

THE DEFENDER

Newsletter for CJA Attorneys
Vol. 4 No. 2
March-April 1998

Victory Issue

Rash of Acquittals

Recently, the federal criminal defense bar has experienced a phenomena generally unknown in these parts - success. Defendants have actually walked out the courthouse door at the end of jury trials.

In the last six months, this has occurred 11 times. More surprising, eight of those acquittals happened since the beginning of the year.

This district averaged 41 defendants tried by jury during each of the last three years. Therefore, during those six months, the defense has had approximately a 54% acquittal rate. (I realize that I am

manipulating the numbers a bit here, but its my newsletter).

Two lawyers, Andrew Jones and Assistant Federal Defender Carlos Williams, have obtained two acquittals each. Andrew Jones accomplished the once-in-a-lifetime feat of receiving two acquittals in one day from two different juries, for two different clients.

Andy was in one trial that lasted the better part of two weeks. While that jury was deliberating, he was put to trial in another courtroom. Both, juries announced their verdicts the same day - both "not guilty."

The whole list of victorious lawyers is as follows:
Gordon Armstrong
Jim Byrd
Gennaro Cariglio
Chris Clanton
Bob Clark
Greg Hughes
Andrew Jones (2)
Jay Kimbrough
Dan Wannamaker, AFD
Carlos Williams, AFD (2)
Congratulations.

Armed Career Criminals vs. Career

Offenders

One of the most confusing aspects of sentencing law is the distinction between the enhancements for Armed Career Criminals and Career Offenders. Two years ago, there was an article in this newsletter detailing all aspects of those enhancements and the "Three Strikes" law.

Since "Three Strikes" cases are rare in this district, this article will just summarize some of the things to anticipate in cases involving the other two enhancements.

The Armed Career Criminal Act enhancement ("ACCA") applies in **only** one kind of case - a felon in possession of a firearm, pursuant to 18 U.S.C. §922 (g). If you are defending such a case, you must check to see if the defendant has three prior convictions for "violent felonies" or "serious drug offenses." If so, the statutory minimum punishment is 15 years. 18 U.S.C. §924 (e). The offense level and criminal history category rise proportionally to the statutory minimum. §4B1.4.

Under the Career Offender provisions ("COP") of the guidelines, a person

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charged with either a "crime of violence" or a "drug trafficking crime" will face a substantially higher offense level and criminal history category, if the person has two previous similarly defined convictions. §4B1.1.

The following are important distinctions between the two enhancements:

- ACCA is statutory and COP is not.
- ACCA applies to felons in possession of a firearm. COP does not.
- COP applies to persons charged with crimes of violence or drug trafficking crimes. ACCA does not.
- Under ACCA any common law burglary is a violent felony, but under COP only a burglary of a dwelling is a crime of violence.
- ACCA requires three predicate priors. COP needs only two.
- ACCA priors need only to be separate transactions to count as distinct priors. COP priors that are in related cases are not counted separately.

The worst aspects of these two enhancements are the differently named, but like sounding definitions. The case law says that although the definitions under each are similar, they are not identical. In other words, you cannot always be sure that a crime of violence is a violent felony, or that a serious drug offense is a drug trafficking crime. Be careful.

Reversible Errors

United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (Evidence was insufficient that

seized money could support cocaine quantities).

United States v. Knobloch, 131 F.3d 366 (3d Cir. 1997) (Court could not impose an increase for a firearm when there was a consecutive gun count).

United States v. Moore, 131 F.3d 595 (6th Cir. 1997) (A limited remand did not allow a new enhancement at resentencing).

United States v. Melton, 131 F.3d 1400 (10th Cir. 1997) (Unforeseeable acts of fraud could not be attributed to defendant).

United States v. Johnson, 130 F.3d 1420 (10th Cir. 1997) (Same conduct, charged in different counts, was multiplicitous).

United States v. Ross, 131 F.3d 970 (11th Cir. 1997) (When a defendant is convicted of a conspiracy count with multiple objects, the court must find beyond a reasonable doubt that a particular object was proven before applying that guideline section).

United States v. Rapone, 131 F.3d 188 (D.C. Cir. 1997) (Evidence was insufficient to show retaliation).

