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DEFENSE NEWSLETTER

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Kathleen M. Williams, Federal Public Defender

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FPD/CJA LITIGATION SEMINAR

The Federal Public Defender announces the Eleventh Annual FPD/CJA Litigation Seminar, for the Southern District of Florida Criminal Justice Act Panel.

Date: June 19-21, 2008

Place: Naples Grande Resort & Club, 475 Seagate Drive, Naples, Florida

CLE: 16 hours credit

Don't be late! The seminar commences on Thursday afternoon, June 19th at 1:00 p.m. and concludes at noon on Saturday, June 21, 2008. The seminar will address a variety of federal criminal defense issues. *Please telephone Joan Grady at 305-536-6900, ext. 223, to confirm your attendance and to reserve course materials and seating.* Naples Grand Resort is offering our group a rate of \$119.00 (they waived a resort fee) per night. Please call the reservation number 1-800-247-9810 and identify yourself as being with the Federal Public Defender group. Make reservations early; rooms are limited. We look forward to seeing you!

SUPREME COURT UPDATE

BEGAY v. U.S., No. 06-11543 (Apr. 16, 2008)

● **Sentencing: Felony Conviction for Driving Under the Influence is Not a Violent Felony.** The Supreme Court held that a felony conviction for driving under the influence of alcohol (DUI) falls outside the scope of the “violent felony” definition, for purposes of imposing a mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior “violent felony” convictions. The Court concluded that DUI is too unlike the four examples

Congress listed in the “violent felony” definition, namely “burglary, arson, or extortion, or [an offense that] involves use of explosives,” to indicate that Congress intended that provision to cover DUI. “[T]he statute covers only similar crimes, rather than every crime that presents a serious potential risk of physical injury to another.” (Emphasis in original). The Court found that DUI differs from the four example crimes, in that it does not involve the violence and aggressive conduct typical of them. The Court noted that a contrary definition would take in crimes “far removed . . . from the deliberate kind of behavior associated with the violent

criminal use of firearms.”

BURGESS v. U.S., No. 06-11429 (Apr. 16, 2008)

● **Sentencing: State Drug Conviction Punishable by More Than One Year of Imprisonment Qualifies as a Felony Drug Offense Regardless of Whether the State Classifies it as a Felony or Misdemeanor.** The Supreme Court held that a state conviction for an offense punishable by more than one year qualifies as a “felony drug offense” for federal recidivist sentence enhancement purposes, even if the state classifies the offense as a misdemeanor. The Court concluded that the term “felony drug offense,” as used in the Controlled Substances Act, meant an offense punishable by imprisonment for more than one year, whether a felony or a misdemeanor. The Court declined to apply the rule of lenity, finding no ambiguity for the rule of lenity to resolve.

VIRGINIA v. MOORE, No. 06-1082 (Apr. 23, 2008)

● **Fourth Amendment: Search of Vehicle Incident to Arrest and Supported by Probable Cause is Constitutional Even if Arrest Was Illegal Under State Law.** The Supreme Court held that police did not violate the Fourth Amendment when, after arresting Moore for the misdemeanor of driving with a suspended license, they then searched him. Thus, crack cocaine found in the search did not need to be suppressed. The Court recognized, under a Virginia statute, driving on a suspended licence was not an “arrestable offense” in Moore’s circumstances. Hence, the arrest and search violated Virginia law. But this

state law violation did not constitute a constitutional violation. The Court noted that the police had “probable cause” to search Moore incident to his arrest. Thus, this aspect of Fourth Amendment law was satisfied. The Court further noted that, historically, state statutes had not defined the limits of Fourth Amendment protection. The Court also noted that incorporating state-law arrest limitations into the Fourth Amendment would produce an unpredictable regime that varied state to state.

Recent Grants of Certiorari

Chambers v. U.S., No. 06-11206 (U.S. Apr. 21, 2008)

Issue: Whether a failure to report to prison is the equivalent of escape for purposes of enhanced sentencing under the Armed Career Criminal Act.

