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TO THE POINT

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The cannibal, the jury, and the judge.

By David Zapp, Esq.

Years ago I wrote an article entitled "The Right To A Jury Trial, A Right I Can Do Without." I said then that juries were not what they were cracked up to be. They were not the bastion of freedom standing between you and the state. In fact, sometimes a judge is far better able to give you a fair trial. Jurors are people with biases that you can't find out about until it's too late. With judges, at least you'll know all their biases and more.

With a judge you can know everything from his rulings to what he had for breakfast. You can get this information from all the lawyers and prosecutors who have ever appeared before him and the law clerks who have worked with him. And since judges are lawyers, they are trained to focus on the issue not the prejudice.

The case of the "cannibal cop" is a case in point. The case was about a defendant accused of fantasizing about eating women—literally eating women as a meal. The defendant never acted upon the fantasy, and except for chatting with a few other kooks who shared his kink, he was all talk. The jurors convicted. The judge had to step in, something judges are loathe to do, i.e., disturb a finding of a jury, and set aside the verdict, holding it's not a crime to fantasize.

Moral of the story: if you get the right judge and you have a triable case, and I do mean triable--don't go thinking that a judge is going to always find for you—you mght give serious tohiught to going to trial before a judge and not a jury. I can think of several judges in the Southern District and Eastern District of New York who would definitely give you a fair trial. In fact every courthouse in America has judges before whom you could get a fair trial. I just remind you again that you are going not to get more than a fair trial. You can do fine before juries but as most criminal lawyers and defendants know it is a lot easier to hang a jury than to have them vote in your favor and that is what they are betting on. A hung jury is all you need to escape a conviction or get a favorable plea bargain. It is a disruptive strategy that favors the defendant. A prosecutor never wants a hung jury. But if you have a losing case by all means go with a jury.

The fly in the ointment in Federal court, at least, is that a prosecutor does not have to consent to a non-jury trial. That's because while you have a "*right"* to a jury trial, you do not have a "*right"* to a non-jury trial. But even if the prosecutor doesn't consent to a non-jury, let the judge know you were willing to go before him to get justice. Can't hurt, but ultimately, remember, you're never better than your evidence.

Legal News Round Up

Reconsideration of Sentence-Rule 35

18 USC 3553(A) sets forth the factors to be considered when sentencing a defendant, <u>not</u> resentencing him. The law does not provide for resentencing except in cases where, 1), there is a clear procedural error in the sentencing or, 2), the defendant has given subsequent substantial assistance. FRCP Rule 35. Anybody who gets a reduction gets it because he cooperated. Ask around and if somebody says it was because the judge went back and re-considered the 3553 factors that person is just lying to cover up his cooperation.

The Two Point Reduction Amendment

United states vs. King, 2013 WL 4008629, N.D.III.2013, found an ex post facto violation and cut out one part of the amendment to 1B1.10 that limited the extent of the reduction to the low end of the guideline range. The judge held that the ex post facto clause [changing laws after defendants have been arrested when different laws existed. In this case the judge said the application of a rule that eliminates or limits the potential for freedom that had previously been available before the amendment is prohibited by the United States Constitution.

So as far as this court is concerned, if a judge wants to reduce your sentence pursuant to 1B1.10 (2-point amendment), it can.

The holding in this case has been rejected elsewhere. See US v. Diggs, 768 F.3d 643 (**7th Cir. 2014)**; US v. Anderson, 2013 WL 5924430 (DKy 2013).

One Judge's Way of Dealing with the 2-Point Amendment

Judge John Gleeson of the Eastern District of New York recently issued the following order:

"ORDER TO SHOW CAUSE as to [defendant]: The Court has received a list of individuals who might be eligible for a sentence reduction pursuant to 18 U.S.C. § 3582(c). The defendant in the above-captioned case is one of the individuals on the list. The attached Order directs the parties to show cause and appoints the Federal Defenders of New York to represent [defendant] in connection with this application. Oral argument will be held on Thursday,

January 8, 2015, at 4:00 p.m., in Courtroom 6C. Ordered by Judge John Gleeson on 11/7/2014."

New Attorney General from Eastern District of New York

President Barack Obama has nominated New York federal prosecutor Loretta Lynch to be the nation's next attorney general. He made the announcement at the White House Saturday morning, calling Lynch a fierce fighter for equality under the law.

"Loretta doesn't look to make headlines; she looks to make a difference. She is not about splash; she is about substance," Obama said. Lynch has been the U.S. attorney for the Eastern District of New York since 2010, covering Brooklyn, Queens and Staten Island. Born in North Carolina and educated at Harvard, Lynch is currently the United States Attorney for the Eastern District of New York.

Recent Cases

Cost of Incarceration is Not Permissible Factor in Deciding Whether to Impose Imprisonment

UNITED STATES V. PARK, NO. 13-4142-CR (2D CIR. JULY 9, 2014)

Convicted of filing a false corporate tax return, Park was sentenced to three years' probation, including six months' home detention. The district court (Judge Block) explained that it was imposing this sentence -- below the 15-to-21 month Guidelines range of imprisonment -- solely because of the "government shut-down" in place at the time of sentencing. The court said that it was **not imposing imprisonment "only because of the economic plight** that we are facing today."

The Appeals Court struck down the sentence saying that the lower court should not have considered the cost of incarceration at all.

"You hold it too long, you 'seized' it"

Circuit Issues Important New Fourth Amendment Decision:

UNITED STATES V. GANIAS, NO. 12-240-CR (2D CIR. JUNE 17, 2014)

The Court of Appeals held that the government violates the Fourth Amendment when it indefinitely retains computer files that were seized pursuant to a search warrant and not returned within a reasonable time.

Agents, pursuant to a warrant, copied all files from a computer with intent to only "seize" the files that the search warrant allowed to be seized. The government was required to turn over the other files within a reasonable time after it had searched through the files for the relevant ones. It did not.

Later, the agents came to think that the defendants may have been involved in tax offenses, too. So they thought they should look at some of those irrelevant files that had been hanging around the office and had never been returned within a reasonable time. They obtained a second search warrant to look for tax related matters.

The Second Circuit held that **retaining those files** which yielded the useful evidence **for an unreasonable time** and that were not responsive to the first warrant was an unreasonable seizure in violation of the Fourth Amendment. Therefore the Court suppressed the "fruits" of the second warrant because that search should never have occurred.

Hey, this guy's stoned!

UNITED STATES V. TAYLOR, NO. 11-2201-CR(L) (2D CIR. MAY 23, 2014)

In December 2013, a panel of the Court of Appeals issued an opinion, vacating three defendants' convictions relating to a conspiracy to rob a pharmacy in Manhattan. The panel ruled that the post-arrest statements of one of the defendants were **not voluntary because he was "largely stupefied"** when he made them and because his interrogators took undue advantage of his condition. Because the error was not harmless as to him or as to the other defendants, the Court vacated the convictions of all three defendants. The Court found it unnecessary to decide whether the admission into evidence of Taylor's statements against his co-defendants violated *Bruton v. United States*, 391 U.S. 123 (1968). [The case of *Bruton* barred using a confession of one defendant against another without putting the confessing defendant on the stand to preserve the non confessing defendant's right to confront his accuser]

In March 2014, the panel granted the government's petition for a panel rehearing, withdrew its original opinion, and issued a revised opinion. The new decision once again vacated all three defendants' convictions, and again found Taylor's post-arrest statements involuntary. But this time the panel reached the *Bruton* issue and resolved it in favor of the co-defendants.

Be careful of what you wish for!

- David Zapp, Esq.

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