United States v. Bauer, 132 F.3d 504 (9th Cir. 1997) (Questioning of defendant's bankruptcy attorney violated attorney-client privilege).

United States v. Wilson, 131 F.3d 1250 (7th Cir. 1997) (The government waived the issue of urging additional relevant conduct at resentencing).

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (Jury instructions did not

adequately impose burden of proving knowledge).

United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997) (Probation revocation for a drug user does not require a prison sentence; treatment is an option).

United States v. Soto, 132 F.3d 56 (D.C. 1997) (Counsel was ineffective for failing to urge downward role adjustment).

United States v. Hinojosa-Gonzalez, 132 F.3d 1314 (9th Cir. 1997) (Defendant did not receive adequate notice of upward departure).

United States v. Foster, 133 F.3d 704 (9th Cir. 1998) (Firearm found in truck was not immediately available to defendant).

United States v. Johnson, 132 F.3d 628 (11th Cir. 1998) (1. Prosecutor violated plea agreement by urging higher drug quantity; 2. Full three levels for acceptance must be reduced unless acceptance was untimely).

United States v. Drinkwine, 133 F.3d 203 (2d Cir. 1998) (Insufficient evidence that defendant could pay a fine).

United States v. Covington, 133 F.3d 639 (8th Cir. 1998) (Evidence did not show imprisonment within last 15 years on predicate offense used for career offender enhancement).

United States v. Duran, 133 F.3d 1324 (10th Cir. 1998) (Entrapment instruction failed to place burden on government).

O'Connor v. United States, 133 F.3d 548 (7th Cir. 1998) (Petition under §2255 was properly filed during pendency of appeal on denial of new trial).

United States v. Glass, 133 F.3d 1356 (10th Cir. 1998) (Defendant's psychotherapist-patient privilege was violated).

Gambino v. Morris, 134 F.3d 156 (3d Cir. 1998) (There was no rational basis to deny parole).

United States v. Williams, 133 F.3d 1048 (7th Cir. 1998) (Statements by informant to agent were hearsay).

United States v. Russell, 134 F.3d 171 (3d Cir. 1998) (CCE instruction omitted unanimity requirement).

United States v. Kennedy, 133 F.3d 53 (D.C. 1998) (Court cannot refuse to group counts in order to give defendant a higher sentence).

United States v. Burt, 134 F.3d 997 (10th Cir. 1998) (Deputy sheriff's drug dealing did not merit abuse of trust or special skills enhancements).

United States v. Desantis, 134 F.3d 760 (6th Cir. 1998) (Neither defendant's business failure, nor state administrative findings, were relevant to fraud case).

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998) (Owner of a health care provider did not occupy position of trust with Medicare).

United States v. Kaplan, 133 F.3d 826 (11th Cir. 1998) (Transfer of funds to U.S. to pay extortion did not establish effect on commerce).

United States v. Thomas, 134 F.3d 975 (9th Cir. 1998) (Defendant may present good prior conduct to support entrapment defense).

United States v. Cooper, 133 F.3d 1394 (11th Cir. 1998) (Defendant had reasonable

expectation of privacy in rental car four days after contract expired).

United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998) (Court failed to consider safety valve at resentencing).

United States v. Baird, 134 F.3d 1276 (6th Cir. 1998) (Instruction failed to charge jury that contractor was only liable for falsity of costs it claimed to have incurred).

United States v. Wilson, 135 F.3d 291 (4th Cir. 1998) (Prosecutor's argument that defendant was a murderer prejudiced drug case).

United States v. Beckner, 134 F.3d 714 (5th Cir. 1998) (Lawyer was not shown to have knowledge of client's fraud for aiding and abetting).

United States v. Saenz, 134 F.3d 697 (5th Cir. 1998) (Court's questioning of a witness gave appearance of partiality).

United States v. Sylve, 135 F.3d 680 (9th Cir. 1998) (Deferred prosecution was available for charge under Assimilative Crimes Act).

United States v. Tilghman, 134 F.3d 414 (D.C. 1998) (Court's questioning of defendant denied him a fair trial).

United States v. Hayes, 135 F.3d 435 (6th Cir. 1998) (Enhancements for reckless endangerment, and assault, during flight, were double counting).

