

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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UPCOMING TRAINING OPPORTUNITIES IN 2004

The Defender Services Division of the Administrative Office of U.S. Courts will sponsor several Criminal Justice Act seminars and workshops in 2004. These sessions are free to all CJA Panel Attorneys and include:

Sentencing Advocacy Workshop

San Antonio, Texas, 3/11 - 3/13

This program presents a comprehensive approach to sentencing advocacy within the confines of the Federal Sentencing Guidelines.

Winning Strategies 2004

Santa Fe, New Mexico, 4/22 - 4/24

Boston, Massachusetts, 5/20 - 5/22

Memphis, Tennessee, 7/29 - 7/31

The Winning Strategies seminars this year will concentrate on statement cases, and topics include: 5th Amendment case law and suppression motions, statement issues in multi-defendant cases, the role of culture in confessions, mental health issues, as well as more general topics such as Guidelines amendments and Supreme Court updates.

Trial Advocacy Workshop

Williamsburg, Virginia, 6/24 - 6/26

This workshop will focus on the use of courtroom technology, such as Trial Director and Power Point presentation.

Immigration Crimes Seminar

San Diego, California, 8/26 - 8/28

This seminar is intended to be a comprehensive training on effective advocacy in the defense of clients charged with immigration offenses.

Tuition and programs materials are free to all CJA Panel Attorneys. Enrollment is limited. If interested, please contact the Federal Public Defender for Northern West Virginia at (304) 622-3823 for application forms and further information.

FEDERAL DEATH PENALTY DEFENSE TRAINING

A four-day "Life in the Balance" training program will be offered in Memphis, Tennessee, March 13 -16, 2004. This seminar will focus on the training needs of counsel who have not tried a capital case or who are new to the federal death penalty. There will be 4-5 breakout sessions focusing specifically on the federal death penalty. Scholarships are offered to CJA Panel Attorneys.

By statute, 18 U.S.C. § 3005, a capital defendant is allowed two counsel, one of which "shall be learned in the law applicable to capital cases." This "Life in the Balance" training program is a great first step for those attorneys who wish to participate in death penalty litigation. Call the Federal Defender Office at (304) 622- 3823 for further details.

DEATH PENALTY DEFENSE INTERNET ASSISTANCE

An excellent resource for death penalty defense issues is available at the web site maintained by the Capital Defense Network at www.capdefent.org. The site is regularly updated by resource counsel with new information that can be found under the “What’s New” section

FEDERAL DEATH PENALTY FACTS

Since 1988, the federal government has taken to trial a total of 82 federal death penalty cases involving 124 defendants in 94 trials. These 124 defendants were culled from a pool of 305 against whom the Attorney General had authorized the government to seek the death penalty.

The majority of these 305 defendants avoided trial by negotiated guilty plea, or when the government dropped its request for the death penalty, or dismissed the charges entirely. Eight were found not guilty of the capital charge. Two were declared innocent. One was granted clemency. There have been three executions. Juries or judges have rejected the death penalty 61 times and voted for death 33 times.

AMENDMENT TO FEDERAL EVIDENCE RULE 608(b)

Effective 12/1/03, Rule 608(b) of the Federal Rules of Evidence was amended. The deleted text of the old rule is in [brackets]; the new text is underlined:

(b) Specific instances of conduct. – Specific instances of the conduct of a witness, for the purpose of attacking or

supporting the witness’ [credibility] character for truthfulness, other than conviction of crime, may not be proved by extrinsic evidence.

The Committee Notes explain that the change was made to make it clear that the absolute bar on extrinsic evidence “applies only when the sole reason for proffering that evidence is to attack or support the witness’ character for truthfulness.” According to the Committee, “the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. The apparent intent of the amendment is to circumscribe an overinclusive interpretation of “credibility.”

NEW MILEAGE REIMBURSEMENT RATE FOR CASE RELATED TRAVEL

Federal Travel Regulations were recently amended. Effective January 1, 2004, CJA Panel Attorneys are authorized 37.5 cents per mile for all case related travel. The travel rate for case related mileage before 1/1/04 remains at .36 cents per mile. Please note this change when submitting CJA payment vouchers.

MY LITTLE RED RULES BOOK

An updated version of the My Little Red Rules Book is available from the Federal Defender Office of Eastern Washington and Idaho. This pocket-sized, soft-bound booklet contains selected provisions from the U.S. Constitution; the Federal Rules of Evidence with Annotations; selected Federal Rules of Criminal Procedure; the federal bail and Jencks act provisions; and a Drug

Quantity and Sentencing Table. Booklets cost \$5.50 each. Please send a check to the Federal Defender Office for Eastern Washington, 10 North Post #700, Spokane, WA 99201

DOCUMENTING DEFENDANT'S DECISION NOT TO FILE AN APPEAL

A majority of the federal criminal case dispositions in this district include a plea agreement containing an appeal rights waiver provision. The waiver addresses both direct appeal rights and collateral review pursuant to 28 U.S.C. § 2255. In these cases, defendant and counsel execute the plea agreement, it is ultimately accepted by the court, and sentencing takes place. Pursuant to the waiver provision, no criminal appeal is ever filed.

