

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. I, NO. 1

JANUARY 2003

OPEN FOR BUSINESS!

The newly created Office of the Federal Public Defender for the Northern District of West Virginia officially opened December 16, 2002. Temporary residence will be inside the federal courthouse at Clarksburg, West Virginia. The next several months will be devoted to obtaining permanent office space in the Clarksburg business district; making office equipment purchases; and hiring staff. At the present, Defender Services, a branch of the Administrative Office of the United States Courts, has authorized an initial staff of five to include: The Federal Public Defender, an Assistant Federal Public Defender, an Investigator, an Administrative Officer, and a Legal Secretary. Once the new office begins accepting criminal cases, the annual case opening statistics will likely support continued growth. Long term plans include staffed offices in Wheeling and in Martinsburg.

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An extremely important function for the new Defender Office will be the provision of support services to panel attorneys appointed under the Criminal Justice Act. Even in those districts where a Defender Office operates, a fairly large percentage of cases must still be paneled to

the private sector due to conflicts of interest and case management decisions. The Defender Office will provide members of the panel with free access to computer-assisted legal research; use of a well-stocked criminal law library; access to motions and brief bank; and assistance and advice on any matters that arise during the defense of a federal criminal case. Panel members are encouraged to share any work-product deemed appropriate for the motions/brief bank, including pre-trial motions; trial memoranda; jury instructions; and briefs to the Fourth Circuit of Appeals, etc.. Periodically, the Defender Office will also sponsor training and seminar sessions for panel attorneys that will count toward mandatory Continuing Legal Education credits.

ABOUT THE QUARTERLY:

The *West Virginia Northern Federal Defender Quarterly* will issue on a regular basis to all attorneys currently listed on the Criminal Justice Act panel here in the Northern District of West Virginia. The *Quarterly* is meant to serve as an informal medium that focuses on cutting-edge issues relating to the defense of federal criminal cases. It will include periodic compilations of published opinions from the Fourth Circuit of Appeals (as well as those rare, unpublished gems that usually mean a defense victory, yet hold no precedential value). The *Quarterly* will also serve as a forum for anyone who wishes to test out an article; tell a story; or just plain vent.

This issue of the *Quarterly* contains articles that outline recent amendments to the Federal Rules of the Criminal Procedure and the Federal Sentencing Guidelines.

OVERHEARD IN THE COURTHOUSE

Congratulations to David E. Goddard, Esq. for his December 2002 trial victory in United States v. Kenneth Davidson. His client was found not guilty of making a false statement in acquisition of a firearm and being a felon in possession of a firearm. The matter was tried before Chief Judge Keeley in Clarksburg.

AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2002

Ten new amendments to the sentencing guidelines went into effect November 1, 2002. The Amendments are fully incorporated in the 2002 Guidelines Manual. Listed below is a brief outline of the changes made by the 2002 amendments. The Sentencing Commission did not designate any of the amendments for retroactive application to previously sentenced and imprisoned defendants.

Drugs- The Commission amended U.S.S.G. Sec. 2D1.1 (a)(3) to include a provision that establishes a maximum base offense level of 30 from the Drug Quantity Table if the defendant receives a mitigating role adjustment under U.S.S.G. Sec. 3B1.2. Specific offense characteristics and adjustments from Chapter 3 are added or deducted from the base level of 30. A statutory mandatory minimum sentence trumps this guideline.

An amendment to the U.S.S.G. Sec. 2D1.1, comment note 11, adds MDMA (3,4-Methylenediozymethamphetamine) to the list of substances for which a typical weight per unit is provided. It establishes the typical weight of an MDMA pill at 250mg.

The safety valve amendment found in U.S.S.G., Sec. 2D1.1(b)(6), comment note 21, clarifies that the two-level reduction applies even where the defendant is convicted under a statute that does not carry a mandatory minimum term of imprisonment, such as a telephone count under 21 U.S.C. Sec. 843(b). The amendment also clarifies that the two-level reduction in Sec. 2D1.1 (b)(6) applies without regard to the limitation found in U.S.S.G. Sec. 5C1.2(b), which sets a minimum offense level of 17 for defendants facing a five-year mandatory minimum sentence.

The maximum base level under subsection (a)(2) of the U.S.S.G. Sec. 2D1.8 (Renting or Managing a Drug Establishment) was increased from offense level 16 to offense level 26. This provision applies to the defendant who, "had no participation in the underlying controlled substance offense other than allowing use of the premises..." U.S.S.G. Sec. 2D1.8(a)(2).

Promoting Commercial Sex Act/Prohibited Sexual Conduct - This amendment to the U.S.S.G.2G1.1 broadens the conduct covered by the guideline to include commercial sex acts where it previously had only included "prostitution." It also expands to cover offenses involving fraud where the previous subsection covered offenses involving "physical force" and "coercion." Lastly, the amendment deletes the provision which encouraged an upward departure based on the age of the minor because this factor was already taken into account by the guideline.

Offenses Involving Cultural Heritage Resources- This amendment creates a new guideline, U.S.S.G. Sec. 2B1.5, for offenses involving cultural heritage resources, i.e. national memorials, landmarks, parks, historical sites and historic and cultural items. It covers theft, damage to, destruction of, and illicit trafficking in such items. The offense level will be based on both the “value” of the location/item at issue and the specific offense characteristics contained within Sec. 2B1.5. There is also a cross-reference to offenses involving arson and the use of explosives.

Official Victim- U.S.S.G. Sec. 3A1.2 was amended so as to expand the category of persons who are considered “official victims.” In addition to law enforcement and corrections officers, it now includes any employees, independent contractors or volunteers authorized to act on behalf of a prison or correctional facility.