DEFENSE HIGHLIGHTS

This month’s Eleventh Circuit highlights include: reversal of a sentence in an arson conviction for failure to make proper findings of fact (Mock); reversal of a sentence for lack of evidence to support a death enhancement (Westry); and reversal of sentence for supervised release violation (Velasquez).

ELEVENTH CIRCUIT CASE SUMMARIES

U.S. v. ELLISOR, No. 05-14459 (Apr. 7, 2008)

● **Evidence: Evidence of Prior Similar Fraud and Evidence of Theft Intertwined With Current Fraud**

Properly Admitted. Evidence of Prior Non-fraudulent Acts Properly Excluded. Evidence Sufficient to Prove Fraud. Sentencing: Loss Amount Properly Determined. Enhancement for Perjurious Trial Testimony Proper. Upward Variance Proper. The Court affirmed the mail fraud convictions and 87-month sentence of a defendant convicted of defrauding schools and children's parents of money paid for tickets for a non-existent "Christmas Around the World Show." The Court rejected Ellisor's claim that the district court violated Fed. R. Evid. 404(b) when it admitted evidence of two prior incidents, a fraudulent "Washington D.C. on Tour" show, and his non-payment of his \$ 1,657 charges at Coconut Grove's Doubletree Hotel. The first incident showed Ellisor's "intent to defraud by promoting an illusory show," while the evidence of the unpaid hotel bill was intertwined with the proof of the government's fraud case, occurring as it did in the weeks leading up to the dates advertised for the show. The Court also affirmed the exclusion of evidence of Ellisor's prior authentic shows, noting that evidence of good conduct is not admissible to negate criminal intent. The Court rejected a challenge to the sufficiency of the evidence, finding "ample" evidence from which the jury could have convicted. "'Christmas From Around the World' was billed as featuring 28 foreign ambassadors, Harry Potter characters, lavish Christmas decorations, raffle prizes, and even live reindeer. When the children showed up . . . the convention center was locked and bare." Turning to the sentence, the Court

rejected Ellisor's argument that the loss amount was less than \$30,000, that schools, not parents and children, should only be counted as victims, and that he had misrepresented that the University of Miami was a sponsor. The Court also affirmed the obstruction of justice enhancement based on Ellisor's perjurious testimony at trial. Finally, the Court affirmed the upward variance based on the "reprehensible" offense and prior similar misconduct.

U.S. v. MOCK, No. 06-15861 (Apr. 14, 2008)

● **Sentencing: Death Enhancement in Arson Conviction Improper Where Court Failed to Make Specific Findings.** The Court affirmed a defendant's arson convictions, but reversed the sentence because the district court did not make explicit findings of fact to support its attempted murder enhancement. The Court rejected a challenge to remarks in the prosecutor's closing argument, noting that while "colorful," they did not jeopardize the fairness of the trial. The Court also rejected a variety of challenges to the trial court's evidentiary rulings. Turning to the sentence, the Court noted that U.S.S.G. § 2A2.1 provides for a sentence enhancement for arson offenses if the offender "attempted to cause death" by first-degree murder. The trial court imposed this enhancement without making explicit findings. The Court noted that findings are necessary to facilitate judicial review. The Court therefore vacated the sentence and remanded for resentencing.

U.S. v. HARRELL, No. 06-15410 (Apr. 17, 2006)

● **Sentencing: Enhancement for Obstruction of Justice Must be Cross-referenced With the Underlying Crime Being For Which Prosecution Would Have Been Obstructed.** On a government appeal, the Court held that the sentencing court erred in declining to impose the Guidelines cross-reference enhancement for obstruction of justice, U.S.S.G. § 2J1.2, with regard to obstruction that occurred “in respect to” other underlying crimes. The defendant was convicted of obstruction of justice for attempting to convince a witness to support his version of a conversation he had with another person, which itself also involved witness tampering. At sentencing, the government claimed the obstruction of justice sentence should be enhanced, under the guideline cross-reference, based on the seriousness of the underlying crimes for which Harrell was being prosecuted when he obstructed justice. The Court agreed that the Guideline enhancement should apply with respect to the underlying crimes for which the prosecution would have been obstructed had the tampering been successful, for example, if a prosecution’s witness’ credibility was successfully undermined. However, the enhancement would not apply to charges that were severed from the trial at which Harrell’s obstruction conduct was at issue. “For the obstruction of justice [enhancement] to be cross-referenced, the obstruction of justice must have had the potential to disrupt the government’s investigation or prosecution of [the] crimes.”

