
The Defender

Newsletter for CJA Attorneys Vol. 4, No. 1

January/February 1998

Cooperation Issue¹

Getting Along

In December, 1996, Judy Clarke, then NACDL President, wrote a letter to Attorney General Janet Reno, encouraging more dialogue between the Justice Department and the criminal defense bar. To her credit, General Reno has welcomed that dialogue.

Recently, as a member of the Defender Services Advisory Group, I received a copy of a letter from Janet Reno inviting our Group's Chairman to attend a meeting with her to discuss issues affecting defenders and DOJ.

In the December 1997 issue of *The Champion*, there was an article co-authored by the Chair of the Criminal Justice Section of the ABA, the President of the National Association of Criminal Defense Lawyers, and the President of the National Association of District Attorneys. All three agreed upon various criminal justice issues.

Here, in the Southern District of Alabama, we have been making our own inroads toward consensus. Recently, U.S. Attorney Don Foster elevated Ginny Granade to First Assistant and Michel Nicosi to head the Criminal Division of his office. Deborah Griffin now supervises all drug cases.

All three are known to the criminal defense bar for being

approachable and fair. I commend Don Foster for the excellent personnel choices he has made since becoming U.S. Attorney.

Under Michel's reign there will be changes. All plea agreements must be approved by Michel or Deborah. To our benefit, it means more uniformity. There should no longer be such a great disparity among the types of agreements reached with various prosecutors. Waivers of appeal will be bargained for. There will be no more "waive appeal or no deal."

To assist the prosecutors in making this work, defense lawyers should try not to wait until the pretrial conference to begin negotiations. It will be more difficult for AUSAs to get authorization to deal a case on short notice.

Another change is discovery, Michel promises to make discovery as open and fair as possible. In exchange, you will be asked to sign a letter upon receipt of discovery materials acknowledging that you received them. Please sign the letter and check that it accurately reflects what you received. If there is a discrepancy, complain as soon as you discover it.

Reversible Errors

United States v. Cruz, 127 F.3d 791 (9th Cir. 1997) (A defendant could not join a conspiracy that was already completed).

United States v. Farrell, 126 F.3d 484 (3d Cir. 1997) (Urging a witness to "take the fifth" was not witness tampering).

United States v. Bowen, 127 F.3d 9 (1st Cir. 1997) (Amendment defining hashish oil was applied ex post facto).

United States v. Stein, 127 F.3d 777 (9th Cir. 1997) (Upward departure based on more than minimal planning and multiple victims was unwarranted).

United States v. Otis, 127 F.3d 829 (9th Cir. 1997) (1. Evidence did not support management of CCE; 2. Duress instruction was omitted).

United States v. Allen, 127 F.3d 260 (2d Cir. 1997) (Insufficient evidence of extortionate credit).

United States v. Corrigan, 128 F.3d 330 (6th Cir. 1997) (Neither, number of victims, number of schemes, nor amount of loss, supported upward departure).

United States v. Rogers, 126 F.3d 655 (5th Cir. 1997) (An attempted drug crime did not support career offender enhancement).

United States v. Emerson, 128 F.3d 557 (7th Cir. 1997) (Money laundering and mail fraud should have been grouped).

United States v. Cross, 128 F.3d 145 (3d Cir. 1997) (Fixing cases was not mail fraud just because court mailed disposition notices).

United States v. Graham, 128 F.3d 372 (6th Cir. 1997) (An eight-year delay between indictment and trial violated the sixth amendment).

United States v. Monus, 128 F.3d 380 (6th Cir. 1997) (A court did not adequately explain loss findings).

United States v. Wolff, 127 F.3d 84 (D.C. Cir. 1997)

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¹Not the kind that involves "substantial assistance in the prosecution of others."

(Government's failure to argue for acceptance of responsibility breached agreement and required entire sentence to be reconsidered).

United States v. Rounsavall, 128 F.3d 665 (8th Cir. 1997) (Defendant was entitled to an evidentiary hearing to determine if the government's failure to move for a reduced sentence was irrational, in bad faith, or unconstitutionally motivated).

