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Federal Criminal Appellate Practice in the Second Circuit

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CRIMINAL LAW PRACTICE IN FEDERAL DISTRICT COURT
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FEDERAL APPELLATE PRACTICE IN THE SECOND CIRCUIT

Included in your coursebook is my fairly comprehensive outline of federal criminal appellate practice in the Second Circuit. The outline is divided into four parts: appealability at page 243; mechanics of appeal at page 248; scope of review at page 255; appellate advocacy at page 258; and decisionmaking at page 263. Also included is a list of suggested references at page 266. You will find the section on appealability quite complete, since I have tried to pull together all our leading cases on this important and sometimes confusing subject. There is one omission in that section, however, that I shall correct a little later. Rather than discuss each of the subjects covered in the outline, I intend to use part of the time allotted to me to answer three questions frequently asked by members of the Bar. The first question is: "Why are such a large proportion of criminal appeals unsuccessful in the Second Circuit?" The second question, related to the first, is: "What kind of attention do criminal cases really get in the Court of Appeals?" The third is: "When is mandamus appropriate?" I shall use the remainder of the time allotted to me to answer any other questions you may have.

First, some interesting statistics: During the 12 month period ending June 30, 1987, 525 criminal appeals were terminated in our court. Of these cases, 121 were terminated by

consolidation; 132 on procedural grounds and 272 on the merits. There were reversals in only 22 of the 272 criminal appeals decided on the merits. The reversal rate, therefore, was 8.1%! What accounts for such a low rate of reversal? The answer has come to me gradually during my service as a member of the court, and I share it with you in the hope that it will inform the presentation of your appeals in the Second Circuit: the constraints of appellate review account for the low rate of reversal in criminal cases.

Let's take a look at some of these constraints. Although defense counsel persist in challenging the sufficiency of evidence supporting conviction, the appellate court is subject to some very significant constraints in this area. Although we may have some questions as to the sufficiency of the evidence underlying a conviction, we must sustain the verdict if we find that any rational trier of fact could have found the essential elements of the crime established beyond a reasonable doubt. There is a further constraint affecting sufficiency of the evidence review: the circuit court must, after viewing all pieces of evidence in conjunction and not in isolation, draw all favorable inferences and resolve all issues of credibility in favor of the prosecution. Nevertheless, defense counsel persist in arguing on appeal that this witness or that witness is not credible because of inconsistencies in testimony or for other reasons. Chances of prevailing on such arguments are practically nil. A procedural tip -- in order to preserve a claim of

insufficiency of evidence for appeal, a motion for judgment of acquittal should be made at the close of all the evidence.

There are some other constraints with regard to factual findings. For example, a district court's finding of consent to search will not be set aside unless clearly erroneous. As to the factual question of custody, the Supreme Court has said that a court of appeals errs in substituting its finding for that of the trial court on that issue. My colleague, Judge Newman, disagrees with me as to the constraints on appellate review of the custody question, as appears from my dissent in the Ceballos decision cited in the outline. Although the general rule is that a district court's ruling may not be disturbed unless clearly erroneous, the Supreme Court has held that the Court of Appeals must make an independent determination on the issue of voluntariness when the privilege against self-incrimination is claimed.

A district judge's determination to admit or exclude an expert's testimony is upheld unless "manifestly erroneous." Despite this constraint and the liberal rules of evidence regarding expert testimony, defense counsel continue to urge reversal on the grounds of erroneous admission of expert opinion. Although we have expressed concern about the propriety of some expert testimony and will undoubtedly have something further to say on the subject, defense counsel have an uphill battle in attacking the testimony of an expert. We have said that we will not overrule a district court's decision to curtail cross-

examination unless an abuse of discretion is clearly shown. We have a number of cases where cross-examination is curtailed by the trial judge. In some of those cases we may think that we would have exercised our discretion against curtailment. We are constrained, however, to rule against the appellant on this issue in the absence of a difficult-to-make showing of abuse of discretion. The abuse of discretion constraint also applies in the review of district court decisions relating to severance, consolidation, continuance, change of venue and motions to withdraw guilty pleas.

