THE DEFENDER

Newsletter for CJA Panel Attorneys
Vol. 5 No. 1
January - March 1999

Mardi Gras Recovery Issue

Seminar

Mark your calendars for Friday, April 16, 1999. Alabama Criminal Defense Lawyers Association and my office are sponsoring "Drug Law for the New Millennium," at the Adams Mark Hotel in Mobile. Participants will receive 5 hours CLE credit, written materials and lunch. The cost is $100, payable to ACDLA, P.O. Box 1147, Montgomery, AL 36101-1147.

The seminar will cover search and seizure, sentencing, discovery/pretrial motions, cross-examining forensic experts, and a panel discussion on the use and abuse of informants. The seminar will cover federal and Alabama law.

All CJA Panel Attorneys in this district should plan to attend. Lawyers who are simply unable to raise the cost of admission may call me. I can pay for a couple of scholarships.

CONTENTS

For those who need more than 5 hours CLE, there will be national CJA Panel training in Savannah, GA, June 3-5, 1999. Call me for an application.

Cooperation not Capitulation

For those of you who did not already know it, PBS's Frontline documentary "Snitch" made clear that there are cooperating defendants in the Southern District of Alabama. In many cases, the defendants cooperate even before counsel is appointed.

There is a tendency among counsel of such clients to forget they are still advocates. Defendants cannot depend on the benevolence of prosecutors to protect their interests. This is especially true at sentencing, where a properly placed objection can be as valuable as a downward departure for substantial assistance.

It is the position of our U.S. Attorneys Office that defense counsel have an obligation to file all appropriate objections to presentence reports, even when the government may wish to acquiesce to defendants' positions. Prosecutors cannot control how presentence reports are written. Therefore, even if the parties agree enhancements are inapplicable, someone has to bring the issues before the court. Defense counsel have a duty to do so.

Defense counsel often deliberately refrain from objecting in such circumstances. They fear that objections will upset the prosecutor and cause the motion for substantial assistance to be withdrawn. They also worry that the court will deny acceptance of responsibility.

Sometimes these are a valid fears, but usually not. Whether defendants have provided substantial assistance in the prosecution of others has nothing to do with whether objections to the presentence report should be granted. Similarly, objections to the application of the law to the facts are not bases for courts to find defendants failed to accept responsibility.

Counsel should only refrain from objecting in two instances. First, if the positions are frivolous, objections may only reduce counsels' credibility with the court on other issues. Second, if defendants falsely deny the charged facts, or relevant conduct, those defendants do risk loss of credit for acceptance of responsibility.

Cooperating defendants are clients like any other. Appointed counsel can neither fire them nor ignore them.

Policy Matters

Two recent federal appellate decisions evidence a new trend. Courts are now applying one-sided policy analyses to justify their opinions.

There are generally two policy positions in criminal cases. On one side, proponents of law enforcement want to allow the police as much discretion as possible in curtailing crime. On the other side, civil libertarians want to enforce the protections of citizens.

In the 1960's and '70's, when many major criminal law decisions were issued by the Supreme Court, there was a cry from law enforcement proponents that the courts had swung too far to the left. Whether this was a valid criticism or not, there can be no denying that those decisions clearly tried to resolve policy arguments from both sides.

"In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." *Miranda v. Arizona*, 384 U.S. 436, 481 (1966).

The *Miranda* Court went on to examine the FBI's longstanding policy of requiring that suspects be informed of their rights before questioning. The Court also looked at similar practices in other countries, that mandated some form of warning for many decades without problems.

Compare that to the policy analysis of *United States v. Dickerson*, 1999 WL 61200 (4th Cir. Feb. 8, 1999) (holding 18 U.S.C. §3501 overruled *Miranda*). There, the court never mentions the well documented police techniques of psychological coercion recognized in *Miranda*. Instead, the policy analysis is limited to reciting an old concurrence by Justice Scalia that *Miranda* **may** have produced "the acquittal and the nonprosecution of many dangerous felons." No proof was supplied.

