 1564 (11th Cir. 1996) (shotgun found in a closet).

☼

The reversal of United States v. Mueller, probably will not have very broad application. 74 F.3d 1152 (11th Cir. 1996). It says that filing a misleading affidavit during the pendency of a civil lawsuit, in order to delay those proceedings, in which the plaintiff was a bank, is not bank fraud under 18 U.S.C. §1344. The opinion did not mention the application of any other criminal or civil laws that such a false pleading may violate.

♣

When a defendant has possessed powder cocaine, which is later cooked into crack by others, that processing must be foreseeable to the defendant in order for him to be held accountable for the crack. United States v. Chisolm, 73 F.3d 304 (11th Cir. 1996). Further, even if it is foreseeable, the court must have some factual basis to determine what amount of crack would result if the powder were processed.

In this case, the Circuit found that, absent factual support, the assumption of a one-to-one ratio was plain error. The Court went on to find that under the facts in the case, there was no evidence that it was foreseeable to the defendant that his powder cocaine would end up as crack.

♦

The government failed to prove a defendant was a "marijuana user," for the purpose of making him a "prohibited person" under U.S.S.G. §2K2.1 (a) (6). United States v. Bernardine, 73 F.3d 1078 (11th Cir. 1996). Here, the government could only proffer that the defendant had once stated that he "quit smoking pot," and that the government *could* (although it did not) produce witnesses saying they smoked marijuana with the defendant.

The opinion found that none of this was reliable evidence of when the defendant may have used marijuana. There was no mention of whether confiscation of a Grateful Dead T-shirt would have increased the reliability of the evidence.

♠

The last two reversals were habeas cases dealing with procedural issues. In Upshaw v. Singletary, 70 F.3d 576 (11th Cir. 1995), a state determination of a procedural bar to "ineffectiveness of counsel" claims did not provide adequate ground to preclude a federal evidentiary hearing.

In White v. Butterworth, 70 F.3d 573 (11th Cir. 1995), the Circuit held that a liberal reading of the petitioner's pro se petition, satisfied the "in custody" requirement of 28 U.S.C. §2254.

◖

It is also a good idea to keep track of favorable district court opinions. Although not binding precedent, these decisions can be persuasive authority.

In United States v. Momodu, 909 F. Supp. 1571 (N.D. Ga. 1995), the court granted the defendant's motion to suppress. This case appealed to me because it sounded identical to a case I had in Houston some years ago. See Jones v. State, 746 S.W. 2d 281 (Tex. App. - Hou.

[1st Dist], 1988) (or don't, it's up to you).

In Momodu, an officer stopped a man in a residential complex because he appeared "suspicious." A subsequent search of the man produced mail that was not addressed to him regarding credit card applications. This initial discovery led to a request for a consent to search and then additional searches.

The court granted the motion based upon the complete lack of evidence that the officer had any reason to believe that any particular crime was afoot, and that the defendant was involved in any crime. All the seizures that followed were tainted.

❧

Another district court, gave §2254 relief to an Alabama habitual offender who was tried in absentia. Teel v. Burton, 904 F. Supp. 1294 (M.D. Ala. 1995). The court cited the fundamental right to be present at one's trial, and made a detailed factual review of whether the petitioner had waived that right when he did not appear for his trial. The court found merit to Teel's claim that he was indigent and was without the funds to travel to court from Florida on the day of trial.

☼

During a trial for burning down a high school, a district court allowed the defendant to introduce a statement by a third party that he, the school's principal, had started the fire. United States v. Johnson, 904 F. Supp. 1303 (M.D. Ala. 1995). The court admitted the statement under the residual exception to the hearsay rule (F.R.E. 803 (24)).

The court found the statement trustworthy because the witness was available, the statement was made during two different FBI interviews, and there was "substantial evidence from which a jury could reasonably conclude" that the principal burned down the school.

The defendant was later acquitted.

❖

A district court dismissed a false statements charge for violating the statute of limitations. United States v. Moreno, 904 F. Supp. 1374 (S.D. Fla. 1995). Although this was a conspiracy charge, the last overt act occurred more than five years before the indictment.

Fact Sheet

Our office has created a booklet to circulate to clients called, "Facts for Federal Criminal Defendants." The ten-page booklet (8 ½ " x 5 ½ ") gives defendants some general information about what will happen to them during a federal criminal prosecution. It is not case-specific, but it briefly covers, "Silence," "Release or Detention," "Your Lawyer, " "Your Rights," "Custody," "Arraignment," "Probation Office Conference," "Speedy Trial," "Trial," "Guilty Pleas," "Cooperation," "Other Charges," "Sentencing," "Appeal," "Probation," and "Prison."

The booklet is available in English and Spanish. Anyone is free to have, and use, copies. You may use the information to create your own.

* * * * *

We recently received a lovely softbound book entitled," Long Range Plan for the Federal Courts." It is a fascinating view of how the Judicial Conference of the United States sees the future of the United States Courts.

The Conference has predicted that between the year 2000 and 2020 criminal filings in the federal courts will rise from 47,800 to 83,900. Civil filings will treble during that period.

The report concludes that to referee this new litigation, by 2020 the United States will need to have as many as 4,070 federal judges. Presumably, most other Americans will either be in law enforcement or serving a prison sentence.

Although the report was highly complimentary of the federal defender organizations, I was a little apprehensive about the index, which stated:

" **Federal defenders** (see criminal defendants)."

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