United States v. Candelario-Cajero, 134 F.3d 1246 (5th Cir. 1998) (Absent an upward departure, grouped counts cannot receive consecutive sentences).
And...

United States v. Terry, No. 95-6074 (11th Cir. 1998) (Unpublished) (Drug quantity findings were not supported by evidence) (Congratulations to CJA Panel Attorney Donald Partridge).

Seminars

CJA Panel lawyers may attend free training seminars in Dallas, TX on June 18-20, 1998, Portland, ME on August 27-29, 1998, and San Francisco, CA on October 15-17, 1998.

Topics include: Supreme Court update, federal gun cases, pleas, immigration crimes, downward departures, discovery, drug cases, cross examination, fraud cases, the guidelines, ethics, and federal capital habeas.

Call me for an application form.

Media

Attached is an article by Rob Stewart in the Winter 1998 issue of THE DRUG POLICY NEWSLETTER. It is about Dorothy Gaines. AFD Lyn Campbell represents Ms. Gaines on appeal.

The Gaines case also came to the attention of the PBS show "Frontline." Recently, a producer of that show came to Mobile to interview Lyn and I about the Gaines case and the issue of the government's use of cooperating individuals in drug cases. Several other local attorneys were also interviewed.



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Dorothy Gaines: Guilt by Association

by Rob Stewart

The U.S. government offered Dorothy Gaines a deal: a five-year sentence for all Gaines knew about a drug trafficking ring in and around Mobile, Alabama. Gaines turned the offer down, saying she was innocent of charges that she helped supply the ring with cocaine.

Today, Gaines, 39, is in the Federal Correctional Institution in Tallahassee, Florida. She is serving a 19 -year-and-seven-month sentence for two counts of conspiracy to possess and distribute over one and a half kilograms of crack cocaine.

The amount of drugs is vague because the government did not have material evidence of the drugs associated with Gaines . A search of Gaines' house turned up no drugs, no money, and no paraphernalia associated with drug dealing . All the government had on Gaines was the testimony of others —some of whom were defendants from the same busted drug ring who faced long prison terms unless they cooperated with the prosecution and built cases against other suspects.

Gaines was a suspect because she dated a crack user, Terrell Hines, who knew Dennis Rowe, the alleged leader of the Mobile cocaine ring. "When I found out [Hines] was using drugs," Gaines said, "I put him into rehab. I split the relationship when he went back to drugs."

Dorothy Gaines, Reg. No. 05609-003, 501 Capital Circle NE, Tallahassee, FL 32301, with her son, Phillip

At first, things seemed to go Gaines' way. The Alabama state court rejected the case because the charges against Gaines could not be corroborated with concrete evidence—all the prosecution had was testimony.

Unfortunately for Gaines, she lived in one of the nation's most active federal judicial districts for prosecuting local drug cases. In addition, Gaines did not realize that federal law permitted the prosecution to use uncorroborated testimony in a conspiracy case. Since a combined local and federal drug task force arrested the suspects, the case was moved up to the U.S. District Court for the Southern District of Alabama in 1994.

After Gaines turned down the plea bargain, the U.S. Attorney's Office tried Gaines and three other defendants at the same time. Gaines, however, was confident that the jury would find her not guilty.

Instead, the jury saw the determination with which the other witnesses testified against Gaines, describing her as integral to the crack distribution network. In retrospect, Gaines sees that the jury probably convicted her because of the weight of the evidence against her codefendants.

Because Gaines, a first-time offender, did not cooperate, her sentence was not reduced from the prescribed 235 months. One witness, who was already serving time for prior felony convictions on gun and drug charges, was released early. Rowe, the ringleader, was facing a possible life sentence, but he helped the government build cases against others including Gaines and will be out in 2004. With good behavior, Gaines will be in prison until 2012.

Besides the lack of direct evidence against her, Gaines points to indirect evidence that she was not a player in the drug ring. Gaines was living in public housing when she was arrested and is missing several teeth because she could not

afford proper dental care. That summer, her car had been repossessed. Her accusers did not contend that Gaines used drugs or spent drug-trafficking money on herself. But Gaines' court appointed attorney failed to introduce the records documenting her low income or the high level of com -

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-munity support for her.

