

THE DEFENDER

Newsletter for CJA Panel Attorneys

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Penultimate 1998 Issue*

Cyber Subscription

Please help reduce our mailing costs by providing us with your internet e-mail address. Send your address to pubdef@mobileinterlink.net.

*Next Issue

The next issue of The Defender will be the annual collection of reversible errors. The issue will cover all cases from 1995 to date. Old cases will be Shepardized to confirm they are still precedent.

Please remember that the annotations are merely to draw your attention to cases that may assist your research. They are not a substitute for reading the cases.

Bailey Fix

In light of *Bailey v.*

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United States, 516 U.S. 137 (1995) (Passive possession of a firearm was insufficient to prove "use" of a firearm during a drug trafficking crime), Congress has amended 18 U.S.C. §924 (c). It now prohibits possession of a firearm "in furtherance" of a crime of violence or drug trafficking crime.

There are also increased penalties. Possession nets a minimum consecutive 5 years. Brandishment gets at least a consecutive 7 years. Discharge is punished by a minimum consecutive 10 years. Possession of short-barreled rifles or shotguns, or semi-automatic assault rifles, gets a minimum consecutive 10 years. Second offenses are minimum consecutive 25-year sentences.

There is a minimum consecutive 30 years for possession of a machinegun, destructive device, or any firearm equipped with a silencer or muffler. A second offense is mandatory life.

Book Plug

I recommend Alan Ellis' FEDERAL PRISON GUIDEBOOK. This book gives a complete listing of all Federal Bureau of Prisons facilities, with a great deal of background information unavailable from other sources.

The book is \$39.50 from Law Offices of Alan Ellis, P.O. Box 2178, Sausalito, CA 94966 (415) 332-6464. Alan is a subscriber and supporter of The Defender.

Reversible Errors

United States v. Hinojosa-Gonzales, 142 F.3d 1122 (9th Cir. 1998) (Defendant did not get adequate notice of upward departure).

United States v. Blotcher, 142 F.3d 728 (4th Cir. 1998) (Court improperly denied defendant's race neutral peremptory challenge).

United States v. Downer, 143 F.3d 819 (4th Cir. 1998) (Court's substitution of conviction for lesser offense, after reversal, violated Ex Post Facto Clause and Grand Jury Clause).

United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) (Court failed to make findings regarding applicability of safety valve).

United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998) (Defendant who does not contest facts at trial may be eligible for acceptance).

United States v. Faulks, 143 F.3d 133 (3rd Cir. 1998)

(Agreement not to contest forfeitures may be basis for downward departure).

United States v. Sligh, 142 F.3d 761 (4th Cir. 1998) (Court failed to give instruction on entrapment).

United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (1. Later drug sales were not foreseeable to defendant; 2. Court could depart based on entrapment and diminished capacity).

United States v. D'Agostino, 145 F.3d 69 (2d Cir. 1998) (Diverted funds were not taxable income for purposes of tax evasion).

United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998) (Vague appeal waiver was void).

United States v. Graves, 143 F.3d 1185 (9th Cir. 1998) (Accessory to felon in possession had to know codefendant was a felon and possessed firearm).

United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998) (1. Feeling through sides of bag was a search; 2. Abandonment of bag was involuntary).

United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) (Defendant with limited English and low mental capacity did not voluntarily waive *Miranda*).

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998) (Putting hand in pocket and warning to cooperate or "no one will get hurt" was not express threat of death).

United States v. Burt, 143 F.3d 1215 (9th Cir. 1998) (Entrapment instruction failed to place proper burden on government).

United States v. Lominac, 144 F.3d 308 (4th Cir. 1998) (Additional supervised release was applied ex post facto).

United States v. Hotal, 143 F.3d 1223 (9th Cir. 1998) (Anticipatory search warrant failed to identify triggering event for execution).

United States v. G.L., 143 F.3d 1249 (9th Cir. 1998) (Lenient theft guidelines did not justify upward departure).

United States v. Dahler, 143 F.3d 1084 (7th Cir. 1998) (Defendant whose rights were restored was not armed career criminal).

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998) (Defendant could not be ordered to pay restitution on loan unrelated to fraud).

United States v. Mitchell, 145 F.3d 572 (3rd Cir. 1998) (Anonymous note incriminating defendant was inadmissible hearsay).