However, it is now becoming somewhat common for defendants to file an ineffective assistance of counsel claim months later. The defendant will allege that he asked his attorney to file notice of appeal, and that request was never acted upon. Usually these petitions are drafted by other inmates somewhat familiar with the law. In particular, the Fourth Circuit has held that trial counsel's failure to file notice of appeal when requested constitutes ineffective assistance of counsel, and requires a district court to grant the § 2255 motion so as to allow a criminal defendant to take a direct appeal. United States v. Peak, 992 F.2d 39 (4th Cir. 1992). Moreover, a defendant's allegations, standing alone, will often require an evidentiary hearing because a credibility issue exists – essentially a swearing match between defendant and trial counsel over whether an appeal was ever requested. There were two such proceedings

here in the district in the last month.

Any practitioner wishing to avoid the prospect of testifying at such a hearing in the future should at least consider the use of documentary evidence to confirm a defendant's decision not to appeal. This documentation should be produced *after* sentencing, but within 10 days of entry of the written judgment. This can include a letter to the inmate explaining the right to appeal; the rights waiver provision of the plea; an assessment that no non-frivolous issues exist for an appeal; and a recommendation that no appeal be filed. The letter would normally close by requesting that the client contact the attorney by mail or phone before a date certain, otherwise, it would be understood that all appeal rights are waived. Other documentation can include a signed declaration from the defendant, stating that appeal rights were discussed *after* sentencing, and defendant agrees that no appeal notice need be filed.

Courts have held that a district court need not hold an evidentiary hearing in a § 2255 case when the issue of the prisoner's credibility can be conclusively decided on the basis of documentary testimony. Frazer v. United States, 18 F.3d 778 (9th Cir. 1994). Documenting a defendant's post-sentence decision not to pursue an appeal is a simple clerical task that might be used to avoid future litigation.

PRETRIAL RELEASE AND THE MEANING OF "COMMUNITY TIES"

Title 18 U.S.C. § 3142(g) outlines the criteria used by the Court when deciding whether to release or detain a defendant

during the pendency of a federal criminal case. These criteria include “length of residence in the community” and “community ties.”

An important consideration under §3142 is whether “community” means only within the charging district, i.e. the Northern District of West Virginia, or any other “community” within these United States. Support for the latter interpretation can be found in United States v. Dominguez, 783 F.2d 702 (7th Cir. 1986); United States v. Himler, 797 F.2d 156 (3rd Cir. 1986); and United States v. Townsend, 897 F.2d 989 (9th Cir. 1990).

In those cases where the defendant has strong ties to a community outside this district, and defendant can be successfully monitored by another jurisdiction’s United States Probation Office, the Court may be receptive to this more expansive interpretation of “community.”

FOURTH CIRCUIT ROUND-UP

United States v. Stockton, 349 F.3d 755 (4th Cir. 2003).

- Court uses de novo standard of review to overturn district court decision to depart downward from Sentencing Guidelines.
- In footnote 4, the Court addresses whether the Ex Post Facto Clause precludes use of the PROTECT Act amendments which require de novo review of certain departure decisions.
- Court holds that application of de novo standard of review pursuant to §402(d) of PROTECT Act does not implicate Ex Post Facto Clause because change in standard of review merely changes who within the

federal judiciary makes a particular decision, not the legal standards for that decision.

United States v. Pratt, 351 F.3d 151 (4th Cir. 2003).

- Court finds F.R.C.P. Rule 43 violation exists where case agent enters jury deliberation room, over objection, to cue up audio tape without defendant or his counsel present; majority finds harmless error; dissent finds government failed to prove harmlessness beyond a reasonable doubt.

United States v. Higgs, 2003WL22992273, 4th Cir. (Md.), 12/12/03.

- Extending the Supreme Court’s holdings in Apprendi and Ring, Court holds that death penalty indictment must allege statutory intent factor found in 18 U.S.C. § 3591(a)(2), and at least one statutory aggravating factor, 18 U.S.C. § 3592(c).
- Assuming indictment defective, Court does not find such error “structural,” therefore, harmless error review possible.

Unpublished:

United States v. Fitzgerald, 80 Fed.Appx. 857 (4th Cir. 2003).