U.S. v. WESTRY, No. 06-13847 (Apr. 16, 2008)

● **Evidence Sufficient to Prove Drug Distribution Conspiracy Even if Suppliers Vied for Same Customers. Hearsay Statement From Overdose Victim Properly Admitted. Jury Instructions: No Error in Failing to Instruct on Withdrawal from Conspiracy. Pinkerton Instruction Properly Given. Sentencing: Death Enhancement Proper Except as to One Defendant. Firearm Enhancement Proper Under Pinkerton Theory.** The Court affirmed convictions and vacated in part sentences for a number defendants convicted of drug trafficking morphine, methadone, oxycontin and other drugs. The Court rejected a challenge to the sufficiency of the evidence of conspiracy. The Court rejected the claim that because the defendants were at time in competition with each other for drug suppliers or customers, they were not part of a conspiracy. The Court pointed to evidence of “interrelatedness” of the defendant’s conduct. The Court further noted that “the existence of healthy competition” did not negate supplying consumers’ demand. As to one defendant, the Court rejected a “mere presence” claim, pointing out that he accepted a cash payment from an undercover officer to pay for his drug trafficking-related travel. The Court also rejected the claim that a hearsay statement from a cocaine addict (and eventual victim of overdose) regarding the source of his cocaine. The Court recognized that the statement was made to a friend. However, it still could be treated as a “statement against penal interest” because of the

chance, “albeit slight,” that the declarant’s admission that he was waiting for cocaine would subject him to severe penalties. The Court found no error in the refusal to give jury instructions regarding the defense of withdrawal from a conspiracy. The only evidence of withdrawal was a statement that one defendant “wasn’t involved” anymore. Because withdrawal requires “affirmative action to disavow or defeat the purpose of the conspiracy,” there was insufficient evidence to support a withdrawal instruction. The Court also rejected a challenge to the Pinkerton jury instructions. The defendants had sought instructions that specified that the amount of drugs at issue, and the death of drug user, were reasonably foreseeable. The Court upheld instructions which more generally instructed the jury that a co-conspirator is responsible for others’ crimes that were “a reasonably foreseeable consequence of the conspiracy.” Turning to sentencing, the Court found no error in the application of the “death enhancement” based on the death of an addict from an overdose from an injection of methadone sold by the defendants. “Where a conspirator is involved in distributing drugs to addicts, some of which are even administered intravenously, it is a reasonably foreseeable consequence that one or more of those addicts may overdose and die.” As to one defendant, however, the Court agreed that the evidence was too “meager” to support a death enhancement, as it only showed his “presence and association” with a member of the conspiracy prior to the death of the addict. A defendant cannot be held accountable for a death that occurred prior to his entry into conspiracy. The Court, however,

affirmed the imposition of a firearm enhancement. The Court held that a firearm’s possession is a reasonably foreseeable consequence of a “long-standing operation of a drug house.” In any event, any error in applying the enhancement was harmless, in light of the life sentences imposed on other bases.

U.S. v. VELASQUEZ, No. 06-16637 (Apr. 21, 2008)

● **Supervised Release: Sentence Improperly Based on Unfounded Assumptions of Immigration Status and Judge’s Personal View of Immigration Policy.** The Court vacated a nine-month sentence imposed on a defendant for violation of supervised release. The defendant pled guilty and was sentenced to time served and two years supervised release for use of a counterfeit visa for entry into the United States, in violation of 18 U.S.C. § 1546(a). While on supervised release, the defendant was arrested for driving with a suspended license. Though recognizing the “de minimus” nature of this supervised release violation, the district court imposed the high-end guideline range sentence of nine months, because of its concern that a person in the United States illegally should not be allowed to “roam free.” The district court also questioned the wisdom of immigration authorities in letting an illegal alien out of custody, on bond, while his immigration asylum application was pending. The Court vacated the sentence, pointing out that Congress vested authority to detain removable aliens in the United States, not in the courts. “[A] judge may not impose a more severe sentence than he would have otherwise based on unfounded

assumptions regarding an individual's immigration status or on his personal view of immigration policy."