United States v. Plath, 144 F.3d 146 (1st Cir. 1998) (Depositing counterfeit checks and withdrawing money did not require more than minimal planning).

United States v. Marsh, 144 F.3d 1229 (9th Cir. 1998) (Admission of complaints by defendant's customers denied confrontation).

United States v. Crouse, 145 F.3d 786 (6th Cir. 1998) (Civic involvement justified downward departure).

United States v. Polanco, 145 F.3d 536 (2d Cir. 1998) (Insufficient evidence that defendant murdered victim to maintain position in CCE).

United States v. Martinez-Salazar, 146 F.3d 653

(9th Cir. 1998) (Juror prejudiced toward government should have been stricken for cause).

United States v. Rapal, 146 F.3d 661 (9th Cir. 1998) (Higher resentence presumed vindictiveness).

United States v. Washington, 146 F.3d 219 (4th Cir. 1998) (Court should not have relied upon statements made pursuant to plea agreement).

United States v. Almaguer, 146 F.3d 474 (7th Cir. 1998) (Use of firearm was included in guideline and did not justify upward departure).

United States v. Bonanno, 146 F.3d 502 (7th Cir. 1998) (Court improperly delegated discretion over drug testing to probation officer).

United States v. Lopez-Sandoval, 146 F.3d 712 (9th Cir. 1998) (Defendant was not an organizer).

United States v. Biro, 143 F.3d 1421 (11th Cir. 1998) (Deportation could not be condition of supervised release).

United States v. Copeland, 143 F.3d 1439 (11th Cir. 1998) (Government contractor was not bribed under federal statute).

United States v. Cunningham, 145 F.3d 1385 (D.C. Cir. 1998) (Unredacted tapes violated confrontation).

United States v. Rhodes, 145 F.3d 1375 (D.C. 1998) (Post-conviction rehabilitation can justify downward departure).

United States v. To, 144 F.3d 737 (11th Cir. 1998) (Insufficient evidence of RICO and Hobbs Act violations).

United States v. Stewart, 145 F.3d 273 (5th Cir. 1998) (Insufficient evidence that

passenger aided and abetted drug possession).

United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998) (Bus passenger did not voluntarily consent to search).

United States v. Toler, 144 F.3d 1423 (11th Cir. 1998) (Insufficient evidence that defendant participated in conspiracy).

United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) (Defendant was not an organizer).

United States v. Schnitzer, 145 F.3d 721 (5th Cir. 1998) (Impermissible theory of fraud justified new trial).

United States v. Gigot, 147 F.3d 1193 (10th Cir. 1998) (Failure to admonish defendant of elements of offense and possible penalties rendered plea involuntary).

United States v. Paul, 142 F.3d 836 (5th Cir. 1998) (Insufficient evidence of conspiracy to import).

United States v. Mathurin, 148 F.3d 68 (2d Cir. 1998) (Court denied hearing on motion to suppress).

United States v. Nagra, 147 F.3d 875 (9th Cir. 1998) (Upward departure based upon factor considered by guidelines was double counting).

United States v. Keating, 147 F.3d 895 (9th Cir. 1998) (Reasonable probability of juror prejudice required new trial).

United States v. Byre, 146 F.3d 1207 (10th Cir. 1998) (Government's opposition to downward departure breached plea agreement).

United States v. Mulder, 147 F.3d 703 (8th Cir. 1998) (Bank's routine practice was irrelevant to fraud prosecution).

United States v. Kushmaul, 147 F.3d 498 (6th Cir. 1998) (Holding baseball bat was not "otherwise used").

United States v. Edwards, 154 F.3d 915 (9th Cir. 1998) (Defendant was denied confrontation when prosecutor became potential witness during trial).

Robles v. United States, 146 F.3d 1098 (9th Cir. 1998) (Parole Commission could not impose second special term of parole).

United States v. Benally, 146 F.3d 1232 (10th Cir. 1998) (Defendant was entitled to instructions on self-defense and lesser included offense).

United States v. Viramontes-Alvarado, 149 F.3d 912 (9th Cir. 1998) (Noncitizen's priors were not aggravated felonies).

United States v. Fultz, 146 F.3d 1102 (9th Cir. 1998) (Guest had expectation of privacy in boxes he stored at another's home).

United States v. Wyss, 147 F.3d 631 (7th Cir. 1998) (Drugs for personal use could not be counted toward distribution quantity).

