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The Defender

Newsletter for CJA Panel Attorneys

Baffling Statistics Issue*

Editor's Biased Analysis.

I recently received a book entitled "Judicial Business of the United States Courts (1995)." This volume is a report from the Director of the Administrative Office of the United States Courts containing statistical information from the past fiscal year.

Given enough numbers you may reach any conclusion you wish. (See *The Bell Curve* for an example of an author misusing numbers to reach a predetermined ideological conclusion). The following are my findings.

Speedy Trial.

Of the 64,771 defendants who were charged in federal court, four had cases dismissed, with prejudice, for violations of the Speedy Trial Act (18 U.S.C. §3162). Defendants have about a .0001% chance of getting their case completely dismissed for being indicted or tried beyond the Speedy Trial deadlines. My conclusion is that the exceptions swallowed the rule.

National vs. Local Crime.

Although national federal criminal filings have dropped 2.8% since 1991, the Southern District of Alabama (ALS) was up 16.7% in the last year. Of those cases in the District, only two were misdemeanors. Total defendants in ALS rose 36.5% last year. In contrast, the Northern and Middle Districts dropped significantly.

Some of this can be explained by an increase in local crime. But local crime has not jumped that much. It is fair to say that a lot of cases are coming to federal court that were not being filed a year ago.

Many of these are drug cases. I know this from observation, but the numbers support this conclusion. For instance, while drug crime accounts for 26% of all criminal cases nationwide, it is 39% of the ALS docket. Also, a defendant generally cannot get probation in a drug case, and the probation rate is down 14% from the year before.

Detention.

You need more mathematical expertise than mine to read these numbers. The general feeling among lawyers is that we detain a lot of people here. Based on this report, and one prepared by ALS Pretrial Services, about 45% to 47% of all defendants in this district are detained pending trial. However, that is only a few percentage points over the national average.

According to local findings, it cost $415,425 to lock up defendants back in 1991. Last year it cost $1,449,587. Even if we are in line with the national trend, it is a very expensive trend.

Of those released, only four were revoked for committing new crimes, and three for failure to appear. It does not appear that there has been a serious problem of releasing "flight risks" or persons that are "dangerous to the community." Most revocations involve addicted persons testing positive for drugs.

Federal Defenders.

Representations by federal defenders outnumbered those of CJA Panel Lawyers (43,654 vs. 35,038 nationwide). In this district, the Defenders Office is currently handling about 60% of the appointments.

New Staff.

Last month, Lyn Campbell became our third Assistant Federal Defender. Since then, we have filled the Research and Writing Specialist position.

Carol Elewski is a 1990

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* "Contrariwise," continued Tweedledee, "if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic." Lewis Carroll, *Through the Looking Glass* (1872).

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graduate of Columbia Law School. She has been published in a national magazine and has a forthcoming article in American Jurisprudence. Carol has excellent writing skills.

Carol will start on July 1, 1996.

Reversible Errors.

Last month, this feature was expanded to include sentencing errors from all circuits. From now on, this section will include most federal circuit and Supreme Court cases in which a defendant received relief on appeal, regardless of the issue.

Supreme Court.

Koon v. United States, 1996 WL 315800 (U.S. June 13, 1996). A district court may depart from the guidelines if: (1) the reason is not specifically prohibited by the guidelines; (2) if the reason is discouraged by the guidelines, but exceptional circumstances apply; and (3) if the reason is neither prohibited nor discouraged, and the reason was not previously addressed by the applicable guideline provisions in that case. (Caveat. This case involved a downward departure. The same logic could be employed to upward departures).

Ornelas v. United States, 116 S.Ct. 1657 (1996). Defendant's motion to suppress, denied at the trial court, and affirmed on appeal, was remanded to court of appeals for *de novo* review.

Eleventh Circuit.

Glock v. Singletary, 1996 WL 252538 (11th Cir. May 15, 1996). Counsel's failure to discover and present mitigating evidence at the sentencing proceeding required an evidentiary hearing.

United States v. Martinez, 83 F. 3d 371 (11th Cir. 1996) Defendant's conviction for conspiracy to possess cocaine reversed when there was no evidence beyond defendant's intent to help conspirators steal money.

Delguidice v. Singletary, 1996 WL 273903 (11th Cir. May 24, 1996) Psychological testing of a defendant without notice to counsel violated Sixth Amendment.