In *United States v. Singleton*, 1999 WL 6469 (10th Cir. Jan. 8, 1999) (federal prosecutors may grant leniency for testimony), the *en banc* Tenth Circuit focused only on the effects of depriving prosecutors of their ability to used informant testimony. No effort was made to discuss the great incentives informants have to lie in support of the government's case.

These allegedly conservative decisions indicate that the social concerns of law enforcement proponents are going to be considered, but not those of civil libertarians.

Reversible Errors

United States v. Meyer, 157 F.3d 1067 (7th Cir. 1999) (Court should have instructed that mere buyer/seller relationship did not establish conspiracy).

United States v. Gamache, 156 F.3d 1 (1st Cir. 1999) (Evidence raised an instruction on entrapment).

United States v. Thomas, 155 F.3d 833 (7th Cir. 1999) (Intent to carry out threat could not be proven by criminal history).

United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1999) (1. Exclusion of deposition denied right to put on defense; 2. Officer could not bolster other officer; 3. Self-defense instruction should have been given).

United States v. Kliti, 156 F.3d 629 (6th Cir. 1999) (Defense counsel who witnessed exculpatory statement had conflict).

United States v. Herndon, 156 F.3d 629 (6th Cir. 1999) (Denial of hearing on potentially biased juror).

United States v. Smith, 156 F.3d 1046 (10th Cir. 1999) (Insufficient evidence of actual or threatened force or violence; 2. No loss shown to support restitution).

United States v. Haywood, 155 F.3d 674 (3rd Cir. 1999) (Defendant allegedly restored to competency required second hearing).

United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1999) (Conviction in federal

court and conviction by tribe of which Indian was not a member, was double jeopardy).

United States v. Havier, 155 F.3d 1090 (9th Cir. 1999) (Revocation petition did not give adequate notice of violation).

United States v. Brown, 156 F.3d 813 (8th Cir. 1999) (Court should have only based sentence on drug quantity proven by government).

United States v. Martinez-Martinez, 156 F.3d 936 (9th Cir. 1999) (Reduction for non-drug conspiracy was mandated when object crime was not substantially complete).

United States v. Silkman, 156 F.3d 833 (8th Cir. 1999) (Administrative tax assessment is not conclusive proof of tax deficiency).

United States v. Kingdom, 157 F.3d 133 (2nd Cir. 1999) (Revocation sentence should have been based only on most serious violation).

United States v. Neils, 156 F.3d 382 (2nd Cir. 1999) (Defendant who merely steered buyers was minor participant).

United States v. Klat, 156 F.3d 1258 (D.C. Cir. 1999) (Counsel required at competency hearing).

United States v. Moore, 159 F.3d 1154 (9th Cir. 1999) (Irreconcilable conflict between defendant and lawyer).

United States v. Stockheimer, 157 F.3d 1082 (2nd Cir. 1999) (Refusing to consider downward departure based on economic reality of intended loss was plain error).

United States v. Allen, 159 F.3d 832 (4th Cir. 1999) (Inevitable discovery doctrine did not apply to cocaine found in duffle bag later detected by dog and warrant).

United States v. Waters, 158 F.3d 933 (6th 1999) (Defendant has right to allocution at revocation hearing).

United States v. Benboe, 157 F.3d 1181 (9th Cir. 1999) (Firearm conviction not supported by evidence).

United States v. Sanders, 157 F.3d 302 (5th Cir. 1999) (Insufficient evidence that defendant carried firearm).

United States v. Moreno-Chaparro, 157 F.3d 298 (5th Cir. 1999) (No reasonable suspicion to believe defendant's car had crossed international border).

United States v. Rivas, 157 F.3d 364 (5th Cir. 1999) (1. Drilling into trailer was not routine border search; 2. No evidence that drug dog's reaction was an alert).

United States v. McRae, 156 F.3d 708 (6th Cir. 1999) (Insufficient findings of obstruction of justice).

