

# THE DEFENDER

A Newsletter for CJA Panel Attorneys

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## Continuing Legal Education

On October 7, 2004, we presented our annual Albany CJA seminar. About 65 lawyers attended and received 6.0 hours of CLE, breakfast, lunch and other refreshments, as well as books and hand-outs. The event was free and co-sponsored by the Northern New York Federal Bar Association and the New York State Defenders Association. It was funded by the District Court.

Especially well received was a two-hour panel discussion with Chief Judge Frederick J. Scullin, Jr., District Judge Gary Sharpe, Magistrate Judge David Homer, AUSA Grant Jaquith and USPO Craig Penet. The panel and the audience exchanged candid opinions.

Lectures were presented by AFPDs Barbara O'Connor, Robert McDowell, David Secular and Jim Greenwald. A seminar with the same format, but different speakers, was held in Syracuse in April. The Albany (October) and Syracuse (April) schedule will continue in 2005.

The last Vermont seminar was held in January in Burlington. In 2005, we hope to

move that seminar to a warmer month, such as May. There are also plans to try to include judges and other agencies in the presentations.

## Attacking Prior Convictions in Deportation Cases

By AFPD Kent Sprotbery

Our office represents many defendants who face charges of illegal reentry after deportation. 8 USC § 1326. Many of those defendants were convicted of what the law defines as an "aggravated felony." These cases frequently contain compelling life stories and are frustrating for attorneys.

In these cases, we confront the single largest offense level increase in the federal guidelines (16 levels) (see U.S.S.G. § 2L 1.2) The increase is a double-whammy because it involves a prior conviction, also increasing their Criminal History Categories. Our clients complain, "Double Jeopardy", "I already did my time" or "That just ain't fair." We sympathize, but explain that the law is unfair.

Recently, in United States v. Sosa, 2004 WL 2361661 (2d Cir. Oct. 21, 2004), the circuit vacated a conviction for a violation of 8 USC § 1326. The basis for reversal was the invalidity of the underlying order of deportation.

The foundation for Sosa's relief was established by the U.S. Supreme Court in INS v. St. Cyr, 533 U.S. 289 (2001). It has been previously applied by the Second Circuit. United States v. Copeland, 376 F.3d 61 (2d Cir. 2004).

The analysis begins with the date of the prior conviction. If the prior conviction is pre-1996 then the INS judge must explain to the defendant the availability of relief under Section 212(c) of the Immigration and Nationality Act (INA).

Section 212 (c) provided that the Attorney General had "broad discretion to cancel deportation orders for aliens who met certain residency requirements and had not served five years in prison for an aggravated felony." This meant a large number of individuals convicted of aggravated felonies had potential relief from deportation. Unfortunately, in 1996, section 212 (c) was repealed by the Immigration Immigrant Reform and Immigrant Responsibility Act (IIRIRA).

The Court, in Sosa, held that the immigration judge must advise an individual of this possibility of relief under 212 (c). The failure of the immigration judge in Sosa to advise Mr. Sosa of his rights pursuant to 212(c) resulted in his conviction being vacated.

I prepared a checklist to aid in

determining if relief is available for your client.

1. Is the prior conviction from 1995 or earlier?
2. Is the prior conviction an aggravated felony? (See 8 USC § 1101 for a list of aggravated felonies.) If it is NO, skip to 4 , If YES, go on.
3. Is the sentence for the prior conviction, less than 5 years?
4. Did the INS judge advise your client of his rights pursuant to 21(c)?

You should request the "A File" of the previous immigration proceedings from the AUSA. Read the transcript of the deportation/removal hearing. If your client meets the above criteria, challenge the basis for deportation.

You can collaterally attack the validity of the prior deportation. The trial court can then dismiss the criminal charge if it is based upon an invalid deportation/removal order. Good luck.

## Errores Juris

United States v. Casas, 354 F.3d 104 (1st Cir. 2004) (Drug conviction based upon inadmissible hearsay).

Holloway v. Horn, 355 F.3d 233 (3rd Cir. 2004) (Prosecutor struck eleven of twelve potential African-American jurors).

United States v. Himler, 355 F.3d 735 (3rd Cir. 2004) (Court departed upward without notice).