United States v. Allen, (11th Cir. May 17, 1996) (Unpublished). A note stating: "This is an armed robbery. Give me all your money," was not an "express threat of death" pursuant to §2B3.1 (b)(2)(F). (Thanks to Panel Attorney Gary L. Armstrong).

Other Circuits.

United States v. Millar, 79 F. 3d 338 (2d Cir. 1996). Enhancement for "affecting a financial institution" under theft guidelines was limited to money received by the defendant.

United States v. Flanagan, 82 F. 3d 624 (5th Cir. 1996). On remand, sentencing court could withdraw "leadership role" so a defendant would qualify for "safety valve."

United States v. Howard, 80 F. 3d 789 (7th Cir. 1996). District court could not rely on probation officer's estimates of drug quantities without corroborating evidence.

United States v. Ketcham, 80 F. 3d 789 (3rd Cir. 1996). Enhancement for "exploitation of a minor" reversed in child pornography case for insufficient evidence.

United States v. Moeller, 80 F. 3d 1053 (5th Cir. 1996) (1) No leadership role for a government official who inherited historically corrupt system. (2) Defendant's lack of understanding of the entire scheme justified minimal role adjustment.

United States v. DiDomenico, 78 F. 3d 294 (7th Cir. 1996). Unconvicted, unstipulated crimes may not be used to determine a "combined offense level," under §3D1.4.

United States v. Burke, 80 F. 3d 314 (8th Cir. 1996). A presentence investigation report may not be treated as evidence when the defendant disputes facts contained therein.

United States v. Blackwell, 81 F. 3d 945 (10th Cir. 1996). Rule 35 does not give district court jurisdiction to increase a sentence later.

United States v. Conway, 81 F. 3d 15 (1st Cir. 1996). A court may not refuse a downward departure based on information received as part of cooperation agreement.

United States v. Murray, 82 F. 3d 361 (10th Cir. 1996). In an assault case, an enhancement for "discharging a firearm" did not apply to shots fired after assault.

United States v. Hamilton, 81 F. 3d 652 (6th Cir. 1996). In order for a court to find a defendant culpable for manufacturing a quantity of drugs, it must be shown he was personally able to make that quantity.

United States v. Strang, 80 F. 3d 1214 (7th Cir. 1996). Perjury in another case did not warrant "obstruction of justice" enhancement in the instant case.

United States v. Medina-Estrada, 81 F. 3d 981 (10th Cir. 1996). In order to apply "obstruction of justice" enhancement for perjury, court must find all elements of perjury were proven.

United States v. Douglas, 81 F. 3d 324 (2d Cir. 1996). A juvenile sentence, more than five years old, was incorrectly applied toward the defendant's criminal history.

United States v. Lindia, 82 F. 3d 1154 (1st Cir. 1996). A court may depart downward from the "career offender" guidelines.

United States v. Blake, 81 F. 3d 498 (4th Cir. 1996). (1) Restitution may only be calculated from the loss directly related to the offense of conviction. (2) Court must make findings that a defendant can pay restitution without undue hardship.

United States v. Fike, 82 F. 3d 1315 (5th Cir. 1996). A defendant could only be held accountable for powder cocaine when conversion to crack was not foreseeable.

United States v. Hernandez, 83 F. 3d 582 (2d Cir. 1996). Staring at a witness and calling them "the devil," did not justify "obstruction of justice" enhancement for intimidation.

United States v. Cox, 83 F.3d 336 (10th Cir. 1996). It was proper to attack a guidelines sentence by a §2255 writ when prior convictions, used in the criminal history calculation, were later successfully attacked.

United States v. Agee, 83 F. 3d 882 (7th Cir. 1996). A waiver of appeal, not discussed at plea colloquy, was invalid.

United States v. Ready, 82 F. 3d 551 (2d Cir. 1996). Waiver of appeal did not cover issue of restitution and was not waived.

United States v. Windom, 82 F. 3d 742 (7th Cir. 1996). Failure to raise an issue at the defendant's first sentencing did not waive the issue when it was raised after remand.

United States v. Manning, 79 F. 3d 212 (1st Cir. 1996). Court should have given "yes or no" answer to deadlocked jury's question, rather than simply refer them to testimony.

United States v. Brumley, 79 F. 3d 1430 (5th Cir. 1996). Mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government."

United States v. Thompson, 82 F. 3d 700 (6th Cir. 1996). Technicalities that do not prejudice government are not cause to deny motion to extend time to file appeal.

United States v. Thompson, 82 F. 3d 849 (9th Cir. 1996). There was insufficient evidence to support a conviction that a silencer was actively used.

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