THE DEFENDER

Newsletter for CJA Panel Attorneys
Vol. 3 No. 4
April 15, 1997

Spring Has Sprung Issue

Venal Equinox

The flowers are blooming, the grass is green...and time is running out on the limitations for filing federal habeas writs. Apparently, a privilege that "shall not be suspended" can be regulated to the point of uselessness.

Another year has passed, taking with it many of our civil rights.

Ethics

Recently, I attended the yearly training seminar for federal defenders. The last presentation of the seminar was a panel exchange on ethics. There was a discussion of how to deal with a client who wishes to take the stand, against counsel's advice, and perjure himself.

The simple answer to the question is: do not get in that situation in the first place. You should have developed enough trust with the client that he does not disregard your advice on such a crucial decision. (see *Client Control*, THE DEFENDER, July 1996). I have never had a client indicate that he intended to lie on the stand. (Stating, "I am not guilty," is not perjury. Stating, "I was in Detroit," when that is untrue, is). The bottom line is that perjury is never a good trial strategy, and the client needs to learn that quickly.

The situation that occurs regularly, that I do not have a good answer for, involves representation of cooperating informants. What do you do when your client, who has told you on several occasions that his codefendant is innocent, decides to plead guilty and testify against that codefendant?

The prosecutor and agents will not know what the client has told you in confidence. Can you warn them, or codefendant's counsel?

I do not think so. The so-called *crime-fraud exception* to the Attorney-Client Privilege is limited to situations in which the client is seeking the attorney's assistance in the furtherance of future criminal conduct. see Rudulf & Maher, *Behind Closed Doors*, THE CHAMPION, April 1997, at 41. The attorney would not be assisting a crime or fraud, only protecting statements previously made when no perjury was contemplated.

Unlike the client who seeks to commit perjury in his own defense, the "lying snitch" is a regular occurrence. There is no question that defendants housed together in Metro Jail or Escambia County Jail, coordinate their stories to ensnare others. All you need are several people willing to tell the same story, and you have a conspiracy case.

I have had clients tell me on many occasions that the prosecutor's version is untrue, but they are willing to adopt it out of convenience. Usually this does not involve testimony against others, but sometimes it does. All I can do is encourage that person to tell the truth. However, "the truth" becomes a very flexible concept when many years of liberty are at stake.

Unlike retained counsel, we appointed lawyers cannot fire our clients when we are unhappy with them. Other than antacid, I know of no answer to the sick feeling these kind of cases can cause.

CJA Training

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The Administrative Office of the U.S. Courts, Defender Services Division, is sponsoring free seminars for CJA Panel Attorneys. "Winning Strategies for Defending Federal Criminal Cases," will be presented on three occasions. The first seminar will be held in San Diego on June 12-14, 1997. The second, will be in Philadelphia on August 21-23, 1997. The third, will be in New Orleans on October 16-18, 1997.

For more information and an application call (800) 788-9908.

New Discovery Rules

Please go by the District Clerk's Office and ask for a copy of the new proposed rules regarding discovery in criminal cases. Those proposals are available for comment. Absent amendment, those rules will go into effect in a month or so.

These proposals basically eliminate discovery motion practice. Under the new rules, the government will have to turn over all discoverable materials at arraignment. The discovery order will describe discoverable materials in detail. Any additional requests are to be handled informally. Disputes that cannot be informally resolved will be a basis for a specifically stated motion to compel.

These rules can serve as a good protection of your discovery rights. Therefore, it is important to assure they cover all possible situations. Please take the time to review and comment upon them.

Reversible Errors

United States v. Willis, 106 F.3d 966 (11th Cir. 1997) (A defendant who previously pleaded nolo contendre in a Florida state court was not convicted for purposes of being a felon in possession of a firearm) (Congratulations to CJA Attorney Peter Madden).

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997) (A defendant could not be ordered to pay restitution for acquitted conduct).

United States v. Todd, 108 F.3d 1329 (11th Cir. 1997) (A defendant was improperly prohibited from introducing evidence that employees implicitly agreed that pension funds could be used to save the company).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 118 S.Ct. 248 (1997) (1. Clean Water Act violation lacked five participants for role adjustment; 2. Facts did not support restitution order).

United States v. McPhee, 108 F.3d 287 (11th Cir. 1997) (A defendant who qualifies may not be given less than the full three-point reduction for accepting responsibility).

United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997) (1. A federal sentence which calculates a state sentence into the base offense level must be concurrent to the state sentence; 2. Defendant was unlikely to be able to pay restitution order).

United States v. Ortland, 109 F.3d 539 (9th Cir.), cert. denied, 118 S.Ct. 141 (1997) (Since mail fraud is not a continuing offense, an act committed after the date of an increase to guidelines did not require all counts to receive increased guidelines).

United States v. Morales, 108 F.3d 1213 (10th Cir. 1997) (Drug mandatory minimum does not apply to money laundering offense).