- Court provides detailed Daubert analysis and upholds district court order excluding government expert testimony about the patterns of typical child molesters.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. II, NO. 2

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GUIDELINE AMENDMENTS IN RESPONSE TO PROTECT ACT

The PROTECT Act included a directive that the Sentencing Commission promulgate new amendments that would reduce the frequency in which courts depart below the sentencing guidelines. In response, the Commission implemented an amendment affecting several guideline departure provisions and it was effective October 27, 2003.

The amendment prohibits several grounds for departure, including (1) the defendant's acceptance of responsibility; (2) defendant's mitigating role in the offense; (3) defendant's decision to plead guilty or enter into a plea agreement; (4) defendant's payment of restitution; (5) and defendant's gambling addiction. The amendment also prohibits armed career criminals and sex offenders from being considered for downward departure, and it limits the extent of a §4A1.3 departure for career offenders. In addition, the amendment imposes increased restrictions on departures for aberrant behavior, family ties and responsibilities, victim's conduct, coercion and duress, and diminished capacity.

Findings provided by the Commission call into question the need for such changes. A vast majority of downward departures across the country in the last ten years were either initiated by the government, or used in "fast track" immigration cases.

Both the new amendment and the

Commission's report can be found on its web site at www.ussc.gov.

ASHCROFT MEMORANDUM AND ITS EFFECT ON PLEA NEGOTIATIONS

This edition of the *Quarterly* includes an attached verbatim copy of a Department of Justice policy statement issued several months ago by United States Attorney General John Ashcroft. Known affectionately as the "Ashcroft Memorandum," it contains a detailed directive that essentially guts independent charging decisions made by each United States Attorney in his or her respective district. The memorandum in part requires pleas to the most serious, readily provable offense, demands that an §851 information be filed to double statutory enhancements in drug prosecutions, and limits dismissal of a §924(c) firearm count that carries a mandatory minimum consecutive sentence.

Implementation of the Ashcroft Memorandum in this district will make federal plea negotiations more difficult, and it will likely result in an increase in the number of jury trials as guideline ranges are trumped by more lengthy statutory penalties.

However, the memorandum is certainly subject to interpretation. Specific sections can and should be used to a defendant's advantage when negotiating with a federal prosecutor. One need not accept a general reference to the Ashcroft Memorandum if used to curtail meaningful plea negotiations.

ELECTRONIC COURT FILING AND PRACTICE UNDER THE CRIMINAL JUSTICE ACT

The United States District Court for the Northern District of West Virginia is scheduled to implement its Case Management/Electronic Court Filing (CM/ECF) system in the Fall of 2004. CM/ECF is an Internet-based document filing system. All pleadings and court filings normally submitted and received as "hard copy" will soon be immediately available via the Internet in a portable document format (PDF). The Clerk's Office will provide a log-in and password to each attorney using the system. Training sessions will be available.

In a federal criminal case, one can expect to submit and receive charging documents, pleadings, motions, memoranda, voir dire questions, jury instructions, and orders via the CM/ECF system.

More information will become available through the Clerk's Office as the CM/ECF system nears its operational date. However, any CJA Panel Attorney utilizing the CM/ECF system will need to acquire the following equipment and software: a Pentium PC with at least 64 MB RAM; Windows 95; Internet Explorer; Internet access (broadband recommended) with e-mail address; Adobe Acrobat Reader and Writer Programs; and a Scanner.

2004 EDITION OF ERRORES JURIS

Alex Bunin, the Federal Public Defender for the Northern District of New York and the District of Vermont, recently issued his 2004 Edition of Errores Juris (previously entitled "Reversible Errors"). The publication is well over 50 pages in

length, and provides case citations and descriptive bullets of all courts of appeals criminal cases across the country that were remanded because of reversible error. The case listing has subject matter headings and is a great research tool.

There are over 180 CJA 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 or WordPerfect attachment to anyone with an interest. Please call (304) 622-3823; provide your e-mail address; and the Errores Juris 2004 Edition will be forwarded.

NEW CJA PANEL ATTORNEY LISTSERVE E-MAIL SYSTEM

After almost eighteen months of occupying temporary space inside the federal courthouse in Clarksburg, the Federal Public Defender Office will finally be moving to permanent office space. The Federal Defender will operate from the third floor of the Huntington Bank Building located on West Pike Street in Clarksburg. This new and additional space will allow the Defender Office to operate a Listserve e-mail system for CJA Panel Attorneys and others active in the Northern West Virginia federal criminal defense bar.

A Listserve is an unmoderated, membership restricted, e-mail forum for a limited audience. In this case, the Listserve will be available to only those federal criminal defense attorneys who practice here in Northern West Virginia. Such restriction will allow for more robust and candid communications while, at the same time, protecting defense-based materials.