United States v. Acosta-Colon, 157 F.3d 9 (1st Cir. 1999) (Defendant's 30 minute handcuffed detention, preventing him from boarding flight, was not lawful stop).

United States v. Quintero, 157 F.3d 1038 (6th Cir. 1999) (Federal sentence could not be imposed consecutively to not yet imposed state sentence).

United States v. Maddox, 156 F.3d 1280 (D.C. Cir. 1999) (Prosecutor's argument referred to matters not in evidence).

United States v. Morillo, 158 F.3d 18 (1st Cir. 1999) (Insufficient evidence of drug conspiracy).

United States v. Idowu, 157 F.3d 265 (3rd Cir. 1999) (Insufficient evidence that defendant knew purpose of drug conspiracy).

United States v. Salvano, 158 F.3d 1107 (10th Cir. 1999) (Neither, cross country trip, nervousness, nor scent of evergreen, justified warrantless detention).

United States v. McElyea, 158 F.3d 1016 (9th Cir. 1999) (Crimes of a single transaction may not be counted separately under Armed Career Criminal Act).

United States v. Casey, 158 F.3d 993 (8th Cir. 1999) (Court must use guideline of charged offense).

United States v. Thomas, 159 F.3d 296 (7th Cir. 1999) (Statutory rape without violence was not predicate crime under Armed Career Criminal Act).

United States v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1999) (1. Insufficient evidence of aiding and abetting; 2. Insufficient evidence of obstruction).

United States v. Adkinson, 158 F.3d 1147 (11th Cir. 1999) (Insufficient evidence of fraud).

United States v. Barnes, 159 F.3d 4 (1st Cir. 1999) (Open-ended continuance violated speedy trial).

United States v. Richardson, 161 F.3d 728 (D.C. Cir. 1999) (1. Improper remarks by prosecutor; 2. Burglary not shown to be crime of violence).

United States v. Rodrigues, 159 F.3d 607 (D.C. Cir. 1999) (1. Improper closing by prosecutor; 2. Insufficient evidence of fraud and theft).

United States v. Lampkin, 159 F.3d 607 (D.C.

Cir. 1999) (1. Jury improperly instructed that government could not prosecute juvenile witnesses; 2. Jury allowed to consider tapes not in evidence).

United States v. Juvenile LWO, 160 F.3d 1179 (8th Cir. 1999) (Judge may not consider unadjudicated incidents at juvenile transfer hearing in assessing nature of charges or prior record).

United States v. Jones, 159 F.3d 969 (6th Cir. 1999) (Irrelevant false testimony did not support obstruction of justice).

United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1999) (Failure to appear on unrelated offense was not obstruction).

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Partlow, 159 F.3d 1218 (9th Cir. 1999) (Specific offense characteristics must be applied in the order listed).

United States v. Lawrence, 161 F.3d 250 (4th Cir. 1999) (Must specify findings to depart up for under-representation of criminal history).

United States v. Walker, 160 F.3d 1078 (6th Cir. 1999) (Insufficient evidence of organizer role).

United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1999) (Insufficient evidence of aiding and abetting murder or retaliation).

United States v. Beard, 161 F.3d 1190 (9th Cir. 1999) (It was error to substitute alternates for jurors after deliberations began).

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1999) (Offenses outside United States were not relevant conduct).

United States v. Hanson, 161 F.3d 896 (5th Cir. 1999) (Factual questions about bank fraud should have been decided by jury).

United States v. Mount, 161 F.3d 675 (11th Cir. 1999) (Weapon found in stairwell was not carried).

United States v. Mortimer, 161 F.3d 240 (3rd Cir. 1999) (Trial judge was absent during defense closing).

Jones v. United States, 161 F.3d 397 (6th Cir. 1999) (Control of drugs did not justify managerial role).

United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1999) (Calculation of benefits from bribes did not support findings).

United States v. Weaver, 161 F.3d 528 (8th Cir. 1999) (Typo on PSR recommending wrong base level was plain error).

