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The Defender

Newsletter for CJA Panel Attorneys

"Anti-Terrorism" Issue*

New Staff

Effective immediately, K. Lyn Hillman Campbell ("Lyn"), formerly Research and Writing Specialist for this office, is now our third Assistant Federal Defender. This position was advertised locally and nationally. Lyn has been the primary author of over 20 appellate briefs for this office. Her proven skills made her the best candidate for the job.

Lyn's former position is currently open. Candidates for Research and Writing Specialist must be attorneys with excellent writing ability. Southern District of Alabama Federal Defenders Organization is an Equal Opportunity Employer.

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*"...[T]here is no distinctly native American criminal class except Congress." Mark Twain, *Pudd'nhead Wilson* (1897).

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Effective Reelection Act of 1996

Congress and the President have delivered us the Anti-Terrorism and Effective Death Penalty Act of 1996. Next year we can expect such aptly named legislation as the End of All Crime Act of 1997.

This year's model seeks to prevent terrorism by raising mandatory assessments to $100.00 in felony cases, and counting weekends and legal holidays when granting continuances of detention hearings.

The death penalty will now be more "effective" by rushing §2255 and §2254 writs to federal court at warp speed. (180 days from final judgement if states "opt in"). Noncapital writs now have a one-year statute of limitations.

Little Red Books

Recently, I mailed copies of the 1996 "My Little Red Rules Book" to CJA Panel Attorneys and others in the District regularly practicing federal criminal law. This 4"x 6" book fits in a coat pocket and contains important portions of the United States Constitution, Federal Rules of Evidence, Federal Rules of Criminal Procedure, Bail Reform Act, Jencks Act, Drug Quantity Table and Sentencing Table - with some annotations. It is published by the Federal Defenders of Eastern Washington and Idaho, and normally sells for $5.00. If any member of the Panel did not receive one, please call. We have some left.

During the recent Goldin Industries trial, the courtroom was awash in red, as defense lawyers waived their books at poor Judge Vollmer at every opportunity.

Judicial Conference

The Eleventh Circuit held its annual Conference in Panama City, Florida, on April 25-27, 1996. The Conference featured speeches by Supreme Court Justice Anthony Kennedy and Chief Judge Gerald Tjoflat. Attorney General Janet Reno was supposed to come but canceled minutes before her scheduled speech, when her plane was unable to land. (Why she could not have landed at the plethora of military bases in the area is a mystery).

It is a pleasure to be invited to these events - that are always held at beautiful locations. However, while I got a wealth of information about civil pleading issues, there was no discussion of what accounts for a sizable part of the federal docket - crime.

That same weekend, on his 90th birthday, former Supreme Court Justice William J. Brennan, Jr., wrote, "The barbaric death penalty violates our Constitution ... But I refuse to despair. One day the Court will outlaw the death penalty. Permanently." (N.Y. Times, April 28, 1996).

Economics of Crime

An old Woody Guthrie song refers to the fact that a banker can steal more with a pen than a man with a gun. Not only that, but when the banker gets caught he is a lot better off.

Recently, the Eleventh Circuit put a stop to the ever expanding reach of the mail fraud statute (18 U.S.C. §1341), in United States v. Brown, 79 F.3d 1550 (11th Cir. 1996). Officers and a lawyer of a corporation were convicted of defrauding home buyers by inflating the prospective resale value of the properties. The corporation had previously pled guilty and admitted to $169M in fraud.

The Circuit reversed the individuals' convictions stating, "reasonable jurors could not find that a person of ordinary prudence, about to enter into an agreement to purchase [a] home in Florida would rely on...the seller's own affirmative representations about the value or rental income of the [seller's] homes."

There is no question that this decision is a welcomed restraint on the limits of mail fraud. However, it stands in stark contrast to the "rule of lenity's" application in the war on drugs. The Circuit has previously held that the cocaine base/powder 100/1 sentencing ratio is constitutional on its face. United States v. Byse, 28 F.3d 1165 (11th Cir. 1994).

Two district judges in the Northern District of Georgia have since held the 100/1 ratio violates the Equal Protection Clause of the Fourteenth Amendment, because cocaine and cocaine base are the same substance. See United States v. Davis, 864 F.Supp. 1303 (N.D. Ga. 1994) and United States v. Culpepper, 916 F.Supp. 1257 (N.D. Ga. 1995). Both cases, invoked the same "rule of lenity" that caused the Circuit to reverse Brown. Both, are pending before the Circuit on the government's appeal. We will be surprised, but gratified, if the result is the same as Brown.

Bailey Continued

As you recall, Bailey v. United States, is the Supreme Court case holding that in a conviction under 18 U.S.C. §924 (c) (possession of a firearm during a drug trafficking crime), that the weapon must be actively used in relation to the drug crime. 116 U.S. 501 (1995). Since then, we learned that the Justice Department has taken the position that it will not oppose relief for persons previously convicted when there was clearly only passive possession.

This is not the end of the story. The U.S. Attorneys Office argues that at a resentencing, if the §924 (c) is vacated, the court must then resentence on the drug count *adding* the 2 level enhancement under U.S.S.G §2D1.1 (b) (1) for possession of a dangerous weapon.

In a reversal of a direct appeal the court can probably apply the enhancement. See United States v. Lang, 1996 WL 174784 (10th Cir. April 12, 1996). However, the question is more complicated on a §2255 writ. There, the issue is whether such an enhancement is double jeopardy and whether the court has jurisdiction to change the part of the judgement that the petitioner raised no objection to.

We had this come up in two cases before Judge Howard. The court found no jeopardy problem. Judge Howard further found that although the government had no power to seek the enhancement at the resentencing, *the court* had the authority to "correct" the sentence under §2255. These cases are now on expedited appeal to the Eleventh Circuit.