Participants can seek and share information, obtain copies of pleadings and other work product, and receive updated information relating to federal criminal practice and procedure.

Over the course of the next several weeks, the Federal Public Defender Office will be contacting each CJA Panel Attorney to confirm e-mail addresses and interest in participating in Listserve access.

LENGTH OF SUPERVISED RELEASE TERM IN §841(b)(1)(C) DRUG PROSECUTIONS

Defense counsel should be aware of a published Fourth Circuit opinion that addresses the amount of time that a defendant can be placed on supervised release following conviction and sentence for violating 21 U.S.C. §841(b)(1)(C) – a twenty year count drug trafficking count.

In *United States v. Pratt*, 239 F.3d 640 (4th Cir. 2001), the Fourth Circuit compared the “impose a term of supervised release of at least 3 years” language of §841(b)(1)(C) with that portion of 18 U.S.C. §3583(b)(2) which states that “except as otherwise provided, the authorized term[] of supervised release . . . for a Class C . . . felony [is] not more than three years.”

The *Pratt* Court found §3583's three-year maximum term of supervised release would render superfluous §841(b)(1)(C)'s use of the words “at least three years.” The Court in *Pratt* recognized that its holding could result in an §841(b)(1)(C) defendant receiving a term of supervised release of up to life.

Because of *Pratt*, counsel should be prepared to argue why 3 years is a sufficient amount of time for a defendant to abide by conditions of supervised release.

THIRD LEVEL ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY

One fallout from the recent Feeney Amendments to the Sentencing Guidelines includes a revision to U.S.S.G. §3E1.1. Now the Court must receive a government motion before providing a third level downward adjustment for acceptance of responsibility.

According to § 3E1.1, the government's motion for the third level reduction for acceptance of responsibility must state that “the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently . . .”

Implementation of the recent amendment to §3E1.1 has spawned allegations of government abuse. In some districts, no §3E1.1 motion is made by the government where a defendant litigates pre-trial motions, such a motion to suppress evidence or statements. There was at least one instance where the federal prosecutor intended to withhold the §3E1.1 motion unless defendant agreed to a plea agreement along with an information, rather than require the case be presented to a grand jury for indictment. Such practices undercut the language of § 3E1.1 which is concerned with the time and effort expended in *trial* preparation.

Several Federal Defender Offices have briefed the issue and provided sample memoranda. This work product is available should any attorney experience this practice.

FOURTH CIRCUIT ROUND-UP

United States v. Walters, 359 F.3d 340 (4th Cir. 2004).

- Virginia juvenile adjudications are not “convictions” within the meaning of §922(g)(1), being a felon in possession of a firearm.
- Court utilizes state law interpretation to decide issue.
- Holding may be helpful here in West Virginia where WV Code §49-7-3 states “nor shall any child be deemed a criminal by reason of such adjudication.”

United States v. Pressley, 359 F.3d 347 (4th Cir. 2004).

- Third felony that took place after act that led to federal firearms prosecution could not be used as predicate conviction for Armed Career Criminal status.
- Predicate offenses triggering ACC sentence must be committed before the federal offense.

United States v. Smith, 359 F.3d 662 (4th Cir. 2004).

- Larceny from the person of another is crime of violence for career offender guideline.
- Court considers elements of offense under state law (Virginia).

United States v. Mayo, 361 F.3d 802 (4th Cir. 2004).

- Court overturns suppression order, finding that police had *Terry* grounds to stop and frisk defendant.
- Defendant walking in high crime area, and

placed hand in pocket once police arrived; pocket appeared to contain something heavy; and defendant acted in evasive and suspicious manner.

United States v. Reevey, ___ F.3d ___, 2004 WL 737365 (4th Cir.(Md.)), 4/7/04.

- Two level sentencing enhancement under U.S.S.G. §2B1.3 for a threat of death during car jacking (defendant threatened to shoot victim) constitutes impermissible double counting where defendant also convicted of §924(c) – possession of firearm during crime of violence.

(Unpublished)

United States v. Lesczynski, 86 Fed. Appx. 551, 2004 WL 144132 (4th Cir. (Va.)), 1/28/04.

- Court overturns two level obstruction of justice enhancement under U.S.S.G. §3C1.1 where defense witness arguably testified falsely at trial.
- Any obstruction increase requires finding that defendant induced or procured false testimony, and no such evidence exists on this record.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. II, NO. 3

JULY 2004

NEW FEDERAL PUBLIC DEFENDER OFFICE AND ADDRESS

After 18 months operating from the basement of the federal courthouse in Clarksburg, the Federal Public Defender Office recently moved to permanent space at:

Office of the Federal Public Defender
The Huntington Bank Building
230 West Pike Street, Suite 360
Clarksburg, West Virginia 26302
Telephone No. (304) 623-3823
Facsimile No. (304) 622-463

Please forward all correspondence, including CJA vouchers, to the above-listed mailing address and discontinue use of our old P.O. Box address.