Career Offender Triggered by Sec. 924(c) Conviction- The career offender guidelines found at U.S.S.G. Sec. 4B1.1-4B1.2 were amended to provide that a conviction for a firearm offense under 18 U.S.C. Sec. 924(c) or Sec. 929(a) will require a sentence as a career offender. These types of convictions will now result in an offense level of 37 and a criminal history category of VI if the career offender predicates are found. Included therein is a table that takes into account acceptance of responsibility reductions, if any.

Discharged Term of Imprisonment- The amendment to U.S.S.G. Sec. 5G1.3, comment note⁷, provides that the courts may consider a downward departure in cases in which Sec. 5G1.3(b) would have applied but

for the fact that the term of imprisonment was fully served before sentencing in the federal case. Cases falling under Sec. 5G1.3 (b) are those where the undischarged term of imprisonment resulted from offenses that were fully taken into account in the determination of the offense level for the offense to be sentenced.

DNA Samples- U.S.S.G. Sec. 5B1.3 and 5D1.3 add a new mandatory condition of probation and supervised release that requires a defendant to submit to the collection of DNA if the collection is authorized pursuant to 42 U.S.C. Sec. 14135a, the DNA Analysis Backlog Elimination Act of 2000.

Foreign and Corrupt Practices- For violations of 15 U.S.C. Sec. 78dd-1, 78dd-2 and 78dd-3, an amendment deletes U.S.S.G. Sec. 2B4-1 (the guideline for commercial bribery cases). Hereafter, such violations are to be sentenced pursuant to the guideline for public corruption cases under U.S.S.G. Sec. 2C1.1.

Terrorism Amendments- Major changes were included in the 2002 amendments that deal with terrorism. There is a new guideline under U.S.S.G. Sec. 2M5.3 for persons providing material support to a terror organization. New specific offense characteristics were included under U.S.S.G. Sec. 2A5.2 if a weapon is used while interfering with a flight crew or attendant. U.S.S.G. Sec. 2M6.1 was expanded to cover possession/transportation of biological agents, toxins, and delivery systems. The Chapter Three terrorism enhancement was widened to include acts that do not fit the limited statutory definition of “federal

crimes of violence.” The 2002 amendment expands the reach of Sec. 3A1.4 to cases “calculated to influence or affect the conduct of government” or “intimidate or coerce a civilian population” but do not otherwise fall within the statutory definition of “federal crime of terrorism.” For a detailed listing of all terrorism amendments, please refer to Amendment 637 found in the 2002 addition of the Federal Sentencing Guidelines.

2002 AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Effective December 1, 2002, the Federal Rules of Criminal Procedure were amended and reorganized to make them more easily understood and “user friendly.” In addition to stylistic changes, many of the rules were renumbered and shifted to other areas. Listed below is a compilation of those rules that include substantive changes. It is strongly suggested that you refer to the actual text of the new rules as needed. The current edition of the 2002 rules from West Publishing includes the old rule followed by the new rule in italics so that a comparison can be made.

Rules 5(f) and 10(c) allow the use of video conferencing for initial appearances and arraignments. Defendant’s consent is required in lieu of an actual court appearance.

Rule 10(b) allows the defendant to waive his appearance altogether at the arraignment through a written waiver and with the consent of the court.

Rule 11(c)(1)(a) explicitly allows a plea agreement which states that no additional charges will be brought. It expands upon language that allowed dismissal of pending charges.

The notice provisions of Rule 12.1(alibi) and Rule 12.3(public authority defense) require the inclusion of a witness’ phone number in addition to other identifying information.

The insanity notice provisions of Rule 12.2 were expanded to include capital sentencing proceedings.

Rule 12.4 is a brand new rule that requires disclosure statements from non-governmental corporate parties and organizational victims. The rule was enacted to assist judges with recusal decisions.

Rule 32(f)(2) more explicitly state that copies of the pre-sentence report objections must be served on opposing parties. Under Rule 32(h), the Court must give notice of intent to depart (upward or downward) if the basis is not already included in the pre-sentence report.

Rule 32.1(a), an initial appearance must now be held even if a summons already issued for an alleged supervised release violation.

Rule 35(b)(2) allows greater use of substantial assistance motions more than one year after initial sentencing. Information given within the year that did not become useful until later can result in a lesser sentence. In addition, information a defendant already possessed, but did not realize was important until more than a year after sentencing passes, can get a Rule 35 sentence reduction.

Speaking of new rules, the district court judges and the clerk’s office for the Northern District of West Virginia are presently revising the local rules of practice that apply to civil; criminal; and bankruptcy matters. These new rules will take effect sometime in 2003. Stay tuned.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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MARCH 2003

NEW FEDERAL BUREAU OF PRISONS DEVELOPMENTS AND RESOURCES

On December 13, 2002, the Department of Justice issued an opinion letter concluding that the Bureau of Prisons does not have the authority to designate an inmate to a community confinement center for service of a term of imprisonment. Until then, the BOP would oftentimes accept a Court's recommendation that a defendant serve up to an 18-month sentence at a CCC. At the DOJ's directive, the BOP promulgated new rules adopting the DOJ opinion. Under these new rules the BOP will no longer designate defendants to a CCC, and, significantly, would redesignate defendants who had already been designated if they had more than 150 days remaining to service. CCC's.