In Re Sealed Case, 108 F.3d 372 (D.C. Cir. 1997) (A court failed to make findings attributing all drugs to the defendant).

United States v. Bennett, 108 F.3d 1315 (10th Cir. 1997) (There was no proof that a prior burglary involved a dwelling or physical force under career offender provisions).

United States v. Murphy, 107 F.3d 1199 (6th Cir. 1997) (Two prior robberies were a single episode under Armed Career Criminal Act).

Young v. Harper, 117 S. Ct. 1148 (1997) (A person released on "pre-parole" could not be revoked without procedural safeguards extended to parolees).

United States v. Ritsema, 89 F.3d 392 (7th Cir. 1996) (The court could not reject a previously accepted plea agreement after remand).

United States v. Rowe, 106 F.3d 1226 (5th Cir. 1997) (A judge intimidated venirepersons from expressing their biases during jury selection).

Lynce v. Mathis, 117 S.Ct. 891 (1997) (Retroactive cancellation of early release credits violated due process).

United States v. Qualls,

108 F.3d 1019 (9th Cir.), *rehearing granted,* 122 F.3d 38 (1997) (A probation, during which a defendant retained his civil rights, was not a qualifying conviction for felon in possession).

Moore v. Calderon, 108 F.3d 261 (9th Cir.), cert. denied, 117 S.Ct. 2497 (1997) (A defendant should have been allowed to represent himself when he gave the court two weeks notice).

Mitchell v. Prunty, 107 F.3d 1337 (9th Cir.), cert. denied, 1997 WL 403175 (1997) (There was insufficient evidence of aiding and abetting a murder).

United States v. Myers, 106 F.3d 936 (10th Cir.), cert. denied, 117 S.Ct. 2446 (1997) (The safety valve is mandatory when all factors are met).

United States v. Arnold, 106 F.3d 37 (3d Cir. 1997) (Perjury must be proven by clear and convincing evidence for upward adjustment).

United States v. Campbell, 106 F.3d 64 (5th Cir. 1997) (Restitution is limited to the counts of conviction).

United States v. Zink, 107 F.3d 716 (9th Cir. 1997) (Waiver of appeal of sentence did not cover a restitution order).

United States v. McMillan, 106 F.3d 322 (10th Cir. 1997) (A court may reduce a fine pursuant to Rule 35 (b)).

United States v. Coscarelli, 105 F.3d 984 (5th Cir.), *rehearing granted*, 111 F.3d 376 (1997) (A defendant must be admonished as to the minimum and maximum sentences for each object of a conspiracy).

United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997) (Merely browsing confidential computer files is not wire fraud or computer fraud).

United States v. Elliott, 107 F.3d 810 (10th Cir. 1997) (Consent to look in trunk was not consent to open containers within).

United States v. Eshkol, 108 F.3d 1025 (9th Cir.), cert. denied, 118 S.Ct. 120 (1997) (Only existing counterfeit bills may be counted toward upward adjustment).

United States v. Osei, 107 F.3d 101 (2d Cir. 1997) (Two-level safety valve adjustment applies regardless of mandatory minimum).

United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) (That the defendant’s business was “permeated with fraud” was too indefinite a finding).

United States v. Haut, 107 F.3d 213 (3d Cir.), cert. denied, 117 S.Ct. 2528 (1997) (Arson defendants who worked at direction of others were minimal participants).

United States v. Messner, 107 F.3d 1448 (10th Cir. 1997) (Restitution must be based on actual loss).

United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (Rehabilitation is a proper basis for downward departure).

United States v. Otis, 107 F.3d 481 (7th Cir. 1997) (Failure to give notice of an upward departure was plain error).

United States v. Reyes-Oseguera, 106 F.3d 1481 (9th Cir. 1997) (Flight on foot was insufficient for reckless endangerment enhancement).

United States v. Lopez, 106 F.3d 309 (9th Cir. 1997) (Prejudice to a defendant based upon government misconduct was ground for downward departure).

United States v. Tencer, 107 F.3d 1120 (5th Cir.), cert. denied, 1997 WL 612142 (1997) (Insurance checks that were not tied to fraudulent claims were insufficient proof of mail fraud).

United States v. Jerez, 108 F.3d 684 (7th Cir. 1997) (Nighttime confrontation by police at the defendant’s door was a seizure).

Calderon v. U.S. District Court, 107 F.3d 756 (9th Cir.), cert. denied, 118 S.Ct. 265 (1997) (CJA funds for expert may be used to exhaust a state claim).

United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) (The court failed to adequately limit evidence of the defendant’s gang affiliation).

Thought

If the Sixth Commandment states, “Thou shalt not kill,” how does it honor the Ten Commandments by placing them in an Alabama courtroom where death sentences are imposed?

Editor: Alexander Bunin

Southern District of Alabama
Federal Defenders Organization

2 South Water Street, 2d Floor
Mobile, AL 36602

(334) 433-0910
(334) 433-0686 FAX