This additional space allowed us to set up a well-stocked criminal law library and free computer assisted legal research (Westlaw) is available to any CJA Panel attorney defending an appointed case. Stop by to see the new place if you have a chance.

BLAKELY V. WASHINGTON AND ITS LOGICAL EXTENSION TO THE FEDERAL SENTENCING GUIDELINES

Recently, the Supreme Court issued an opinion that may drastically change federal criminal practice. The case is Blakely v. Washington, 2004 WL 1402697 (June 24, 2004). Although the case dealt

with the sentencing scheme used by the State of Washington, the Court expressly extended the reasoning of Apprendi to all facts that require an increased sentence in any manner. According to the Court, the relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in a jury verdict or admitted by the defendant at a guilty plea hearing. Factors that can increase a defendant's sentence must now be included in the charging document and proven by a jury beyond a reasonable doubt at trial unless defendant admits to such facts at a plea hearing. Many of the Justices note that the Federal Sentencing Guidelines, similar to the Washington's sentencing scheme, may be subject to the same attack.

An extension of Blakely to sentencing under the Federal Sentencing Guidelines will necessitate major changes. All Chapter 2, 3 and 5 enhancements previously decided by the court at a sentencing hearing by a preponderance of the evidence standard may now need to be presented to a grand jury, included in the indictment, and proven by a jury at trial beyond a reasonable doubt, unless expressly admitted to by a defendant at a Rule 11 guilty plea hearing. This can include drug quantities used as relevant conduct.

The Blakely decision has thrown federal sentencing practices into confusion. In a case from Utah, United States v. Brent Crawford, the district court found the Federal Sentencing Guidelines were

unconstitutional and the court imposed a sentence using only the statutory factors found under 18 U.S.C. Sec. 3553. The sentence imposed was only 3-months shy of the low-end 151-month sentence defendant faced under the guidelines. In a case from the Southern District of West Virginia, the court in United States v. Ronald Shamblin, corrected defendant's 240 month sentence for conspiracy to distribute methamphetamine, and re-sentenced based on only those facts admitted by defendant at his earlier guilty plea. Because no drug weights were admitted to by defendant at the plea hearing, the court reduced the sentence to 12-months in prison.

Included as an attachment to this edition of the *Quarterly* you will find a Department of Justice memorandum issued July 2, 2004. It offers all federal prosecutors the Department's legal position and policies in light of Blakely. Please read the memorandum and expect its implementation in your pending federal criminal cases. While DOJ claims Blakely does not apply to the Federal Sentencing Guidelines, it asks that federal prosecutors tailor charging practices. Indictments must include all provable guideline enhancements, and plea agreements should include Blakely waivers.

There are no easy answers given the uncertainty generated by Blakely. Defense attorneys should assume that all constitutional protections outlined in Blakely will apply in a federal criminal case. And, the unique procedural posture of a pending criminal case must be now considered. How does Blakely apply to a defendant who already executed a plea agreement and is awaiting sentencing, or a defendant who went to trial and is awaiting

sentencing after a jury made only limited findings by a general verdict? Is supplemental briefing required/allowed in cases pending on direct appeal? And finally, will the Blakely protections be deemed "such a watershed rule of criminal procedure that alters bedrock principles and seriously enhances the accuracy of proceedings," such that it should apply retroactively for purposes of collateral review? On July 9, 2004, the 11th Circuit held in In Re: Dean that Blakely cannot apply retroactively until the Supreme Court expressly orders such application.

This Defender Office will maintain a hard-copy and electronic file of all pleadings it prepares or that were prepared by other Defender Offices, as well as court opinions that issue, extending the Blakely protections to federal criminal cases. Please call (304) 622-3823 if you have any questions relating to Blakely or wish to access these files.

EARLY RELEASE ELIGIBILITY UNDER THE BOP'S INTENSIVE DRUG TREATMENT PROGRAM AND THE BOOT CAMP PROGRAM

Many federal criminal defendants request information on the Bureau of Prison's 500-hour drug treatment program which includes, as a completion incentive, up to a 12-month reduction to a federal sentence. Most defendants can participate in the program if they have a documented substance abuse problem and received a sufficient sentence within which to complete the program. However, not every defendant is eligible for early release. The early release criteria may be found in Chapter 6 of the Inmate Drug Abuse Program Manual under "FOIA/Publications" on the BOP's

website at www.bop.gov

A federal inmate is not eligible for early release upon completion of the intensive drug treatment program if any of the following factors are found by the BOP: 1) is an INS detainee; 2) is a pre-trial inmate; 3) is serving as a contractual boarder from another state, D.C., or a military system; 4) the inmate has a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, or child sexual abuse [use the PRS to screen your client's eligibility]; 5) the current offense is a crime of violence [BOP uses a very broad interpretation of this term], it involved use/possession of a firearm [such as a 2D1.1(b)(1) enhancement or a 922(g) conviction], or 6) the current offense involved a sexual abuse offense upon children.