A number of district court rulings have stayed the new BOP rules pending § 2255 review. *Shawn Lyn Cutler v. United States*, CR 01-439 (D.D.C. Jan. 24, 2003)(granting a 2255 motion in part and enjoining the BOP from transferring defendant from CCC to prison based on principles of equitable estoppel and due process); *Matthews v. Federal Bureau of Prisons*, CV 03-33-S-BLW (D. Idaho Jan. 27, 2003)(granting petitioner's temporary restraining order forbidding BOP transfer of defendant from CCC to prison); *Iacoboni v. United States*, CA 03-3005-MAP (D. Mass. January 10, 2003)(ordering BOP to not transfer petitioner from CCC until court has opportunity to consider "serious and

substantial questions" raised by the change in BOP policy). These § 2255's attack both the DOJ analysis itself and BOP's passage of the new rules in violation of the Administrative Procedures Act.

A wealth of information is available at the Bureau of Prisons web-site located at www.bop.gov. Under the FOIA/Policy section, you will find policy statements that outline the Intensive Confinement Program (Boot Camp); substance abuse programs; and security designation/classification procedures. Defendants with computer Internet access will find very useful information under the Inmate Information section. The BOP describes prison life and most available programs relating to work; education; substance abuse programs; visitation; furloughs, etc. The BOP also provides an Inmate Locator that can find any inmate in the prison system based on name, DOB, or inmate registration number.

ASSISTANCE AND TRAINING RESOURCES

For quite some time now, Jay T. McCamic and Christine B. Stump have acted as Resource Counsel for the panel attorneys here in the Northern District of West Virginia. Resource Counsel provide needed assistance to panel attorneys in those districts that lack a Federal Defender Office.

Given that the Federal Public Defender Office for Northern West Virginia is now up and running, the Resource Counsel contract

will expire on April 30, 2003.
Congratulations to Jay and Christine on jobs well done.

As of now, panel attorneys are invited to contact the Federal Public Defender Office at (304) 622-3823 if there is any assistance needed in the defense of federal criminal cases under the Criminal Justice Act. The office will provide one-on-one consults and roundtable sessions on difficult issues that arise; panel attorneys will have access to a well-stocked criminal law library, a brief bank, and free computer assisted legal research; in-district training sessions and workshops will be available for CLE credits; and notice will issue that relates to training opportunities available outside the district. The Federal Defender Office looks forward to providing whatever assistance panel attorneys might require.

As to available training, the Judicial Training Center of the Defender Services Division sponsors periodic seminars at no cost for CJA panel attorneys. Those seminars in the next few months that are reasonably close to home include: Regional CJA Seminar (broad overview of federal criminal defense practices), May 29-31, Savannah, Georgia; and Trial Advocacy Skills, June 26-28, Williamsburg, Virginia.

Scholarships are also available to attend a 2-week course offered by the National Criminal Defense College in Macon, Georgia. This is an intensive course that develops trial advocacy skills through large class sessions and small group practical exercises. There are two sessions: June 15-28 and July 13-26. Call the Federal Defender Office for more details on these programs.

NEW WEST VIRGINIA NORTHERN U.S. DISTRICT COURT WEB-SITE CONNECTIONS

The Clerk's Office recently added a "Public Defender/CJA Information" section to its web-site at www.wvnd.uscourts.gov. This section allows access to commonly used CJA forms; the CJA 20 Quick Reference; and outside links to helpful criminal defense sites. These sites include the Defender Services Division Training Branch which provides a brief bank by subject matter, i.e. *Apprendi* issues; discovery; drugs; firearms; motions; search & seizure; sentencing, etc. The other site link is to the National Association of Criminal Defense Lawyers. This site has timely information and a "Lawyers Reference" section also containing brief bank materials.

CRIMINAL JUSTICE ACT PANEL QUESTIONNAIRE RESULTS

With the assistance of the Clerk's Office, the Federal Public Defender recently sent out questionnaires to the 191 attorneys who are currently listed on the CJA panel here in the Northern District of West Virginia. The questionnaire sought updated contact information; litigation experience; listings for an expert witness/defense services bank; and preferences for training and CLE sessions.

Almost 100 responses were received by mail and fax. Given that most criminal defense lawyers are hopeless nonconformists by nature, the response rate was somewhat better than expected.

Six attorneys specifically asked to be removed from the CJA panel.

Of those who defended federal criminal cases in this district and elsewhere over the last three years, 33 attorneys handled one to five cases; 31 attorneys handled five to ten cases; 20 attorneys handled ten to twenty cases; and 8 attorneys handled twenty plus federal criminal cases.

Of those with federal criminal jury trial experience in the last five years, 51 attorneys had no such experience; 26 attorneys handled one or two trials; 12 attorneys had three to five jury trials; and 3 attorneys had over five jury trials.

Finally, the questionnaire asked that each attorney pick the top four choices for training from the following menu: CJA forms and vouchers; bail and detention; discovery and pre-trial motions; search and seizure issues; career offender/armed career criminal/penalty enhancement; trial advocacy skills; federal sentencing guidelines; appellate practice; Bureau of Prisons policy and procedures; and new procedural and substantive developments in federal criminal practice.

The top three choices were clearly federal sentencing guidelines; new developments; and discovery and pre-trial motions. Only a few selected CJA forms and vouchers; bail and detention; and appellate practice. The four remaining categories each received about the same number of votes and fell in the middle ground.

SENTENCING COMMISSION ADOPTS EMERGENCY GUIDELINE AMENDMENTS

The U.S. Sentencing Commission adopted an emergency amendment to provisions of

the guidelines that cover fraud and theft offenses. The amendment was effective January 25th and will remain in effect until it is replaced by a permanent measure November 1st. The amendment will mean higher potential sentencing ranges in several situations, including cases in which the loss exceeded \$200 million, and cases in which the offense endangered the solvency or financial security of a large or publicly traded company, or the solvency or financial security of 100 or more victims.

