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1 message

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The Rocky Mountain Advocate: a weekly newsletter

From the Colorado and Wyoming Federal Public Defender's Office
April 8, 2022

While a majority of our week is spent turning down lucrative endorsement deals and fending off autograph seekers, we at the Rocky Mountain Advocate always find the time to compile our compendium of relevant legal happenings. In this week's newsletter you will find an outstanding trial victory, a Tenth Circuit remand based on insufficient evidence, and a resource for challenging the constitutionality of a geofence warrant. Enjoy, and, no, we won't make a celebrity appearance at your cousin's wedding.

Spotlight

Loss in Credit Card Fraud Cases. Last Friday, the Ninth Circuit issued a decision invalidating a pernicious bit of Sentencing Guidelines commentary. Under U.S.S.G. § 2B1.1, a fraud defendant's guidelines range is largely determined by the amount of loss associated with the offense. The commentary to the guideline, however, purports to create a special rule for cases involving stolen or counterfeit "access devices" (read: credit cards and the like). For those cases, the commentary states that "loss . . . shall not be less than \$500 per access device."

In [*United States v. Kirilyuk*](#), the defendant argued that the \$500-per-card minimum set forth in the Guidelines commentary should be rejected as contrary to the text of § 2B1.1, which says that the offense level turns on "loss." The Ninth Circuit agreed. The Court explained that Sentencing Guidelines commentary is invalid if it is inconsistent with, or a plainly erroneous reading of, the Guidelines text. Such is the case with the \$500-per-card minimum. The text of § 2B1.1 does not define the term "loss," but the court held the \$500-per-card minimum is inconsistent with the plain meaning of the term. The court explained that no reasonable person would think that "loss" "mean[s] a pre-determined, contrived amount with no connection to the crime committed." Accordingly, the Ninth Circuit rejected the \$500-per-card minimum, and in Mr. Kirilyuk's case, this meant the difference between a total offense level of 43 and a total offense level of 37.

The argument that won the day in *Kirilyuk* is available in the Tenth Circuit, and everyone who currently has or may be appointed for an identity theft/credit card fraud case needs to be aware of it. *Kirilyuk* is also a good reminder more generally to cast a skeptical eye towards any Guidelines commentary that increases your client's offense level or criminal history above what it otherwise would be.

Notable Wins

Not Guilty! Colorado CJA Panel Attorney Jim Castle as well as paralegal Laura Koch, investigator Rhianne Greenlee, and co-counsel Andre Belanger, secured an incredible result after a 2.5 day homicide trial. The jury found the defendant not guilty of first- and second-degree murder as well as not guilty of two § 924(c) charges. While the jury found the defendant guilty of manslaughter, Mr. Castle persuaded the

court to give a special interrogatory regarding Oklahoma state law and the jury found the defendant not guilty of manslaughter under Oklahoma law. The offense occurred before *McGirt* and, at the time, was not considered tribal land. The judge is currently entertaining a dismissal of the manslaughter conviction. Congratulations to all involved!

Insufficient Evidence. The Tenth Circuit recently [vacated](#) two witness tampering convictions after determining that there was insufficient evidence to satisfy the elements of the crime. The story starts in 2019, when Brandon Bridges was arrested and ratted on Cornelious Jones. Police got a search warrant and arrested Mr. Jones after finding drugs and guns in his house as Mr. Bridges said they would. Mr. Jones and Mr. Bridges then ended up at the same jail and Mr. Bridges was assaulted. The government claimed that Klawaun Sutton and Derrick Segue were involved in the assault, and that the motive was to punish Mr. Bridges for being a snitch. So the government charged Mr. Sutton and Mr. Segue with conspiring to intimidate Mr. Bridges for the purpose of influencing his testimony in an “official proceeding,” in violation of 18 U.S.C. § 1512(b)(1). The jury convicted, and both defendants appealed.

On appeal, they argued that the evidence was insufficient to support conviction on the “official proceeding” element, but the parties hotly disputed what that element required. In the end, and over a dissent from Judge Eid, the circuit agreed with Mr. Segue and Mr. Sutton and held that the government had to prove (1) the defendants contemplated a particular official proceeding, and (2) it was “reasonably likely” that the proceeding would be federal.

The government’s evidence failed to meet this threshold because “the relevant proceedings here involved state criminal charges against Mr. Jones, and the government presented no evidence that Mr. Sutton and Mr. Segue had contemplated any other proceeding that was federal or reasonably likely to evolve into a federal proceeding.” Although the government argued that federal agents were investigating a drug conspiracy, there was no evidence that the federal agents were aware of Mr. Bridges or that anyone at the jail knew anything about the federal investigation. Nor did the “magnitude” of the drug conspiracy give Mr. Sutton and Mr. Segue any reason to believe the case would go federal.