United States v. Hellbusch, 147 F.3d 782 (8th Cir. 1998) (Guilty plea did not foreclose *Bailey* claim).

United States v. Anzalone, 148 F.3d 940 (Government failed to move for downward departure for reasons other than quality of substantial assistance).

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998) (Convictions for 6 firearms and ammunition was multiplicitous).

United States v. Ellis, 147 F.3d 1131 (9th Cir. 1998)

(Testimony about destructive power of explosives was prejudicial).

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998) (Commentary Note on grouping did not provide basis for upward departure).

United States v. Shotts, 145 F.3d 1289 (11th Cir. 1998) (1. Evasive, but true, answer was not perjury; 2. Bail bond license was not property within meaning of mail fraud statute).

United States v. Rouse, 148 F.3d 1040 (8th Cir. 1998) (Search of bags lacked probable cause).

United States v. Miller, 146 F.3d 274 (5th Cir. 1998) (Leaving turn signal on violated no law and did not justify stop).

United States v. Pollani, 146 F.3d 269 (*Pro se* defendant's late request for counsel should have been honored).

United States v. Balogun, 146 F.3d 141 (2d Cir. 1998) (Court could not order supervised release tolled while defendant out of country).

United States v. Garrett, 149 F.3d 1018 (Denying newly retained counsel a one-month continuance was abuse of discretion).

United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998) (Arrest warrant did not determine nature of prior conviction).

United States v. Merino-Balderrama, 146 F.3d 758 (9th Cir. 1998) (Pornographic films should not have been displayed in light of defendant's offer to stipulate).

United States v. Hughey, 147 F.3d 423 (5th Cir. 1998) (Passing bad checks was not

unauthorized use of an access device).

United States v.

Perulina, 146 F.3d 1332 (11th Cir. 1998) (Defendant was not responsible for marijuana imported before he joined conspiracy).

United States v.

Saavedra, 148 F.3d 1311 (11th Cir. 1998) (Defendant could not receive increase for selling drugs near school unless so charged).

United States v. Jones,

149 F.3d 364 (Agent lacked reasonable suspicion for investigatory immigration stop).

United States v. Male

Juvenile, 148 F.3d 468 (5th Cir. 1998) (Certification for juvenile by AUSA was invalid).

United States v. Salzano,

149 F.3d 1238 (10th Cir. 1998) (Officer lacked reasonable suspicion for stop).

United States v. Ortega-Reyna,

148 F.3d 540 (5th Cir. 1998) (Insufficient evidence that drugs hidden in borrowed truck were defendant's).

United States v. Evans,

148 F.3d 477 (5th Cir. 1998) (No evidence that mailings advanced fraudulent scheme).

United States v.

Bacallao, 149 F.3d 717 (7th Cir. 1998) (No showing prior cocaine transactions were relevant conduct).

United States v. Walker,

149 F.3d 238 (3rd Cir. 1998) (Prison worker was not a corrections officer).

United States v.

Thomas, 150 F.3d 743 (7th Cir. 1998) (Defendant was entitled to instruction that buyer/seller relationship is not itself a conspiracy).

United States v.

Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998) (Prior guilty plea did not prevent defendant from contesting noncitizen status).

United States v.

Quintanar, 150 F.3d 902 (8th Cir. 1998) (No evidence that defendant exercised control over contraband).

United States v. Spinner,

152 F.3d 950 (D.C. 1998) (1. Failure to show firearm was semiautomatic assault weapon; 2. Letter containing evidence of prior bad acts should not have been admitted).

United States v.

Stoddard, 150 F.3d 1140 (9th Cir. 1998) (Restitution could not exceed actual loss).

United States v.

Albreksten, 151 F.3d 951 (9th Cir. 1998) (Arrest warrant did not permit search of defendant's motel room).

United States v.

Vavages, 151 F.3d 1185 (9th Cir. 1998) (Prosecutor coerced defense witness into refusing to testify).

United States v. Kaluna,

152 F.3d 1069 (9th Cir. 1998) (Portion of "Three Strikes" law, requiring defendant to prove dangerous weapon was not used, is unconstitutional).

United States v. Haas,

150 F.3d 433 (5th Cir. 1998) (Nonfinal state conviction could be basis for statutory enhancement of drug sentence).

United States v.