New congressional obstruction of justice offenses, i.e. 18 U.S.C. §1519, which covers destruction of records in federal investigations and bankruptcy, was assigned to U.S.S.G. § 2J1.2 Base offense levels increased from 12 to 14; and the guideline amendment adds two levels if the offense involved a large quantity of documents; a targeted selection of documents; or was otherwise extensive. New 18 U.S.C. § 1520, which covers destruction of corporate audit records, is assigned to a guideline provision that governs false statements in certain required records, U.S.S.G. §2E5.3.

The Commission also adopted tougher sentencing guidelines for campaign finance violations for offenders who make or receive illegal campaign contributions worth \$5000 or more. Enhancements are based on the size of the illegal contribution; the source (foreign national or foreign government); and whether threats/intimidation were involved. These guidelines also became effective January 25th.

GIDEON TURNS 40!

March 18, 2003 will mark the 40th anniversary of the landmark 1963 U.S.

Supreme Court decision in Gideon v. Wainwright, 372 U.S. 333 (1963). One year later, Congress passed the Criminal Justice Act. Visit the special web site at www.nacdl.org/gideon to find “Gideon at 40: Fulfilling the Promise.” Articles there both commemorate the promise of Gideon, and reflect on the very real pressures facing the Sixth Amendment right to counsel today.

FOURTH CIRCUIT ROUNDUP

Published Cases:

United States v. Carter, 300 F.3d 415 (4th Cir. 2002).

- defendant may be sentenced to multiple terms of imprisonment for two §924(c) violations where the violations arose from a single underlying predicate drug trafficking offense; conflict with six other circuits.

Rouse v. Lee, 314 F.3d 698 (4th Cir. 2003).

- Court employs “equitable tolling doctrine” to excuse federal habeas petition filed one day beyond AEDPA one-year statutory deadline.

United States v. Mackins, 315 F.3d 399 (4th Cir. 2003).

- unpreserved plain error review and preserved harmless error review result in different outcomes under *Apprendi* where indictment failed to allege drug quantity; only latter standard of review warrants relief.

United States v. Miller, 316 F.3d 495 (4th Cir. 2003).

- guidelines permit court to use intended loss when calculating sentence under old §2F1.1, even if this exceeds the amount of loss actually possible in a medical services, over-billing fraud case.

United States v. Dixon, 2003 U.S. App. LEXIS 1486 (1/30/03).

- in determining whether prior criminal conduct is similar to the offense of conviction for purposes of a possible upward departure under §4A1.3, a district court may consider not only the elements of the offense of conviction, but also any relevant conduct associated with that offense.

Allen v. Lee, 2003 U.S. App. LEXIS 1967 (2/14/03).

- Court grants habeas relief in death penalty, police-shooting case based on *Batson* violations and faulty jury instruction relating to need for unanimous finding on mitigating circumstances.

Unpublished Cases:

United States v. Williams, 2003 U.S. App. LEXIS 1402 (1/29/03).

- Armed Career Criminal increase to level 34 under guidelines, §4B1.4, for use or possession of firearm in connection with crime of violence or controlled substance offense, requires proof that the firearm giving rise to the § 922(g) charge and the §4B1.4 increase be one and the same.

United States v. Crumbliss, 2003 U.S. App. LEXIS 1685 (1/31/03).

- Court refuses to follow 2nd and 7th Circuits which hold that downward departure for extraordinary medical condition is not warranted if BOP has ability to treat condition; trial court did not abuse its discretion when departing from guideline range of 37-46 months to probation with home confinement where defendant suffered from diabetes; required amputation of two toes; and suffered nerve damage in lower extremities.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. I, NO. 3

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THE “FEENEY AMENDMENT” TO THE SENTENCING GUIDELINES AND THE PROTECT ACT OF 2003 (Effective April 30, 2003)

On April 30, 2003, the president signed into law the federal “Amber Alert” statute, addressing child abductions and other offenses against minors, entitled the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ” or the “PROTECT Act.” Most of its provisions are effective immediately upon enactment.

When the initial bill first reached the House of Representatives, an amendment - - called the “Feeney Amendment” -- was attached to it, addressing “sentencing reform” issues. The first incarnation of the amendment made sweeping changes to the sentencing guidelines and restricted the court’s authority to depart downward (not upward) across all offense types. It overruled Koon v. United States, 518 U.S. 81 (1996), and established burdensome reporting requirements clearly intended to intimidate judges into not imposing sentences below the range without approval of the government. There was virtually no public debate (it lasted all of 20 minutes) and no notice to the federal judiciary, the U.S. Sentencing Commission, the defense bar or the legal academic community.

A frenzied attempt to defeat or at least table the amendment ensued, which

included a letter from Chief Justice Rehnquist urging the Senate Judiciary Committee to allow for meaningful public debate before making such sweeping changes and reversing over 15 years of developing sentencing law under the guidelines scheme. Despite these efforts, the amendment ultimately passed, but in a version that was somewhat less sweeping and that restricted judges’ discretion to depart downward only in the category of cases entitled “child crimes and sexual offenses.” The amendment, however, also directed the Sentencing Commission to amend the guidelines so as to “ensure that the incidence of downward departures are [sic] substantially reduced.” Therefore, it remains to be seen how the Commission will respond to this directive, and whether it will effectively restrict downward departures across all offense types in the current amendment cycle. What follows are the highlights of the “Feeney Amendment” and the PROTECT Act.