The case has other inconsistencies. The testimony about how much cocaine Gaines knew about changed throughout the proceedings. Testimony about one night's crack buy fluctuated between the grand jury hearings and the trial. Some cocaine, allegedly kept by Gaines at her house, transformed from its powder form to cocaine base or crack, which carries a heavier federal sentence.

Another problem is the allegation that the government's witnesses coordinated their testimony with each other while being kept in the same holding cell during the trial. When one of the witnesses (who was being tried separately from Gaines) reported the collusion to the court, Judge Alex Howard interrupted the trial to investigate. But, the judge did not find sufficient evidence of collusion to end the trial nor was the jury informed of what happened.

A combination of bad law and poor counsel helped land Gaines behind bars, but she is good-hearted, even generous, in fighting her imprisonment. "My goal upon release is to go into the schools to tell the kids what happened to me," Gaines said. "You don't have to sell drugs to get into trouble. I just dated someone who used drugs."

Gaines has, by all accounts, become a model prisoner. She has commendations from the warden for the two times she has saved inmates' lives and, on one occasion, for helping a sick staff member. Yet, a year of good behavior earns Gaines only a 54-day reduction in her sentence.

Everything Gaines relates about her experience comes back not to the trial but to her family. She is the sole parent for her three children. Her

Something to trade: Phillip Gaines wrote the judge in his mother's case in October 1994 to strike a deal.

oldest, Natasha, left college in 1996

Phillip P. Gaines
THE SON OF DOROTHY
Dear Judge:
I need your help. I could
you help my mom? I have
no dad and no grandmother
have to see a doctor
my mom to take care of
me and my children
my mom is in prison
in October 1994 I need
my mom to be here on the
15 and 17 for my life.
I will cut your grass
wash your car
every day for you
Send my mom
PLEASE PLEASE PLEASE
DOROTHY

to raise her sister and brother in addition to her own children.

Gaines is concerned about all of them and is particularly concerned about her youngest child, Phillips, 13. He told his mother that he wanted to break the law so that he could join her in prison. "I assured him that, if he gets in trouble, he doesn't come to mom," Gaines said.

Gaines describes the day that Phillips said he wanted to kill himself rather than live without his mother as "devastating." She says she talked Phillips through his ordeal. During and after the trial, Gaines encouraged him to pray. During and after the trial, Phillips had dealt with the stress by sending letters to the judge and, later, to President Clinton.

Whereas his mother had nothing to exchange for a reduced sentence, Phillips thought he did. Just before his 10th birthday, Phillips wrote Judge Howard offering to mow the judge's lawn and wash his car in exchange for not sending Gaines away to prison. Phillip's gesture was in part an expression of gratitude to the judge who did what few would have done for a convict facing such a long sentence: Judge Howard released Gaines on her own recognizance in August 1994 after her conviction until her sentencing in March 1995.

Gaines would prefer being confined to home rather than to a

prison cell. "If I could take life on probation or an ankle bracelet, I would," she said. "I've seen seven women go home from here, only to come back a few months later. I asked them, 'How can you hurt your family by coming back to prison?' If only I had the chance to go home."

Gaines has a lot to say about the justice system. In a summary of her case that she drafted, Gaines wrote: "Where is justice? I beg for the return of federal parole, the release of first time, nonviolent offender, and the rehabilitation of the drug addict. Incarceration is not only costly to the taxpayers, it is totally destructive to the individual's family."

"My last word to the nation: The mandatory minimum sentences plus the conspiracy laws are at the root of the growing federal prison populations. You are getting people, not drugs, off the streets."

Who to Write About Gaines' Case Besides your elected representatives in Washington, D.C., you can write letters of support to the U.S. Pardon Attorney, U.S. Department of Justice, 10th St. and Constitution Ave. NW, Washington, DC 20530, to request that President Clinton pardon Gaines. Gaines has one more opportunity in court with a habeas corpus petition, which will be heard by her trial judge: Senior Judge Alex T. Howard, U.S. District Court, S. Dist. of Ala., 113 St. Joseph St., Mobile, AL 36602.