Colorado CJA attorney Lynn Hartfield (Mr. Segue) and John Arceci (Mr. Sutton) were the appellate attorneys on the case.

Resource of the Week

Check out Kansas. The Federal Public Defender for the District of Kansas runs a helpful and edifying blog covering everything from Tenth Circuit legal updates, the law on new technologies such as geofence warrants in the Fourth Amendment context, legal writing strategies and more! We encourage you to [take a look](#).

A broad sweep. What is a geofence warrant, you ask? While traditional court orders permit searches related to known suspects, geofence warrants are issued specifically because a suspect cannot be identified. Law enforcement simply specifies a location and period of time, and, after judicial approval, companies conduct sweeping searches of their location databases and provide a list of cell phones and affiliated users found at or near a specific area during a given timeframe, both defined by law enforcement. Law enforcement has increased their reliance on geofence warrants in recent years, as [this law review article](#) explains, but the constitutionality of geofence warrants remains hotly contested in the courts.

Trainings

Local

Tap Dancing on a Wire: Tips and Strategies for Managing Large-Scale Wiretap Cases. As many of you know first-hand, wiretaps are the bread and butter of drug prosecutions. Many of these cases are complex, with voluminous discovery, complicated defendant relationships, and extensive motions practice. Laura Menninger and Kristen Frost, both incredible attorneys and longtime members of the CJA panel, along with discovery management specialist Richard Demarest, are going to share tips for managing

these large-scale cases and strategies for getting the best outcome for your client.

This webinar will be held on **Monday, April 18** from 12 p.m. to 1:30 p.m. (MDT). You can register for the program [HERE](#). Ninety minutes of Colorado and Wyoming CLE credit are anticipated.

The Faculty of Federal Advocates (FFA) presents "REMARKS FROM COLORADO'S FEDERAL PUBLIC DEFENDER AND U.S. ATTORNEY" Thursday, April 28, 2022 12:00 - 1:15 p.m., (MDT), Alfred A. Arraj Courthouse, [901 19th Street, Denver](#). In this presentation, Federal Public Defender Virginia Grady and U.S. Attorney Cole Finegan will discuss a variety of issues relevant to both criminal and civil practitioners, including the priorities and challenges faced by their respective offices; their views on effective advocacy, given their unique vantage points supervising two of the most active groups of federal practitioners in Colorado; and their observations on practicing with professionalism and civility, given their offices' roles as repeat adversaries in cases with unsurpassed consequences.

2 general CLE credits requested. If you aren't an FFA member but would like to join and take advantage of the member discount, please click [HERE](#) to join prior to registering for this event.

The spring session of the Colorado FPD's Appellate Practice Series will be held virtually on Friday, April 15, from 12 p.m. to 1:30 p.m. (MDT), and will feature a superstar panel discussing an aspect of appellate work that rarely gets attention: [Amicus Practice in the Tenth Circuit](#) – Although we've seen occasional amicus participation in criminal cases in the Tenth Circuit in recent years, the practice is not as widespread as in many other circuits. Join our colleagues **Jessica Stengel** (Utah FPD) and **Shira Kieval** (Colorado FPD) and a panel of national appellate leaders—**Jeffrey Fisher** (Professor of Law and Co-Director of the Supreme Court Litigation Clinic at Stanford Law School; Special Counsel, O'Melveny), **Vanessa Antoun** (Senior Resource Counsel, NACDL) and **Shana-Tara O'Toole** (Founder and President, Due Process Institute)—and for a detailed discussion of when, where, and how you can find amicus support for your case in both the Tenth Circuit and Supreme Court. **Registration is [open now](#).**

National

Appellate Series Session 1: IFPlease Help! The ins and outs of the procedural and logistical process of a federal criminal appeal. This program will be held **online April 20, 2022, 2:00 p.m.-3:15 p.m. (EDT)**. Are you new to federal criminal appeals, or has it just been a while since you have done one? This presentation will cover everything you need to know about the procedural fundamentals of appellate practice, including filing the notice of appeal, submitting the initial paperwork with the court of appeals (e.g., CJA forms), ordering transcripts, obtaining the district court file and securing your appellate record, timely filing your brief in accordance with your court's local rules, and dealing with issues of compensation and reimbursement. Register [here](#).

Evidence Webinar Series: Part Three - The Busy Lawyer's Framework for Dealing with Evidence Problems, June 15, 2022, at 2:00 p.m. – 3:15 p.m. (EDT). This webinar will provide a framework for how criminal defense lawyers can effectively tackle evidence issues. The presenter will review evidence problems from relevance and prejudice, through character and hearsay evidence (discussed at much greater length than in Part I), lay and expert opinion testimony, concluding with authentication and Confrontation Clause issues. Save the date!

Comments? Questions?

We would love to hear from you. Whether you have a tip about a new case, thoughts on how we can do better, or just words of encouragement, email us at cjanewsletter@cofpd.org.

IT Help

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