FEENEY AMENDMENT HIGHLIGHTS

A. Downward departures for “child crimes and sexual offenses” are now restricted to those grounds that are “affirmatively and specifically identified as a permissible ground” in Part 5K of the sentencing guidelines. Congress directly amended § 5K2.0 to add a section specifically addressing this category of cases, and to add § 5K2.22, which sets forth certain prohibited grounds for this category of cases. “Child crimes and sexual offenses”

is defined to include kidnapping a minor (18 U.S.C. § 1201), sex trafficking of children (18 U.S.C. § 1591), obscenity (18 U.S.C. § 1460 et seq.), sexual abuse (18 U.S.C. § 2241 et seq.), sexual exploitation of minors (includes receipt or possession of child pornography) (18 U.S.C. § 2251 et seq.), and transportation for illegal sexual activity (18 U.S.C. § 2421 et seq.). Permissible downward departure grounds for this category of cases, specified in Part 5K of the guidelines, include age (if and to extent permitted by § 5H.1.), extraordinary physical impairment (if and to extent permitted by § 5H1.4), lesser harms (§ 5K2.11), coercion and duress (§ 5K2.12), and voluntary disclosure of offense (§ 5K2.16). Prohibited downward departure grounds for this category of cases include gambling dependence, aberrant behavior, extraordinary family circumstances, diminished capacity, over representation of offense seriousness or criminal history, and any unmentioned factors (since they are not specifically and affirmatively identified in Part 5K), such as post-offense rehabilitation, extraordinary acceptance of responsibility, etc. Downward departures are still presently available for all other offense types, such that the same heartland and combination of circumstances analysis in § 5K2.0 and Koon applies. However, we must watch closely how the Sentencing Commission responds to this new directive that it amend the guidelines to ensure a reduction in the number of downward departures. Moreover, the amendment specifies that for the next 2 years, the Commission is prohibited from passing new downward departure grounds or amendments inconsistent with the new departure restrictions.

B. The amendment directs the Commission to amend the guidelines within 180 days of enactment to add a new 4-level downward departure in illegal reentry cases only for border districts with “fast track” or “early disposition programs authorized by the Attorney General” and only pursuant to a government motion. This will impact districts that have a “fast track” program in place, because the downward departures, pursuant to government motions, were typically far in excess of 4 levels.

C. The third acceptance of responsibility point under § 3E1.1 will *only be available pursuant to a government motion* based on timely acceptance that allows the government to spare its resources by not preparing for trial. The alternative third-point ground, that of timely disclosing the defendant’s offense conduct (the “*mea culpa*” ground), has been repealed. The amendment prohibits the Commission from ever altering this change.

D. The amendment directly amends the pornography guidelines by adding a broader definition to the enhancement for “pattern of activity involving prohibited sexual conduct” in § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), and it enhances penalties for the number of visual depictions and sadistic or masochistic depictions in § 2G2.4 (Child Pornography Guideline). The amendment prohibits the Commission from ever altering these changes.

E. The amendment seeks to chill all departures generally by imposing burdensome reporting requirements on judges who depart. In the “Reasons For Imposing Sentence” section of the judgment

and commitment order, the judge must set forth factually specific written reasons for departing (except in cooperation cases), and the Chief Judge of each district must ensure that the reasons for departing are forwarded to the Sentencing Commission within 30 days of imposition. It further chills departures generally by giving Congress and the DOJ full access to Sentencing Commission data identifying each judge's departure practices. It also requires the Commission to report annually to Congress about national departure trends, including identifying uncooperative districts not forwarding written reasons for departures.

F. The amendment again seeks to chill downward departures specifically by requiring the DOJ to establish written procedures, and to forward those procedures to Congress within 90 days of enactment, to ensure that downward departure motions are formally opposed by line assistants, that prosecutors make sufficient records for appeal, and that appeals are filed when judges depart downward based on the nature or magnitude of the sentencing error, its prevalence in the district, or its "prevalence with respect to a particular judge." If DOJ fails to submit the above written procedures to Congress within 90 days of enactment, then beginning on the 91st day, the Attorney General must report every downward departure (other than cooperation or "fast track" motions filed by the government) within 15 days of imposition of sentence, including the identity of the judge, the facts of the case, the reasons for the downward departure, whether the prosecutor opposed the departure, and whether the government is appealing the departure.

G. The amendment establishes a changed standard of review of departures on appeal, such that departures are to be reviewed *de novo*. This overrules the Koon decision and the longstanding "abuse of discretion" standard in which due deference was given to the sentencing judge, and it means that the appellate court must exercise *de novo* discretion without the benefit of seeing the defendant and the live witnesses. The amendment also restricts sentences upon remand, such that at the resentencing hearing, judges can only depart on those grounds that were raised at the original sentencing hearing that were "specifically and affirmatively included in the written statement of reasons" and found permissible by the appellate court.

H. The amendment changes the enabling legislation to provide that "not more than 3" voting members can be judges. Previously, it provided that "at least 3" had to be judges. This change means that federal judges will no longer be able to have a majority among the 7 voting members of the U.S. Sentencing Commission.

I. Most provisions of the Feeney Amendment became effective immediately upon enactment, April 30, 2003, which raises a multitude of *ex post facto* issues. Remember to always compare the law in effect at the time of commission of the offense with the law in effect at the time of sentencing. A reduction in the extent of sentencing discretion should be deemed a substantive change for *ex post facto* purposes. Lindsey v. Washington, 301 U.S. 397 (1937) (new law imposing mandatory sentence, restricting court's sentencing discretion, violated *ex post facto* principles). Therefore,

the new restrictions on departing downward do not apply unless the offense conduct occurred on or after April 30, 2003, the effective date of the statute.