United States v. Wallace, 355 F.3d 1095 (7th Cir. 2004) (Statement was not an “administrative order” for purposes of fraud adjustment).

Wilson v. Czerniak, 355 F.3d 1151 (9th Cir. 2004) (Defendant could not be tried for aggravated murder after acquittal of simple murder).

United States v. Deemer, 354 F.3d 1130 (9th Cir. 2004) (No emergency exception to warrant requirement when search was not related to 911 call).

United States v. Erskine, 355 F.3d 1161 (9th Cir. 2004) (Defendant did not knowingly and voluntarily waive counsel).

United States v. Gonczy, 357 F.3d 50 (1st Cir. 2004) (Government violated plea agreement by urging higher sentence).

United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004) (Testimony via closed circuit television violated confrontation).

United States v. Cole, 357 F.3d 780 (8th Cir. 2004) (Empty threat did not endanger public safety).

United States v. Plotts, 359 F.3d 247 (3rd Cir. 2004) (Right of allocution exists at revocation hearing).

United States v. Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004) (California misdemeanor molestation statute was not aggravated felony).

Banks v. Dretke, 540 U.S. 668 (2004) (Defendant was denied exculpatory

evidence).

United States v. Pressley, 359 F.3d 347 (4th Cir. 2004) (Previous conviction under ACCA must occur before instant offense).

United States v. Alvarez, 358 F.3d 1194 (9th Cir. 2004) (Defendant entitled to impeaching evidence if material).

United States v. Rice, 358 F.3d 1268 (10th Cir. 2004) (Uncharged conduct cannot be used to both enhance base offense level and depart for inadequacy of criminal history).

United States v. Leung, 360 F.3d 62 (2d Cir. 2004) (Obstruction and passport fraud counts should have been grouped).

United States v. Cartwright, 359 F.3d 281 (3rd Cir. 2004) (Insufficient evidence that defendant participated in drug transaction).

United States v. Hayward, 359 F.3d 631 (3rd Cir. 2004) (Record supported abusive sexual contact rather than criminal sexual abuse).

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004) (Benefit for bribe was the net received, not the gross value of contracts).

Crawford v. Washington, 124 S.Ct. 1354 (2004) (Admission of testimonial statement, that was not subject to cross-examination, violates confrontation).

United States v. Adams, 363 F.3d 363 (5th Cir. 2004) (Restitution limited to

the harm caused by fraud).

United States v. Poor Bear, 359 F.3d 1038 (8th Cir. 2004) (Absent a sexual act, guideline for criminal sexual abuse was inapplicable).

United States v. Dixon, 360 F.3d 845 (8th Cir. 2004) (No criminal history points for invalidated convictions).

Robinson v. Ignacio, 360 F.3d 1044 (9th Cir. 2004) (Right to counsel at sentencing even after previous waiver).

United States v. Carter, 360 F.3d 1235 (10th Cir. 2004) (Protective sweep of garage was not justified).

United States v. Romero, 360 F.3d 1248 (10th Cir. 2004) (Court abused discretion by denying government's motion to dismiss charges).

United States v. Reevey, 364 F.3d 151 (4th Cir. 2004) (Adjustment for threat of death, along with 924 (c) conviction, was double counting).

Reagan v. Norris, 365 F.3d 616 (8th Cir. 2004) (Ineffective assistance of counsel for failing to object to charge omitting essential element).

Caliendo v. Warden of California Men's Colony, 365 F.3d 691 (9th Cir. 2004) (Prejudice was presumed from detective's 20-minute conversation with jurors).

United States v. Ubaldo-Figueroa, 364 F.3d 1042 (9th Cir. 2004) (Defendant denied due process when previous removal proceeding was not translated into Spanish).

United States v. Bennett, 363 F.3d 947 (9th Cir. 2004) (Officer's testimony about global positioning device violated best evidence rule).

United States v. Stephens, 365 F.3d 967 (11th Cir. 2004) (Defendant was prevented from calling witnesses that undermined government's case).

United States v. Vega, 365 F.3d 988 (11th Cir. 2004) (Guidelines could not punish legally possessed firearms).

United States v. Carucci, 364 F.3d 339 (1st Cir. 2004) (No connection shown between alleged unlawful activity and financial transactions).

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