U.S. v. LIVESAY, No. 06-11303 (Apr. 23, 2008)

● **Sentencing: Sentence of Probation Was Procedurally Unreasonable Where Sentencing Court Departed Downward Under §5K1.1, but Based Its Departure on More Than Just Substantial Assistance.** The Court reversed the sentence of 60 months' probation imposed on a former controller at HealthSouth corporation, for his role in this company's \$1.4 billion fraud. The sentence reflected a downward 5K1.1 departure, based on the defendant's substantial assistance to authorities, from the Guideline range of 78-97 months. The Court noted that the sentencing court relied on the fact that Livesay "repudiated the conspiracy at an early time." The Court pointed out, however, that repudiation from a conspiracy is not related to substantial assistance. Hence, the sentencing court committed procedural error. The sentencing court also committed procedural error in failing to give any explanation of its reasons for imposing a sentence of 60 months' probation; the sentencing court failed to give any reasoning or indication of what facts justified its significant variance from the advisory Guidelines range. It also failed to discuss how its sentence would satisfy the § 3553(a) factors. This failure precluded meaningful appellate review. The district court listed the sentences received by others in the HealthSouth fraud, but did not indicate how Livesay's culpability compared to theirs.

U.S. v. MOORE, No. 07-10326 (Apr. 22, 2008)

● **Evidence Sufficient to Prove Sex for Jail Contraband Conspiracy. No Variance and No Amendment of Indictment. Jury Instruction: Not Plain Error to Instruct That Sex is a Thing of Value.** The Court affirmed the convictions of two correctional officers convicted of "bribery." The Court rejected a challenge to the sufficiency of the conspiracy evidence, noting that while the government witness gave conflicting testimony, the jury was free to credit the testimony that the correctional officers agreed to participate in a "sex for contraband conspiracy." The Court rejected the defendants' argument that the mere acts of switching guard duty to avoid detection, allowing inmate use of the telephone, and allowing inmates to leave their unit at night, were not "official acts" for purposes of the illegal gratuity statute. The Court pointed out that an "official act" need not involve a violation of a statute, but could involve the mere violation of an established practice. Under this broader definition, the defendants' acts were "official acts." The Court also rejected the argument that there were multiple conspiracies, not a single "sex for contraband" conspiracy. The Court found no "material variance" from the indictment, noting that the defendants acts all had a "common goal," an "underlying scheme," and "overlapping arrangements." Further, a multiple conspiracy jury instruction was not required, because the evidence showed a common scheme. The Court rejected the argument that the Court constructively amended the indictment when it specifically instructed the jury that

it is a violation of an officer's duty to provide contraband to an inmate. The Court noted that this language was largely based on the indictment and did not expand the grounds for conviction. The Court also found no "plain error" in the jury instruction that sex is a "thing of value."

Updated Case Citations

Devine v. U.S., 520 F.3d 1286 (11th Cir. Mar. 20, 2008)

Downs v. McNeil, 520 F.3d 1311 (11th Cir. Mar. 24, 2008)

Gordon v. U.S., 518 F.3d 1291 (11th Cir. Mar. 7, 2008)

Lawhorn v. Allen, 519 F.3d 1272 (11th Cir. Mar. 11, 2008)

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Michel v. U.S., 519 F.3d 1267 (11th Cir. Mar. 11, 2008)

U.S. v. Aviles, 518 F.3d 1228 (11th Cir. Mar. 4, 2008)

U.S. v. Burgest, 519 F.3d 1307 (11th Cir. Mar. 13, 2008)

U.S. v. Deverso, 518 F.3d 1250 (11th Cir. Mar. 5, 2008)

U.S. v. Futch, 518 F.3d 887 (11th Cir. Mar. 3, 2008)

U.S. v. Maupin, 520 F.3d 1304 (11th Cir. Mar. 24, 2008)

U.S. v. Stratton, 519 F.3d 1305 (11th Cir. Mar. 13, 2008)

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