It is less clear how ex post facto principles apply to the appellate changes made by the Feeney Amendment. Do the changes apply only to departures imposed after April 30, 2003, or to pending appeals as well? The changed standard of review on appeal (de novo) is arguably substantive because it reduces the burden the government has when it appeals a downward departure. The language in Carmell v. Texas, 529 U.S. 513 (2000), may be helpful in this regard. That case found that a changed rule of evidence, which eliminated the need for corroboration of a witness' testimony, violated ex post facto principles. However, these complicated issues will have to be resolved by the courts. Nevertheless, it seems fairly clear that the restricted departure grounds applicable to resentencings after remand violate ex post facto principles. See United States v. Yeaman, 248 F.3d 223, 227-28 (3d Cir. 2001) (the prohibition on departing downward for post-sentence rehabilitation at § 5K2.19 did not apply, because this restriction on sentencing discretion was not in effect at time of commission of offense). It is likewise unclear how ex post facto principles apply to the burdensome reporting requirements imposed upon judges who depart. This is arguably an Article III, separation of powers violation, but does a criminal defendant have standing to raise this challenge? Perhaps so, if the record reflects that the court's decision not to depart was because it did not have the time or inclination to comply with the reporting requirements.

PROTECT ACT HIGHLIGHTS

A. Aside from the "sentencing reforms" made by the Feeney Amendment, the broader statute contains numerous provisions that enhance penalties for offenses against minors. For the category of cases defined as "child crimes and sexual offenses," many of the statutory maximums and minimums have been enhanced, and the authorized supervised release term for all such offenses is increased to "any term of years or life."

B. The base offense level in § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) is increased from Level 24 to Level 32 across the board, regardless of whether the victim is a minor or an adult. The 1-level decrease for releasing the victim within 24 hours in subsection (b)(4)(C) is repealed. The 3-level enhancement for sexually assaulting the victim in subsection (b)(5) is increased to 6 levels, whether the victim is a minor or an adult.

C. A 20-year mandatory minimum has been added to 18 U.S.C. § 1201(g), the kidnapping statute for offenses involving minor victims. The minimum appears to apply even to first offenders, but does not apply if the defendant was a relative or legal guardian of the victim.

D. 18 U.S.C. § 3559 has been amended to add a new "two strikes" provision which carries a mandatory life sentence for the second conviction of a "federal sex offense" involving a minor victim.

E. 18 U.S.C. § 3283 has been amended to provide that no statute of limitations applies to the prosecution of an offense

involving the sexual or physical abuse, or kidnapping, of a child under 18 years, for the duration of that child's life.

F. The act directs the Attorney General to appoint 25 prosecutors whose "primary focus" will be the investigation and prosecution of federal child pornography and obscenity laws. The Attorney General will be required to report to the House and Senate Judiciary Committees on his enforcement actions.

G. The act adds § 2252B to Title 18, which prohibits using misleading domain names on the internet with intent to deceive a person into viewing obscene material or a minor into viewing material harmful to minors.

H. The act adds § 25 to Title 18, which enhances penalties for using minors in crimes of violence. For the first conviction, the statutory maximum penalty and the maximum fine is doubled. For subsequent convictions, the statutory maximum penalty and the maximum fine is tripled.

Special thanks to Felicia Sarner from the Eastern District of Pennsylvania for this cogent synopsis.

UNITED STATES SENTENCING COMMISSION WEB SITE

The Federal Sentencing Guidelines Manual, including recent amendments, is available at the United States Sentencing Commission's web site. It may be found at www.ussc.gov under "Publications." The web site is user friendly, and it allows easy access to pertinent sections of the guidelines, commentary and application notes. Many

clients ask for copies of the guidelines that apply to their cases, and the site provides easy access/printing for these needs.

DRUG TRAFFICKING CONSPIRACY DEFENSE PRIMER

The Defender Services Training Branch has re-instituted its regular newsletter publications at www.fd.org. Under "Recent Publications" you will find a defense primer for drug trafficking conspiracy cases called "Drug Trafficking Conspiracies: The Best Defense Is An Aggressive Offense." Part I is found in the Summer 2000 edition. Part II is found in the Winter 2003 edition. The primer outlines defense strategies in a federal drug case, from discovery, through pre-trial and trial, and sentencing.

REVERSIBLE ERRORS - 2003

Alex Bunin, the Federal Public Defender for the Northern District of New York and the District of Vermont, has issued his Reversible Errors 2003 Edition. The publication is over 50 pages in length, and provides case citations and descriptive bullets of all courts of appeals criminal cases that were remanded because of reversible error. The case listing has subject-matter headings and is a great research tool.

There are over 180 Criminal Justice Act panel attorneys here in the Northern District of West Virginia, and it would be cost prohibitive to copy and mail this edition to everyone. However, the Federal Public Defender Office will e-mail the publication as a PDF. attachment to anyone with an interest. Please call (304) 622-3823; provide your e-mail address; and the Reversible Errors 2003 Edition will be forwarded.

FOURTH CIRCUIT ROUND-UP

The following listing includes recent published cases from the Fourth Circuit Court of Appeals:

United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003).

- Panel decides that post-Daubert Fourth Circuit precedent precludes panel from lifting per se exclusion of polygraph test results at trial; en banc ruling necessary to address whether Daubert effectively overturns this per se exclusion.

United States v. Newsome, 322 F.3d 328 (4th Cir. 2003).

- In a multi-defendant conspiracy, the Court distinguishes between the relevant conduct analysis used to determine “loss,” and the analysis used to determine restitution due following convictions for conspiracy to steal government property.

United States v. Thorton, 325 F.3d 189 (4th Cir. 2003).