One of the most important constraints on appellate review, and one certainly worthy of serious consideration by the appellate bar in each criminal appeal, is the harmless error rule. Rule 52(a) of the Federal Rules of Criminal Procedure tells us that errors which do not affect substantial rights are to be disregarded. This rule gives us the right to look at the record as a whole and to declare that, although there was error at trial, the error did not affect the outcome. It is a rule that gives us some difficulty, because it involves placing ourselves in the position of jurors and saying that we would have convicted even if some item of defense evidence were available to us or even if some item of prosecution evidence were not available to us.

In writing a brief or in arguing an appeal where error is apparent, counsel for the appellant must recognize the harmless error constraint and persuade us that the error was of such

magnitude that it infected the fairness of the trial -- that a reasonable juror would not have voted to convict but for the error, that the error was prejudicial and inseparable in the minds of the jury. Constitutional error can be regarded as harmless only if it can be said to be harmless beyond a reasonable doubt. The Supreme Court has held that some constitutional errors, such as double jeopardy, invoke rights so important as to require automatic reversal.

We are severely constrained in our review of errors in trial procedure. As to evidentiary matters, we are instructed by Rule 103(a) of the Federal Rules of Evidence that the admission or exclusion of evidence is not error unless a party's substantial rights are affected, and a specific objection is made in cases of admission or an offer of proof is made in cases of exclusion. With respect to the assignment of error for giving or failing to give an instruction to a jury, an important constraint is the rule that such error may not be assigned unless specific objection is made before the jury retires.

Earlier on, when I was discussing statistics relating to criminal appeals in the Second Circuit, I observed that 132 of the 525 terminated cases were concluded on procedural grounds. Thus, 25% of all terminations were for procedural reasons. A great number of cases in this category were terminated for lack of appealability. Clearly, the final judgment rule, as modified by the collateral order doctrine, is a major constraint on appellate review. I urge you to consider the question of

appealability before filing a notice of appeal in a federal criminal case. Just to round out my outline on the subject of appealability, I refer you to a case in our circuit in which a defendant was held entitled to immediate appellate review of the denial of a motion to dismiss the indictment. The motion was grounded in the doctrine of separation of powers and was made by a Congressman who was charged with conspiracy and bribery in the Abscam case. Like the speech and debate clause, the doctrine of separation of powers is considered so important to effective representation of the people that any question regarding its applicability should be determined immediately. United States v. Myers, 635 F.2d 932 (2d Cir. 1980).

Finally, although it almost seems unnecessary to say so, appellate review is constrained by precedent. I say "almost unnecessary" because, from time to time, we see appellate advocates who are blissfully unaware of, who ignore, or who seek to overturn precedent. Very recently I sat on a panel hearing an appeal from a conviction for failure to file currency transaction reports. Despite very recent precedent to the contrary, the attorney for appellant insisted that the reporting obligation fell only on financial institutions and not on the individual employees who structure the transactions. It just doesn't make sense to ask the circuit to contravene a precedent established within the past few months. A rule of decision announced by one panel of the circuit is binding on the entire court. Generally, the only way to change the precedent is through an in banc

determination. Occasionally, a panel will depart from precedent after circulating a decision to the entire court to ascertain whether there is any objection. In such cases, the fact of circulation will be noted in the decision. I note here that in banc rehearing is reserved for those very rare cases where full court consideration is necessary to maintain uniformity of decisions or when the proceeding involves a question of exceptional importance. A word to the wise -- a visit to Lexis or Westlaw just before the brief is filed and again just before oral argument is recommended.

Having given you some idea of the narrow compass in which circuit judges work, I pass to the second frequently-asked question: "What kind of attention do criminal cases really get in the Second Circuit?" Considering the skepticism of the appellate attorneys who ask that question, my short answer is: "A lot more than you think."

Some two to three weeks before each court sitting, the judges receive the briefs and appendices in each case to be heard at the sitting. It is my practice to read the briefs and to skim through what I consider the important parts of the appendices. I insert here one of my most severe gripes about appellate advocacy -- it frequently happens that something I am looking for is omitted from the appendix, in which much unnecessary material is included. Following my reading, I examine the bench memos prepared by my clerks and review the memos with them. We may do further research to answer any questions that may occur to us.

We try to identify the important issues that we hope will be covered by oral argument. Most of my colleagues use the same or similar procedures in preparing for the sitting.

