

The Defender

Newsletter for CJA Panel Attorneys

Weird Science Issue

Delicate Memories.

Oliver Zangwell, who investigated memory loss in brain-damaged patients, owned a large, distinctive fountain pen. At the start of his first session with one new patient, he showed him the pen. When at the end of the session he showed it again and asked whether the patient recognized it, the reply was negative. Over the next ten sessions this procedure was repeated, with the patient always denying that he had seen the pen before. In desperation, Zangwell asked whether the patient recognized him, to which the reply was, "Of course, you're the man with all those fountain pens."

That anecdote opens Stuart Sutherland's July 21, 1996 Sunday N.Y. Times review of "The Brain, the Mind, and the Past," by Daniel L. Schacter, published by Basic Books. The story is a dramatic example, of the mind's fragile ability to call up and interpret past events.

As trial lawyers, we deal with the memory of witnesses every day. It may involve the identity of the accused or the contents of long ago conversation.

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Sutherland states, "People may remember a fact but have no memory of how they learned it. This failure can have disastrous consequences: if the police or lawyers rehearse witnesses over-enthusiastically, the witnesses may confuse the rehearsed material with the events they actually witnessed."

The Federal Rules of Evidence do not pay much heed to these dangers. Rule 601 presumes that anyone is competent to be a witness. The 1972 Commentary states, "Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses." Therefore, unless the witness is a three-year-old child or a severe Alzheimer's patient, questions about the witness' capacity to remember events will be matters of weight, not admissibility.

"[D]ifferent kinds of memory involve different parts of the brain and therefore are likely to be differently organized. For example, it has confirmed the old distinction between long-term memory and working memory - the ability consciously to retain something in mind for a few seconds, as when dialing a telephone number."

"Perhaps the most important distinction recently drawn is that between semantic memory (the memory for facts like the Acropolis in Athens) and episodic memory (the

recall of events - those that happened to you, not those you've been told about). The qualification is important, since it is easy to persuade children (and adults in some circumstances) to believe they are recalling experiences they never had."

"A second important distinction is between explicit and implicit memory. In the former, people know that they remember something; in the latter they do not." (Sutherland). Therefore, people are capable of associating events they do know, with those that have merely been suggested to them, and forming false memories.

The idea that memory is not merely a videotape in your brain, waiting to be cued up, is not new. A great deal of research on memory's effect on witness testimony has been done by Dr. Elizabeth Loftus, a professor of psychology, at the University of Washington in Seattle. Her book "Eyewitness Testimony" (Harvard University Press), is an essential study on the mind's ability to capture and recall events under traumatic or fleeting circumstances.

Dr. Loftus has been an effective witness in many criminal cases. Her book, "Witness for the Defense" (St. Martin's Press), documents several cases in which faulty witness memory exposed innocent defendants to imprisonment or execution.

It is not possible to have expert testimony regarding memory in every case. However, understanding the principles of perception and

memory is necessary to anticipate and confront the common misperception that traumatic events like robberies and assaults are easily recalled.

Reversible Errors

Supreme Court

On vacation.

Eleventh Circuit

A judge may modify the forfeiture provisions of a plea agreement, when that forfeiture would be unfairly punitive to the defendant under the Excessive Fines Clause. United States v. Dean, 87 F.3d 1212 (11th Cir. 1996), amending, 80 F.3d 1535 (11th Cir. 1996).

Without proof that the defendant committed the burglary, other stolen items, not found in his possession, could not be calculated toward loss. United States v. King, 87 F.3d 1255 (11th Cir. 1996).

A custodian of records may not be compelled to testify as to the location of documents not in her possession, when those documents would be self-incriminating. In Re Grand Jury Subpoena Dated April 9, 1996, 87 F.3d 1198 (11th Cir. 1996).

The trial court was required to decide whether the government had delayed indictment to gain tactical advantage. United States v. Foxman, 87 F.3d 1220 (11th Cir. 1996).

If a state creates a statutory right to a motion for new trial, then the state must also afford counsel and an evidentiary hearing. Williams v. Turpin, 87 F.3d 1204 (11th Cir.

1996).

Two-level enhancement for leadership role was not proven in drug case. United States v. Lozano-Hernandez, 89 F.3d 785 (11th Cir. 1996).

Sentencing findings did not support the quantity of drugs attributed to a defendant. United States v. Frazier, 1996WL403100 (11th Cir. 8/2/96).

Private residence was not used in interstate commerce. United States v. Denalli, 1996WL400001 (11th Cir. 8/1/96) amending, 73 F.3d 328 (11th Cir. 1996).

Downward departure upheld under Endangered Species Act for conduct that was intended to benefit animals. United States v. Bernal, 1996WL408108 (11th Cir. 8/6/96).

Defendants who pleaded guilty to accepting a gratuity under plea agreement could withdraw their pleas when they were sentenced under bribery guidelines. United States v. Kummer, 1996WL403158 (11th Cir. 8/2/96).

Court failed to submit a jury instruction on whether a ship was subject to the jurisdiction of the United States. United States v. Medina, 1996WL390428 (11th Cir. 8/6/96).