- Court addresses circuit split issue: Whether the New York v. Belton search of passenger compartment of a vehicle incident to arrest doctrine applies when the defendant has already exited the vehicle before the police contact is initiated?

- Court will employ the Belton doctrine when it can be established that there was close proximity, both temporally and spatially, between defendant and vehicle at time of stop and arrest.

United States v. Murphy, 326 F.3d 501 (4th Cir. 2003).

- Multiple outbursts and use of profanity against the district court in a brief, continuous tirade constitute only a single

contempt of court offense under 18 U.S.C. § 401.

United States v. Williams, 326 F.3d 535 (4th Cir. 2003).

- Court provides detailed analysis of Armed Career Criminal definition of “serious drug offense” under 18 U.S.C. § 924(e), and finds that New Jersey convictions for possession with intent to distribute cocaine/heroin, and possession with intent to distribute heroin within 1000 feet of a school, are not predicate convictions exposing felon in possession of firearm to Armed Career Criminal status.

United States v. Jennings, 323 F.3d 263 (4th Cir. 2003).

- Court addresses whether a person convicted of a misdemeanor crime of domestic violence under South Carolina law, but never stripped of his civil rights under state law, is subject to prosecution for possessing a firearm under 18 U.S.C. § 922(g)(9).

- Defendant argued his civil rights, although never taken away, were technically “restored” under 18 U.S.C. § 921(a)(33)(B)(ii).

- Court holds that literal application of statutory exception to liability does not apply; defendant whose civil rights were never revoked or restored cannot take advantage of the restoration exception found in statute.

United States v. Crisp, 324 F.3d 261 (4th Cir. 2003).

- Court finds under Daubert that fingerprint analysis and handwriting analysis are sufficiently reliable to allow admissibility at trial.

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CJA PANEL ATTORNEY MANAGEMENT ISSUES

By separate mailing, those attorneys who comprise the CJA Panel here in the Northern District of West Virginia were advised that an Amended Criminal Justice Act Plan recently took effect. The amended plan, in its entirety, may be found on the district court's web site at www.wvnd.uscourts.gov under the "Federal Public Defender/CJA" section. Starting this month, the Defender Office will take over CJA panel management responsibilities previously handled by the Clerk's Office at each point of holding court.

In large part, management of the panel will continue as it had before the transition. Upon notification from the Court that a defendant qualifies for court-appointed counsel, and the Defender Office determines it cannot take a case due to a conflict of interest or case management decision, attorneys will be selected on a rotational basis from four updated lists maintained for court cases at Clarksburg, Elkins, Wheeling and Martinsburg.

Upon confirmation that a particular CJA attorney can take the case, the Court will issue an appointment order. The Defender Office will then provide the attorney with copies of the appointment order; a CJA 20 form; time and expense itemization sheets; the charging document; any government motions filed to date; notification of the next court appearance; and a package explaining CJA policies.

At the conclusion of the case, the panel attorney should submit the CJA 20 voucher, along with the time/expense itemization sheets, directly to the Federal Defender Office at P.O. Box 1720, Clarksburg, WV 26301. Pursuant to the amended plan, the Defender Office will review the form for accuracy before forwarding the materials to the Court for approval. Following Court approval, the payment process will be handled by the Clerk's Office in Elkins.

Please call (304) 622-3823 if you have any questions about the manner in which these new procedures will be implemented.

CJA PANEL REPRESENTATIVE NAMED FOR NORTHERN DISTRICT OF WEST VIRGINIA

The Defender Services Division of the Administrative Office of U.S. Courts recently appointed Jay T. McCamic of Wheeling to a three-year term as this district's CJA Panel Representative. The appointment was more a formality since Jay was already actively involved in the responsibilities normally associated with Resource Counsel, a position he previously held. The CJA Panel Representative acts as a liaison between the Defender Office and CJA attorneys, provides support and contact information as needed, attends national functions as the local representative, and has access to various training opportunities. Jay can be reached at (304) 232-3548, and we wish him the very best.

DEPARTMENT OF JUSTICE GUIDANCE ON SENTENCING RECOMMENDATIONS AND APPEALS

In the June edition of the *Quarterly*, the Feeney Amendments to the Federal Sentencing Guidelines were outlined. These amendments took effect April 30, 2003, and greatly curtail the Court's ability to depart downward in a number of instances. In July, DOJ issued a directive to all local federal prosecutors that outlines policies and procedures for implementing the Feeney Amendments. The policy statement can be found on the Defender Services Division Training Branch web site at www.fd.org under its "What's New" section. The policy outlines the opposition and reporting requirements for downward departures. In addition, the policy provides background on those situations where the government must appeal a Court's decision to depart downward from the Federal Sentencing Guidelines. Two of the more onerous provisions of the Feeney Amendment include a government motion for the third level reduction for acceptance of responsibility, and a *de novo* standard of review for sentencing guidelines appeals.

POTENTIAL DANGERS WHEN PROVIDING HARD COPY DISCOVERY TO CRIMINAL DEFENDANTS

As defense attorneys, we are always receptive to those federal prosecutors who provide complete discovery much earlier in a criminal case than the local rules might allow. This includes not only Rule 16 materials, but also Jencks materials; Giglio materials; and grand jury transcripts. Receipt and review of these materials very

early in the case allows for a realistic assessment of the most inculpatory information already in the hands of the government. It makes it much easier to advise a client as to viable options, trial or plea, and potential exposure under the Federal Sentencing Guidelines.

However, there have been recent instances here in the district where criminal defendants have received hard copy discovery and then circulated it to others. At least one federal prosecutor is considering obstruction of justice and threatening charges where discovery materials were circulated in the community and individuals were then allegedly threatened.