The BOP's eligibility criteria for participation in the Boot Camp Program is slightly different, and a successful completion of that program will result in a lesser sentence and immediate placement to a half-way house or home confinement setting. See the Intensive Confinement Center Program policy statement under the same section of the BOP's website. An inmate must be 1) serving a sentence of more than 12 months but less than 30, or serving a sentence of more than 30 months, but less than 60 months, and is within 24 months of projected release; 2) serving the first period of incarceration or has a minor history of prior incarceration; 3) is not serving a term of imprisonment for a crime of violence or felony offense the involving use/possession of a firearm or the sexual abuse of children; 4) is appropriate for housing at a minimum security facility; and

6) is physically and mentally capable of participating in the program.

Finally, the BOP will consider a defendant for direct placement into the Boot Camp Program if recommended by the district court judge at sentencing. If the recommendation is ultimately approved by BOP, a defendant could remain on bond until the next Boot Camp cycle opens. Further information on this procedure is available by contacting the Mid-Atlantic Regional Office of the BOP. While more Boot Camp Programs may open, at present males must attend the program in Pennsylvania, and women must to go a federal facility in Texas.

NEW ALTERNATIVE TO PRE-TRIAL DETENTION

We constantly hear from our clients how difficult it is to serve pre-trial detention in West Virginia's regional jails. Overcrowding, poor medical care, low quality food, and lack of access to the outdoors (and tobacco?!) are some of the typical complaints.

Recently, the United States Probation Office for this district made arrangements with the BOP so that pre-trial defendants can be housed at the Bannum Place of Clarksburg, a half-way house. This structured setting provides 24 hour supervision and accountability, access to substance abuse counseling and the opportunity for full-time employment. Typically, Bannum Place requires 25% of a resident's wages for room and board.

A request for pre-trial participation at Bannum Place must be made to the Court at

the detention hearing. Any pre-trial participant must have a TB test and physical prior to placement. Time served on pre-trial status at the half-way house is not creditable towards a later federal sentence.

For more information, call United States Probation Officer Jeff Givens at (304) 624-5504.

FOURTH CIRCUIT ROUND-UP

United States v. Johnson, 93 Fed. Appx. 582 (4th Cir. 2004)(unpublished).

- Non-vehicular fleeing from an officer, under West Virginia Code Sec. 61-5-17, should not count toward criminal history under U.S.S.G. Sec. 4A1.2 because the offense is “similar” to the listed offense of hindering or failing to obey the a police officer.

United States v. Hsu, 364 F.3d 192 (4th Cir. 2004).

- Detailed analysis of defense showing required for entrapment instruction.
- Defendant must show both lack of predisposition, and government inducement which must include solicitation plus some overreaching or improper conduct.

United States v. Hatfield, 365 F.3d 332 (4th Cir. 2004).

- Requirement that police knock and announce their presence before forcible home entry does not apply when occupant responds “come in” to officers who simply knocked on door.

United States v. Tigney, 367 F.3d 200 (4th Cir. 2004).

- Both local ordinance and West Virginia misdemeanor for failure to appear in state court do not count toward criminal history under U.S.S.G. Sec. 4A1.2 because offense is “similar” to listed offense of contempt of court [Congratulations to Martinsburg CJA Panel Attorney Barry Beck for his victory].

United States v. Riggs, 370 F.3d 382 (4th Cir. 2004).

- Court overturns district court’s downward departure based on diminished capacity by using *de novo* standard of review.
- Court finds that 922(g) defendant with prior convictions for drug distribution and possession of short-barrel shotgun, who suffered from paranoid schizophrenia unless medicated, was not eligible for departure because “the facts and circumstances of the defendant’s offense indicate a need to protect the public.”
- Court finds defendant can discontinue taking medications, and had done so in past, such that a need to protect the public existed.

United States v. Cross, 371 F.3d 176 (4th Cir. 2004).