United States v. Alvarez, 127 F.3d 372 (5th Cir. 1997) (A warrant affidavit contained a false statement made in reckless disregard for the truth).

United States v. Johnston, 127 F.3d 380 (5th Cir. 1997) (A prosecutor commented on the defendant's failure to testify and asked questions highlighting defendant's silence).

United States v. Foster, 128 F.3d 949 (6th Cir. 1997) (Exculpatory grand jury testimony should have been admitted at trial).

United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997) (Government failed to show use of mails in a fraud case).

United States v. Glass, 128 F.3d 1398 (10th Cir. 1997) (The introduction of a co-defendant's incriminating statement violated *Bruton*).

United States v. Schroeder, 129 F.3d 439 (8th Cir. 1997) (A warrant did not authorize a search of adjoining property).

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997) (A firearm enhancement was not proven).

United States v. Senn, 129 F.3d 886 (7th Cir. 1997) (Lying about minor details to grand jury was not obstruction).

United States v. Clark, 128 F.3d 122 (2d Cir. 1997) (Downward departure for a lesser harm was available in a felon in possession case).

United States v. Soto-Silva, 129 F.3d 340 (5th Cir. 1997) (Deliberate ignorance instruction was not warranted for charge of maintaining premises for drug distribution).

United States v. Soliz, 129 F.3d 499 (9th Cir. 1997) (Questioning should have stopped when defendant invoked right to silence).

United States v. Cain, 128 F.3d 1249 (8th Cir. 1997) (Sales made before defendant was hired were not relevant conduct toward fraud).

United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997) (Failure to provide allocution at supervised release revocation was plain error).

United States v. Hunt, 129 F.3d 739 (5th Cir. 1997) (There was insufficient evidence of an intent to distribute).

United States v. Castro, 129 F.3d 752 (5th Cir. 1997) (Inventory search could not be used as ruse to investigate).

United States v. Word, 129 F.3d 1209 (11th Cir. 1997) (1. Lay testimony of abuse to defendant was admissible; 2. Fraud, before defendant joined conspiracy, was not relevant conduct).

In Re Grand Jury Investigation, 130 F.3d 853 (9th Cir. 1997) (Search warrant was over broad).

United States v. Iribe-Perez, 129 F.3d 1167 (10th Cir. 1997) (Jury was told that the defendant would plead guilty before start of trial).

United States v. Norman, 129 F.3d 1393 (10th Cir. 1997) (1. Felon whose civil rights had been restored was not illegally in possession of firearm; 2. Concealing drugs at scene of crime was not obstruction).

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997) (Restitution should not have been higher than the loss stipulated in the plea agreement).

United States v. Christo, 129 F.3d 578 (11th Cir. 1997) (A check kiting scheme was not money laundering).

United States v. Gilchrist, 130 F.3d 1131 (3d Cir. 1997) (A plea agreement was breached by imposing a higher term of supervised release).

United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997) (A

defendant retains his privilege against self-incrimination, through sentencing).

United States v. Defries, 129 F.3d 1293 (D.C. Cir. 1997) (The court should have given an advice of counsel instruction on an embezzlement count).

United States v. Doyle, 130 F.3d 523 (2d Cir. 1997) (Erroneous instructions stated that presumption of innocence and reasonable doubt were to protect only the innocent).

United States v. Turner, 130 F.3d 815 (8th Cir. 1997) (Prosecution of count, identical to one previously dismissed, was barred).

United States v. Perez, 129 F.3d 1340 (9th Cir. 1997) (1. A firearm found near defendant was not used or carried; 2. Jury should have been required to decide the type of firearm).

United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (1. Abuse of trust did not apply to a false tax return charge; 2. Enhancement for sophisticated means could not be based on acquitted conduct).

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997) (Applying both brandishing weapon and threat of death enhancements was double counting).

United States v. Carter, 130 F.3d 1432 (10th Cir. 1997) (A requested instruction on venue should have been given).

United States v. Johnson, 130 F.3d 1420 (10th Cir. 1997) (Gun possession convictions for the same firearm were multiplicitous).

United States v. Davenport, 131 F.3d 604 (7th Cir. 1997) (A violation of a state civil provision was not covered by Assimilative Crimes Act).

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