Reversible Errors

The United States Supreme Court held that a state may not require a defendant to prove his incompetence by clear and convincing evidence. Cooper v. Oklahoma, 116 S.Ct. 1373 (1996). "Preponderance of evidence" is the highest permissible standard.

When one deposits a check for $10,000, the bank has no duty to create a currency transaction report ("CTR"). Therefore, it is not a crime to structure check deposits so that no single deposit exceeds $10,000. United States v. Phipps, 1996 WL 167097 (11th Cir. April 25, 1996).

Even if the defendant pleads guilty, it is ineffective assistance of counsel to fail to file notice of appeal when the defendant has requested counsel to do so. Martin v. United States, 1996 WL 169394 (11th Cir. April 26, 1996). An out-of-time appeal was granted.

With orders to grant petitioner's §2254 writ the Circuit found: (1) petitioner's statement to officers that "if you got that against me, you might as well get me a lawyer" constituted an unequivocal request for counsel; (2) the confession obtained thereafter was inadmissible; (3) absent the confession there was no probable cause to arrest petitioner; and (4) a second, later confession was tainted by the illegal arrest *and* was involuntary. Craig v. Singletary, 80 F.3d 1509 (11th Cir. 1996).

A statute prohibiting fraud in connection with access devices (18 U.S.C. §1029 (a)(4)), does not criminalize the use or sale of a cellular phone that can disguise its identity to avoid billings ("tumbling cellular phone"). United States v. Morris, 81 F.3d 131 (11th Cir. 1996).

A judge may modify the forfeiture provisions of a plea agreement when that forfeiture would be unfairly punitive to the defendant, despite the government's objection. United States v. Dean, 80 F.3d 1535 (11th Cir. 1996).

Sentencing Errors

As a new feature, The Defender will begin collecting errors in the application of, or departure from, the federal sentencing guidelines. These cases will not be limited to the Eleventh Circuit.

A government agent's sale of drugs to an informant could not be counted as the defendant's relevant conduct. United States v. Berrio, 77 F.3d 206 (7th Cir. 1996).

(1) "Loss" to a fraud victim is mitigated by the value received by defendant's actions. (2) The court must make findings in support of a restitution order. United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996).

Money laundering guidelines are based on the amount of money laundered, not the loss in related fraud. United States v. Allen, 76 F. 3d 1348 (5th Cir. 1996).

A plea agreement to recommend no enhancement was breached by the government's neutral position at sentencing. United States v. Carrero, 77 F.3d 11 (1st Cir. 1996).

(1) A defendant may successfully challenge by §2255 drug quantity calculations based on excludable material. (2) A defendant may not be enhanced with a prior drug conviction when the government withdrew notice as part of a plea agreement. United States v. Levay, 76 F.3d 671 (5th Cir. 1996).

Under the guidelines related to the Armed Career Criminal Act, "felon in possession" is not a crime of violence. United States v. Talbott, 78 F.3d 1183 (7th Cir. 1996).

Enhancement for manufacturing counterfeit notes does not apply to those so obviously counterfeit that they are unlikely to be accepted. United States v. Miller, 77 F.3d 71 (4th Cir. 1996).

There must be proof that cocaine base was "crack" for enhanced penalties to apply. United States v. James, 78 F.3d 851 (3rd Cir. 1996).

Defendant's position as bank director did not justify managerial role when he did not manage or supervise others in crime. United States v. Jobe, 77 F.3d 1461 (5th Cir. 1996).

Downward departure for "aberrant behavior" should not be denied without examining totality of circumstances. United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996).

Different transactions almost two years apart, with the sole similarity being the type of drug, are not relevant conduct. United States v. Hill, 79 F.3d 1477 (6th Cir. 1996).

Simply carrying a firearm in own's car is not "otherwise unlawful use." United States v. Mendoza-Alvarez, 79 F.3d 96 (8th Cir. 1996).

Merely because a fraud scheme used Spanish language media, did not justify an enhancement for victims "particularly susceptible to fraud." United States v. Castellanos, 81 F.3d 108 (9th Cir. 1996).

A court should not upwardly depart for defendant's status as an attorney without first considering application of the "abuse of trust" enhancement. United States v. Harrington, 1996 WL 122620 (5th Cir. March 19, 1996).

In order to justify an "obstruction of justice" enhancement, the court must find the defendant knowingly made a false statement under oath. United States v. Williams, 79 F.3d 334 (2nd Cir. 1996).

Defendant making statutory challenge may still qualify for acceptance of responsibility. United States v. Fells, 78 F.3d 168 (5th Cir. 1996).

Occupational restriction was not supported by court's findings. United States v. Doe, 79 F.3d 1309 (2nd Cir. 1996).

Restitution order must be limited to conduct of conviction. United States v. Reed, 80 F.3d 1419 (9th Cir. 1996).

(1) Disparity in co-conspirators sentences is not justified due to inconsistent factual findings. (2) Government must prove sentencing enhancements by a preponderance of evidence. United States v. Torres, 1996 WL 183168 (9th Cir. April 18, 1996).

Downward departure is permissible for pre-arrest rehabilitation. United States v. Workman, 80 F.3d 688 (2nd Cir. 1996).

Record must show that defendant read PSI and supplements. Waiver of appeal of unanticipated error was not enforceable. United States v. Petty, 80 F.3d 1384 (9th Cir. 1996).

Subscription List

Any attorney who wishes to get their own copy of The Defender should contact this office. Color issues are mailed. Defenders in other offices can send an e-mail requesting an e-mail subscription.

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