- For defendant convicted of using force to intimidate a federal witness in a drug case, U.S.S.G. Sec. 2X3.1 requires sentencing court to use base offense level for the drug-related “underlying offense,” including any increase based on the quantity of the drugs involved, without regard to whether defendant knew or had reason to know of the drug amount involved.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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OCTOBER 2004

CRIMINAL CASE FILINGS AVAILABLE FOR PUBLIC VIEWING ON PACER, EFFECTIVE NOVEMBER 1, 2004, AND SEALED/REDACTED FILING REQUIREMENTS

The United States District Court for the Northern District of West Virginia is readying its implementation of the Case Management/Electronic Court Filing (CM/ECF) system. CM/ECF is an Internet-based document filing system. All pleadings and court filings normally submitted and received in "hard copy" form will soon be immediately available via the Internet in a portable document format (PDF).

The new CM/ECF system will use November 1, 2004 as the effective date when all "hard copy" filings will be available for public viewing through PACER. Unless counsel take affirmative steps to file sensitive materials after this date under seal or through the use a redacted version and reference list (as explained below), all criminal pleadings will be available for public viewing on PACER.

Counsel must take care to insure that sensitive client information that is sometimes included in a criminal pleading is protected. This can include such pleadings as a motion for competency evaluation; applications for subpoenas that list the theory of defense; witness lists that include home addresses; and sentencing memoranda that might list substance abuse history, medical and psychiatric treatment, or other highly personal information, etc.

Prior to November 1, 2004, PACER

access would only list the filing by name; the actual pleading could not be viewed in its entirety through PACER. This will change, effective November 1, 2004. This includes both traditional "hard copy" filings, as well as electronic filings later submitted when the CM/ECF system is in operation.

The district court judges will soon issue a Notice of Electronic Availability of Case File Information. Both the notice and the local rules for CM/ECF will be posted on the Court's internet site at www.wvnd.uscourts.gov

The Notice will outline the sealing and redaction requirements for documents containing sensitive information. First, a party may file an unredacted document under seal. This would usually be done where the sensitive information is in narrative form and it is not conducive to piecemeal redaction. For documents that contain other sensitive information, like social security numbers; names of minor children; dates of birth; financial account information or home addresses, a redacted version can be filed with the Court. For example, the social security number in this public filing would be XXX-XX-1234, including only the last true digits of the number. In addition to this public filing, the party must file a reference list under seal that completely identifies this sensitive information for the Court and opposing counsel. This new process will insure both public access to information as Congress intended and litigants' privacy interests.

CM/ECF REQUIREMENTS

When the Case Management and Electronic Court Filing (CM/ECF) system is finally in full operation, all pleadings that were filed in “hard copy” format must be filed electronically. In a federal criminal case, one can expect to submit and receive charging documents, pleadings, motions, memoranda, voir dire questions, jury instructions, and orders via the CM/ECF system. Participation in the electronic filing system will be mandatory unless counsel is granted leave from the Court in a particular case.

More information will become available through the Clerk’s Office as the CM/ECF system nears its operational date. However, any CJA Panel Attorney utilizing the CM/ECF system will need to acquire the following equipment and software: a Pentium PC with at least 64 MB RAM; Windows 95 or higher; Internet Explorer 6.x; Internet access (broadband recommended) with e-mail address; Adobe Acrobat Reader and Writer Programs; and a Scanner.

BLAKELY UPDATE

Defendants’ briefs were recently submitted to the U.S. Supreme Court from the First Circuit case of United States v. Fanfan and the Seventh Circuit case of United States v. Booker. The U.S. Supreme Court is scheduled to hear oral argument in October and later determine whether the rationale of Blakely v. Washington applies to the Federal Sentencing Guidelines. Blakely held that the relevant “statutory maximum” for Apprendi purposes is the maximum a judge may impose based solely

on the facts reflected in a jury verdict or admitted by the defendant at a guilty plea hearing.

Until the U.S. Supreme Court rules, parties in the Fourth Circuit continue to be bound by United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004). The Fourth Circuit joined a circuit split by holding that Blakely does not render the Federal Sentencing Guidelines unconstitutional. However, given the inherent uncertainties surrounding this issue, the Hammoud opinion directs that district courts impose two different sentences and include each sentence in the written judgment order. One sentence must be under the applicable Federal Sentencing Guidelines; a second sentence must be based on the factors outlined in 18 U.S.C. §3553. The full 59-page *en banc* opinion in Hammoud issued from the Fourth Circuit on September 8, 2004, 2004 WL 2005622.

Pursuant to a directive recently issued by the DOJ, some federal prosecutors here in the district are seeking superseding indictments that include sentencing enhancements based on various sections of the Federal Sentencing Guidelines. This practice may very well be deemed constitutionally required once the Supreme Court rules. However, in the interim, at least one district court has stricken the inclusion of such information from the indictment, United States v. Mutchler, ___ F.Supp. 2d ___, 2004 WL 2004080 (S.D. Iowa).