United States v. Castaneda, 162 F.3d 832 (5th Cir. 1999) (Failed to prove defendant violated transactional immunity agreement).

United States v. Polasek, 162 F.3d 878 (5th Cir. 1999) (Convictions of defendant's associates should not have been admitted).

United States v. Montez-Gavira, 163 F.3d 697 (2nd Cir. 1999) (Deportation did not moot appeal).

United States v. Tyler, 164 F.3d 150 (3rd Cir. 1999) (Police did not honor defendant's invocation of silence).

United States v. Whiteskunk, 162 F.3d 1244 (10th Cir. 1999) (Upward departure must include some method of analogy, extrapolation, or reference to the guidelines).

United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1999) (Passenger was not linked to contraband in vehicle).

United States v. Ponec, 163 F.3d 486 (8th Cir. 1999) (No showing that money withdrawn from defendant's account came from employer).

United States v. Graham, 162 F.3d 1180 (D.C. Cir. 1999) (Conclusionary statement that defendant was lieutenant did not justify role adjustment).

United States v. Strager, 162 F.3d 921 (6th Cir. 1999) (Disrespectful call to probation officer did not justify revocation).

United States v. Flowal, 162 F.3d 956 (6th Cir. 1999) (Drug quantity was arbitrarily chosen).

United States v. Fagan, 162 F.3d 1280 (10th Cir. 1999) (Court can depart downward for exceptional remorse).

United States v. McFerron, 163 F.3d 952 (6th Cir. 1999) (Defendant did not have burden of persuasion on neutral explanation for peremptory strike).

United States v. Spence, 163 F.3d 1280 (11th Cir. 1999) (Juror dismissed during deliberations without just cause).

United States v.

McClellan, 164 F.3d 308 (6th Cir. 1999) (Court must explain why it is departing above revocation guidelines).

United States v. Allard, 164 F.3d 1146 (8th Cir. 1999) (Offense characteristic for one offense could not be used for another).

United States v. Dunigan, 163 F.3d 979 (6th Cir. 1999) (Court did not adequately consider defendant's ability to pay restitution).

United States v. Robinson, 164 F.3d 1068 (7th Cir. 1999) (Hearsay statements used at sentencing were unreliable).

United States v. Gomez, 164 F.3d 1354 (11th Cir. 1999) (Unrelated drug sales were not relevant conduct to conspiracy).

United States v. Sanders, 162 F.3d 396 (6th Cir. 1999) (Possibility that defendant could have been charged with state burglary did not mean firearm was used in connection with another offense).

United States v. Alvarez-Tautimez, 160 F.3d 573 (9th Cir. 1999) (Counsel ineffective for failing to withdraw plea after co-defendant's suppression motion granted).

United States v. Jones, 160 F.3d 473 (8th Cir. 1999) (Government actions prejudicing defendant can justify downward departure).

United States v. Avilez-Reyes, 160 F.3d 258 (5th Cir. 1999) (Judge should have recused himself in case where attorney testified against judge in disciplinary hearing).

United States v. Chamberlain, 163 F.3d 499 (8th Cir. 1999) (Inmate under investigation was entitled to *Miranda* warnings).

United States v. Ivy, 165 F.3d 397 (6th Cir. 1999) (Consent to enter home was not shown to be voluntary).

United States v. Serino, 163 F.3d 91 (1st Cir. 1999) (Defendant gave valid neutral reason for striking juror).

United States v. Dekle, 165 F.3d 826 (11th Cir. 1999) (Insufficient evidence that doctor conspired to illegally distribute drugs).

United States v. Rettelle, 165 F.3d 489 (6th Cir. 1999) (Mandatory minimum controlled by drugs associated with conviction only).

Editor: Alexander Bunin
Executive Director
Southern District of Alabama
Federal Defenders Organization
2 South Water Street, 2nd Floor
Mobile, AL 36602
(334) 433-0910
(334) 433-0686 FAX
pubdef@mobileinterlink.net