All of us deal with this issue on a regular basis. Each of us must decide the best way to proceed. Some attorneys will review discovery in the client's presence, but not provide actual copies of the materials. Others will provide copies of discovery to a defendant so that he or she has ample time to review the materials. This is especially true where a defendant is detained at a remote location and it makes the scheduling of attorney-client sessions much more difficult.

At the very least, defendants should be warned about potential dangers that might arise if discovery materials are disseminated to third parties not associated with the case. The § 3E1.1 reduction for acceptance of responsibility is at issue. The Court can consider a § 3C1.1 obstruction enhancement. And, separate criminal charges are possible if warranted by the alleged misconduct.

Now might be the time to initiate a dialogue with the prosecutors to insure a timely free-flow of discovery materials, while addressing valid concerns relating to the misuse of these same materials.

FOURTH CIRCUIT ROUND-UP

Elliott v. United States, 332 F.3d 753 (4th Cir. 2003).

- Forged endorsement on check, as opposed to check drawn on account with insufficient funds, constitutes a “false statement” to a financial institution under 18 U.S.C. §1014.
- No requirement that government prove financial institution suffered risk of financial loss, as required under §1344 bank fraud, as long as false statement was made for purpose of influencing bank’s action.
- District court abused its discretion in awarding four-level downward departure for extraordinary family responsibilities as record supported strong family and community network support.

United States v. Brower, 336 F.3d 274 (4th Cir. 2003).

- In prosecution for distribution of over 50 grams of cocaine base, defendant argued that Apprendi required jury instruction that he knew he was distributing that specific controlled substance in the amount alleged; Court holds that Apprendi does not change mens rea requirement, and government need not prove defendant knew specific amount or specific type of drug involved.

United States v. Pasquantino, 336 F.3d 321 (4th Cir. 2003).

- En banc ruling overturns panel decision that barred wire fraud prosecution under common law revenue rule, where Canadian government allegedly suffered tax loss through scheme to defraud.

United States v. Abuagla, 336 F.3d 277 (4th Cir. 2003).

- Materiality is not an element of crime of making false statement under oath in a naturalization proceeding, under 18 U.S.C. §1015(a), where defendant misstated his arrest record on application for naturalization.

United States v. James, 337 F.3d 387 (4th Cir. 2003).

- Failure to stop for blue light under South Carolina code constitutes “violent felony” for armed career criminal status under 18 U.S.C. § 924(e).

United States v. Blount, 337 F.3d 404 (4th Cir. 2003).

- At issue was whether U.S.S.G. §2K2.1(b)(5) requires a four-level enhancement for possessing firearm in connection with a felony where defendant acquires firearm during burglary, but does not use firearm or evince willingness to do so; Court finds possession of weapon was during “another felony offense,” but was not “in connection with” the offense; firearm must facilitate or have a tendency to facilitate the other offense for enhancement to apply.

United States v. Jarrett, 338 F.3d 339 (4th Cir. 339).

- Information provided to government by private citizen computer hacker can support search warrant application; in order to establish agency relationship between citizen and police, must show that government knew of and acquiesced in private search,

and private citizen intended to assist law enforcement.

United States v. Leftnant, 341 F.3d 338 (4th Cir. 2003).

- Six separate counts of possessing counterfeit obligations, in violation of 18 U.S.C. § 472, were multiplicitous where defendant was found in possession of counterfeit bills with six separate serial numbers at same time and location.

United States v. Williams, 2003 WL 22038949 4th Cir. (S.C.) 8/29/03.

- Robbery of \$1000 from drug dealer satisfies jurisdictional requirement for Hobbs Act prosecution that criminal act affected interstate commerce.

United States v. Midgett, 2003 WL 22070490 4th Cir. (N.C.) 9/14/03.

- Information known by defense counsel was insufficient to show defendant's trial testimony would be perjurious; district court erred when forcing defendant to choose between testifying and retaining counsel; weak third-person defense, although lacking corroboration, does not rise to level of perjury as found in Nix v. Whiteside.

United States v. Curbelo, 2003 WL 22100675 4th Cir. (N.C.) 9/11/03.

- District court's dismissal of juror mid-trial without defendant's consent constitutes structural error, and error invalidates the conviction without need of prejudice; also, government failed to show harmless error; Court never reaches question of whether error is of a constitutional dimension.

Unpublished Opinions:

United States v. Allen, 65 Fed. Appx. 476, 2003 WL 21259905 (4th Cir. (W.Wa.)).

- Defendant pleaded guilty to four counts of 42-count indictment, alleging, inter alia, that he participated in a conspiracy to possess with intent to distribute more than 50 grams of cocaine base (requiring mandatory minimum sentence of 10 years).

- Drug amount alleged in indictment pursuant to Apprendi normally applies to quantity of drugs attributable to conspiracy as a whole.

- Even though defendant pleads guilty to the conspiracy count, he may still challenge his individual responsibility for the drug amount attributable to him at sentencing under the guidelines.

- District court did not err in its determination of the quantity attributable to defendant for sentencing purposes.

_____ The Allen holding might be useful in those very difficult situations where a defendant pleads guilty to all counts contained in a drug trafficking indictment, without a plea agreement that normally contains a stipulation concerning relevant conduct.

Defendant will still face mandatory minimum sentence required by statute, unless "safety valve" exception applies. However, defendant may still be eligible for two-level reduction for acceptance of responsibility (third level now requires government motion), and defendant at least has opportunity to convince Court that individual responsibility for relevant conduct purposes is far less than drug amount claimed by government.