Copies of the briefs filed in Fanfan and Booker, and the full opinions in Hammoud and Mutchler may be obtained from the Federal Public Defender Office by calling (304) 622-3823.

BOP'S M.I.N.T. PROGRAM

Those representing female clients who are both pregnant and facing federal incarceration should be aware of the Federal Bureau of Prison's Mothers and Infants Nurturing Together (MINT) Program. The BOP contracts with the Greenbrier Birthing Center in Hillsboro, West Virginia for services.

Female federal inmates who might otherwise be housed at FCI Alderson in southern West Virginia are allowed to reside at the birthing center for up to three months before child birth in order to take advantage of better prenatal care. After birth, both mother and child are allowed to remain together at the Greenbrier Birthing Center for 12 to 18 additional months. This program is not available if the expectant mother is considering adoption.

Recommendations for the BOP's MINT Program should be made by the district court at sentencing and included in the written judgment order.

2004 WINNING TRIAL STRATEGIES MATERIALS AVAILABLE ON-LINE

The Training Branch of the Office of Defender Services has posted all seminar materials from the 2004 Winning Trial Strategies seminars that were held across the country these last several months.

These materials may be found on the Defender Services website at www.fd.org under the "Publications & Materials" section. The postings from this year's seminars include:

- Fifth Amendment Statements.
- Discovery: The Long Journey to Nowhere.
- Litigating False Confession Cases.
- Ethical Issues When a Client's Testimony May be False.
- Prosecutorial Misconduct.
- Representation in Multi-Defendant Cases.
- Guide to Joint Defense Agreements.
- Sample Severance Motions.
- Understanding Affirmative Defenses.
- Methamphetamine Cases and Sentencing Guideline Issues.

The 2005 season of Winning Trial Strategy sessions and other training programs offered to CJA Panel attorneys will be posted in the January 2005 edition of the *Quarterly*.

STAFFED FEDERAL DEFENDER OFFICES UPDATE

Due to GSA construction delays, the staffed Defender Office on the second floor of the U.S. Courthouse in Wheeling, West Virginia will not open until January 14, 2005. Assistant Federal Public Defender L. Richard Walker will staff that office upon its completion. Because of 2005 fiscal year uncertainties, a new staffed Defender Office in Martinsburg, West Virginia was temporarily tabled. A Martinsburg staffed office and the hiring of a third Assistant Federal Public Defender was previously approved by both the 4th Circuit and Judicial Conference.

2004 CRIMINAL CASE STATISTICS

During fiscal year 2004 (10/1/03-9/30/04), the Defender Office opened 176 cases and closed 150 cases. The CJA Panel attorneys received 219 criminal cases.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES:

Published Opinions:

United States v. Holmes, 376 F.3d 270 (4th Cir. 2004).

- Detailed factual analysis supporting protective search of vehicle for weapons after traffic stop under Michigan v. Long.

- Court finds police officers justified in conducting protective search of vehicle for weapons even after suspects handcuffed and secured in police cruiser based on *possibility* suspects would have later access to weapons.

United States v. Martin, 378 F.3d 353 (4th Cir. 2004).

- North Carolina misdemeanor sentence of 60-days, imposed by district court and being considered *de novo* by superior court, does not count as a “prior sentence of imprisonment” and two criminal conviction points.

- North Carolina’s two-tiered court system renders review of sentence “totally . . . stayed.” under §4A1.2(a)(3).

- As a result, conviction only carries one criminal history point.

United States v. Moussaoui, ___ F.3d ___, 2004 WL 2029733 (9/13/04)

- Post 9/11 case where Court holds that enemy combatant has access to classified government witnesses who may possess exculpatory information.

- Court remands so parties can craft “adequate substitutions” for witness depositions.

- Interesting opinion in that entire pages of the ruling are redacted and omitted to protect classified intelligence.

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004).

- En Banc opinion where Fourth Circuit rules that Federal Sentencing Guidelines are constitutional in light of Blakely.

- Court rules on constitutionality of “material support to a foreign terrorist organization” violation, 18 U.S.C. §2339B.

Unpublished Opinions:

United States v. Bayne, 103 Fed. Appx. 710 (4th Cir. 2004).

- Four level downward departure affirmed in possession of sawed-off shotgun case based on Lesser Harms, §5K2.11.

- Court finds reduction appropriate where defendant loaned shotgun to friend, shotgun was returned in sawed-off condition, and defendant simply stored shotgun in his home.

United States v. Sanders, 2004 WL 1908299 (8/27/04).

- West Virginia conviction for fleeing on foot from a police officer, §61-5-17(d), excluded from criminal history calculation as the elements test establishes conviction resembles “hindering or failing to obey a police officer under §4A1.2(c)(1).