So it should be apparent that a great deal of consideration has been given to each case by each judge by the time we arrive for a sitting. I daresay that each of us by then has formed at least a tentative opinion in each case, subject to persuasion by oral argument or by discussion with our colleagues. We seldom review a case among ourselves prior to oral argument, but sometimes we get a view of each other's impressions of the case during the argument. Those of you who have argued criminal appeals in our court know that we are very attentive during the oral argument. In spite of what many may think, oral presentation continues to be a vital part of our decisionmaking process. From time to time, a judge will remark, following oral argument, that his perception of the case was turned around completely by the verbal exchange. That being true, it is a source of concern to many of us that there are so many deficiencies in appellate advocacy in general and in oral argument in particular. At any rate, it seems to me that it is very foolish for an attorney to pass up the opportunity for oral argument.

Further consideration is given to many of our cases in the robing room following oral argument, and final decisionmaking occurs there in some cases. In other cases, tentative votes are recorded and voting memos will be exchanged in the remainder.

Voting memos are a long standing tradition in the Second Circuit and customarily are exchanged on the day of oral argument or on the following day. These memos provide a written record of a judge's vote as well as a brief summary of rationale. They are of great value to the judge ultimately assigned to write the opinion.

At the end of a week's sitting, the judges generally meet and review all the cases heard during the week, discuss the voting memoranda and share any additional thoughts they may have had since the memoranda were exchanged. The votes are then taken and recorded, and opinions are assigned by the senior active judge, unless that judge is in dissent. In the latter case, the active judge next senior assigns. By the time of the conference, decisions on those appeals found to have no precedential value ("jurisprudential purpose") will have been disposed of by summary order.

Further consideration is given to each criminal case when proposed opinions are circulated. Very often, the non-writing judges will suggest changes in the opinion. Sometimes, the writing judge will advise that his or her view of the case has changed, and there will then be additional conferences or the exchange of additional memoranda, and a realignment of original voting positions may ensue. Attention is given to criminal cases even after the summary orders or opinions are filed. This comes about when we consider petitions for rehearing. Finally, each member of the court will give attention to the case when

suggestions for rehearing in banc are circulated. Any judge may call for a vote on rehearing in banc, and a majority vote of the active judges is necessary to convene the court for such a rehearing. Although in banc sittings are rare, they seem to be on the increase. By now, I think, you should be satisfied that a great deal of attention is devoted to the consideration of criminal cases by the judges of the Second Circuit Court of Appeals.

Now to mandamus, a little known device for getting the circuit court to pass on an issue without going through the regular appeals process. Rule 21 of the Federal Rules of Appellate Procedure provides that an application for a writ of mandamus is made by filing a petition with the Clerk of the Court of Appeals with proof of service on the respondent judge and on all parties to the trial court proceeding. The rule sets forth the contents of the petition and tells us that an answer should not be filed unless directed by the court. Supplementary Rule 21 of the Rules of the Second Circuit instructs that the petition should not bear the name of the district judge but should be titled only: In re _____, the name of the petitioner.

Generally, a three part test must be met if mandamus is to be granted. There must be (1) a usurpation of power by the district court; (2) a clear abuse of discretion and (3) the presence of an issue of first impression. We have held that the purpose of mandamus is to confine an inferior court to the lawful exercise of its prescribed jurisdiction or to compel it to

exercise its authority when there is a duty to do so. It is discretionary and sparingly exercised. In criminal cases mandamus is used to curtail lower court disruption of the administration of criminal justice.

In a case decided in 1987, In re United States, 834 F.2d 283, mandamus was granted on a petition of the government in an ongoing RICO prosecution. There, the district court had ordered the government to disclose all oral statements made by the defendants and co-conspirators that the government intended to offer at trial as admissions of a defendant, so long as at some point the statements had been "memorialized" in one form or another. The district court invoked what it claimed to be its "inherent power" to require appropriate discovery as authority for the order to disclose. However, Rule 16 of the Federal Rules of Criminal Procedure provides only that the substance of oral statements made to government agents shall be disclosed and Jencks Act discovery only extends to disclosure for impeachment purposes. Since the district court had made the same error in a previous case and continued to insist on its non-existent "inherent power," mandamus clearly was indicated. In a very recent case, U.S. v. Coonan, decided February 11, 1988, the government lost a petition for mandamus. In that case, the government, in another RICO situation, sought to prevent the district judge from having the jury render a special verdict on predicate acts rather than a general verdict encompassing enterprise, pattern of racketeering activity and all the elements

necessary to establish the offense.

Having attempted to answer the three most frequently asked questions, I am open to any further questions you may have.