Grimmett, 150 F.3d 958 (8th Cir. 1998) (Withdrawal from conspiracy, outside statute of limitations, bars prosecution).

United States v.

Gamache, 156 F.3d 1 (1st Cir. 1998) (Jury should have been instructed on entrapment).

United States v. Meyers, 150 F.3d 459 (5th Cir. 1998) (Defendant denied right of allocution).

United States v. Hodge,

150 F.3d 1148 (9th Cir. 1998) (Insufficient evidence of false statements).

United States v. Mejia-Mesa,

153 F.3d 925 (9th Cir. 1998) (*Brady* claim required hearing).

United States v. Thorne,

153 F.3d 130 (4th Cir. 1998) (Court failed to advise defendant of the nature of supervised release).

United States v. Estrada-Fernandez,

150 F.3d 491 (5th Cir. 1998) (Simple assault is lesser included offense of assault with deadly weapon).

United States v. Reccko,

151 F.3d 29 (1st Cir. 1998) (Police switchboard operator did not occupy position of trust).

United States v.

Wadena, 152 F.3d 831 (8th Cir. 1998) (Money laundering, unrelated to defendant's position, did not warrant abuse of trust).

United States v.

Thomas, 155 F.3d 833 (7th Cir. 1998) (Court failed to group counts).

United States v. Shoff,

151 F.3d 889 (8th Cir. 1998) (Purchase with proceeds of fraud was not money laundering).

United States v.

Rodriguez-Rivas, 151 F.3d 377 (5th Cir. 1998) (Vehicle stop lacked reasonable suspicion).

United States v.

Whitaker, 152 F.3d 1238 (10th Cir. 1998) (Post-offense drug rehabilitation can justify downward departure).

United States v.

Johnson, 152 F.3d 553 (6th Cir. 1998) (Arson was within heartland of cases and did not justify upward departure).

United States v. Mussari, 152 F.3d 1156 (9th Cir. 1998) (Ex post facto application of criminal penalties).

United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998) (Checkpoint stop to merely look for drugs was unreasonable).

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998) (Deportation cannot be condition of supervised release).

United States v. Schmalzried, 152 F.3d 354 (5th Cir. 1998) (Government failed to connect firearm to drug offense).

United States v. Gore, 154 F.3d 34 (2d Cir. 1998) (1. Buyer/seller relationship did not establish conspiracy; 2. Possession and distribution of the same drugs may only be punished once).

United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998) (Insufficient evidence of illegal gambling).

United States v. Davenport, 151 F.3d 1325 (11th Cir. 1998) (Defendant did not waive right to review presentence report by absconding).

United States v. Garcia, 151 F.3d 1243 (9th Cir. 1998) (Gang relationship alone did not support conspiracy).

United States v. Madrid, 152 F.3d 1034 (8th Cir. 1998) (Inevitable discovery doctrine did not save illegal search of house).

United States v. Odedo, 154 F.3d 937 (9th Cir. 1998) (Defendant not admonished

about nature of charges).

United States v. Baker, 155 F.3d 392 (4th Cir. 1998) (Cannot put conditions of release on person acquitted by reason of insanity who is not a danger).

United States v. Washington, 151 F.3d 1354 (11th Cir. 1998) (Bus passenger was searched without voluntary consent).

United States v. Hickman, 151 F.3d 446 (5th Cir. 1998) (1. Two agents at prosecutor's table was abuse of discretion; 2. Pointing firearm was not restraint).

United States v. Kliti, 156 F.3d 150 (2d Cir. 1998) (Court should have held hearing on defense counsel's potential conflict).

United States v. Evans, 155 F.3d 245 (3rd Cir. 1998) (Cannot make reimbursement for court-appointed counsel a condition of supervised release).

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998) (Using guideline effective after commission of offense violated ex post facto).

United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998) (Court must consider defendant's ability to pay restitution).

United States v. Havier, 155 F.3d 1090 (9th Cir. 1998) (Motion to revoke must specifically identify charges).

United States v. Suarez, 155 F.3d 521 (5th Cir. 1998) (Defendant was not admonished as to nature of charges).

United States v. Ginton, 154 F.3d 1245 (11th Cir. 1998) (No managerial role for defendant who did not supervise or control others).

United States v. Glover, 154 F.3d 1291 (11th Cir. 1998) (Time credited toward a sentence does not lengthen total sentence).

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