More than minimal planning increase did not apply to plan to assault a fictitious informant. United States v. Shenberg, 1996WL390428 (11th Cir. 7/12/96).

Other Circuits

An undercover agent's unspecified fear, did not justify partial

closure of a trial. Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996).

A prosecutor's decision to proceed against a juvenile in federal court was reviewable. United States v. Juvenile Male #1, 86 F.3d 1314 (4th Cir. 1996).

Court could not ignore previously adopted plea agreement at resentencing. United States v. Ritsema, 89 F.3d 392 (7th Cir. 1996).

A defendant's concession to an element of the charged crime can make prior bad acts irrelevant. United States v. Crowder, 87 F.3d 1405 (DC Cir. 1996).

A defendant must act willfully to be guilty of criminal contempt. United States v. Mottweiler, 82 F.3d 769 (7th Cir. 1996).

Court is limited to facts at time stop occurred to evaluate reasonableness of seizure. United States v. Odum, 72 F.3d 1279 (7th Cir. 1995).

Jury instruction may not shift the burden to a defendant on issue of self-defense. United States v. Talbott, 78 F.3d 1183 (7th Cir. 1996).

It was plain error to allow alternate jurors to deliberate with jury. United States v. Ottersburg, 76 F.3d 137 (7th Cir. 1996).

Court should have excluded testimony that a defendant was in a motorcycle gang. United States v. Irvin, 87 F.3d 860 (7th Cir. 1996).

Record lacked evidence to support a finding of defendant's consent to search. United States v. Caicedo, 85 F.3d 1184 (6th Cir. 1996).

"Straw man" purchase of a firearm is legal when intended

recipient is a minor. United States v. Moore, 84 F.3d 1567 (9th Cir. 1996).

Court could not deny hearing on motion to compel government to immunize a witness. United States v. Young, 86 F.3d 944 (9th Cir. 1996).

In fraud case, pre-indictment restitution should be deducted from loss. United States v. Allison, 86 F.3d 940 (9th Cir. 1996).

Counsel found ineffective for not objecting to inadmissible evidence. Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996).

Court improperly considered a defendant's decision to go to trial rather than accept a plea offer. United States v. Moskovits, 86 F.3d 1303 (3d Cir. 1996).

Imposing a new term of supervised release violated the Ex Post Facto Clause. United States v. Beals, 87 F.3d 854 (7th Cir. 1996).

Murder guidelines improperly applied in mail fraud conspiracy because it was not charged an object of conspiracy. United States v. Aderholt, 87 F.3d 740 (5th Cir. 1996).

Findings did not establish reasonable certainty that the defendant intended to sell base offense level quantity of counterfeit goods. United States v. Sung, 87 F.3d 194 (7th Cir. 1996).

To be eligible for safety valve, the defendant need not give information to a specific agent. United States v. Real-Hernandez, 1996WL396797 (9th Cir. 7/17/96).

No link between knife-point robbery of coconspirator and the charged drug conspiracy, to justify increase in the sentence. United States

v. Lagasse, 87 F.3d 18 (1st Cir. 1996).

Collateral recovered to secure a loan, and the interest paid, must be subtracted from loss in a fraud case. United States v. Allen, 88 F.3d 765 (9th Cir. 1996).

Defendant's sexual abuse, unrelated to receiving child pornography did not prove "pattern of activity" to increase offense level. United States v. Surratt, 87 F.3d 814 (6th Cir. 1996).

Downward departure approved for a defendant who did not personally benefit from money laundering. United States v. Walters, 87 F.3d 663 (5th Cir. 1996).

No criminal history points may be attributed to a defendant when indigence prevented payment of fines. United States v. Parks, 89 F.3d 570 (9th Cir. 1996).

Erroneous information did not justify a sentence at top of range. United States v. Tabares, 86 F.3d 326 (3d Cir. 1996).

An upward adjustment for a management role must be based on managing persons, not merely assets. United States v. Patasnik, 1996WL384550 (2d Cir. 7/11/96).

A note indicating the presence of a bomb, and a request to cooperate to prevent harm, during a bank robbery, was not an express threat of death. United States v. Alexander, 88 F.3d 427 (6th Cir. 1996).

Extrapolation of drug quantities was error. United States v. Caldwell, 88 F.3d 522 (8th Cir. 1996).

In assessing fine and restitution and fine, court should have considered familial obligations of the

defendant's recent marriage. United States v. Hines, 88 F.3d 661 (8th Cir. 1996).

Failure to object to government's breach of plea agreement is not a waiver. United States v. Belt, 89 F.3d 710 (10th Cir. 1996).

Required Reading

For an article inspiring to all those involved with criminal defense, read "The Electric Chair and the Chain Gang: Choices and Challenges for America's Future," by Stephen B. Bright, 71 Notre Dame Law Review 845.

Editor: Alex Bunin
Southern District of Alabama Federal
Defenders Organization
2 South Water Street, 2nd Floor
Mobile, AL 36602
(334) 433-0910
(334) 433-0686 FAX