

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. III, NO. 1

JANUARY 2005

NEW CASE COMPENSATION MAXIMUMS UNDER CJA

Passage of the fiscal year 2005 federal appropriations bill included an amendment to 18 U.S.C. §3006A that raises the case compensation maximums for both appointed counsel and providers of investigative, expert and other services. The old and new maximums for appointed counsel are:

- felony cases, from \$5,200 to **\$7,000**;
- appeals, from \$3,700 to **\$5,000**;
- parole cases, from \$1,200 to **\$1,500**;
- parole appeals, from \$3,900 to **\$5,000** and
- for any other representation, i.e. misdemeanor cases and supervised release violations, from \$1,200 to **\$1,500**.

As was the earlier practice, appointed counsel may not exceed these case maximums unless written justification is both provided to the district court and later approved by the Fourth Circuit Court of Appeals. The operative date for these new rates is **December 8, 2004**. Any case that includes compensable work performed *on or after* the operative date uses the new rates. For those cases fully completed before the operative date, the old rates apply. The hourly rate of \$90 for work performed still applies. However, the hourly rate for death penalty defense under the CJA will increase from \$125 per hour to **\$160** per hour, effective April 1, 2005.

In addition, the cost ceilings for providers of investigative, expert and other services have

increased as well. CJA Counsel may obtain such services without prior authorization as long as the total cost of services obtained, without prior authorization, does not exceed **\$500**. The old rate was \$300. The maximum amounts payable for such services with prior judicial approval increased from \$1,000 to **\$1,600**. The same operative date of **December 8, 2004** applies. Any services provided on or after that date employ the new rates.

Please call the Federal Public Defender Office at (304) 622-3823 if you have any questions about the new case compensation maximums under the Criminal Justice Act.

2005 CJA APPROPRIATIONS

The final appropriations for Defender Services provided an 11% increase above fiscal year 2004. This amount is still \$6.0 million below anticipated requirements. The final plan reduces funding for Federal Defender Organizations by \$3.5 million and for panel attorneys by \$2.5 million from full requirements to make up this shortfall.

According to data maintained by Defender Services, CJA panel attorney payments averaged about \$1.0 million per day in 2004. 10% of the CJA panel attorney cases (“mega-cases”) in 2004 accounted for 57% of the annual CJA payments to panel attorneys.

BOOKER/FANFAN UPDATE

The 2004 session of the U.S. Supreme Court closed without any ruling on the applicability of Blakely v. Washington to the Federal Sentencing Guidelines. We will have to wait until at least January 10, 2005 to hear the finale of the Booker and Fanfan cases.

The Federal Public Defender Office for the Northern District of West Virginia will work in conjunction with the Training Branch of the Office of Defender Services to provide immediate updates to the panel once the Court finally rules on these important issues.

AMENDMENTS TO UNITED STATES SENTENCING GUIDELINES, EFFECTIVE NOVEMBER 1, 2004

The Good (Decreases):

- **§2A2.2** - Base offense level for aggravated assault will be decreased from offense level 15 to offense level 14.
- **§2D1.1** - New amendment makes clear that the court shall exclude from the offense level determination the amount of controlled substance, if any, that the defendant establishes that he did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, regardless of whether the defendant agreed to be the seller or buyer of these controlled substances. The new amendment applies in those cases where a defendant “puffs” his real ability to access controlled substances.
- **§2D1.11** - Amendment uses a new method – similar to a “Role Cap” to address the overstatement of culpability in the drug guidelines for precursor chemicals. It reduces somewhat the effect of quantity on

the offense level by giving greater consideration to the defendant’s role in the offense.

- **§4B1.4(b)(3)(A)** - The amendment eliminates a double-counting issue for defendants who face conviction for both a violation of 18 U.S.C. §924(c) and 18 U.S.C. §922(g) and meet the requirements for enhanced punishment under the Armed Career Criminal Act, 18 U.S.C. §924(e).

The Bad (Increases):

Homicide, Manslaughter & Assault - The base offense level for all these guidelines was increased and other enhancements added or existing ones increased under **§2A1.1 through §2A1.5, and §2A2.1 through §2A2.4**

Child Pornography & Sexual Abuse Offenses - This amendment implements a number of directives in the PROTECT Act, including increasing base offense levels to correspond to new or increased statutory mandatory minimum and maximum penalties; it affects **§2A3.1-.4; §2G1.1; §2G1.3; §2G2.1 and §2G2.2; §2G3.1; §3D1.2**, and conditions of probation and supervised release found under **§5B1.3; §5D1.2; §5D1.3; §7B1.3**.

CAN-SPAM Offenses - **§2B1.1** - Creates new adjustments for felonies under the Controlling the Assault of Non-Solicited Pornography and Marketing Act.

Public Corruption - **§2C1.1; §2C1.2** - Increases the punishment for bribery, gratuity and “honest services” cases.

Drug Offenses - **§2D1.1; §2D1.11; 2D1.12** - Adds a “special instruction” directing

application of vulnerable victim adjustment if defendant commits a sexual offense by distributing a controlled substance; adds a two level increase for mass marketing; provides a uniform mechanism for determining sentences in cases involving drug analogues; and adds white phosphorus and hypophosphorous acid to the Chemical Quantity Table.

MANPADS & Explosive Devices - §2K2.1

- Provides steep increase of 15 level if destructive device involved a portable air defense system, portable rocket or missile, and eliminates the cumulative specific offense characteristic offense level cap of 29 levels for these types of destructive devices.

Body Armor - §2K2.6 - Creates new guideline for new offense which prohibits possession of body armor by individuals who have been convicted of a felony.

Immigration Offenses - §2L2.2(b) -

Provides a new 4-level upward adjustment if defendant fraudulently obtained or used a United States passport. Upward departure invited if passport used with intent to engage in terrorist activity.

Hazardous Materials - §2Q1.2 - Adds a 2-

level increase if the offense involves a conviction for transporting hazardous materials under 49 U.S.C. §5124, and also adds an upward departure if the defendant had a terrorist motive or if the offense resulted in extreme psychological injury.

DIGITAL PHOTO/VIDEO PHONE PROHIBITION IN COURTHOUSES

Until further notice, the Court has issued a directive that prohibits counsel from

entering the U.S. Courthouse with any cellular telephone that has digital photo or video camera capabilities. Counsel will be asked by the Court Security Officers to check such phones at the security check-point.

CIVILIAN CLOTHES FOR DEFENDANTS AT TRIAL

Chapter 7 of the *Guide to Judiciary Policies and Procedures* prohibits a Defender Office or Panel Attorney from expending CJA funds for the purchase of civilian clothes to be used by a defendant at trial so as to avoid appearing before the jury in prison attire.

The Federal Public Defender Office has collected and sorted outfits by size, including two-piece suits, dress pants and dress shirts, and shoes. If a CJA Panel Attorney represents a defendant who lacks family support or is otherwise unable to obtain civilian clothes for trial, please call the Defender Office at (304) 622-3823. Donations of clothing for male and female defendants will gladly be accepted.

FREE COMPUTER ASSISTED LEGAL RESEARCH

The Office of Defender Services recently reached an agreement with Westlaw and Lexis whereby one annual fee is centrally paid so that each Federal Defender Office can have unlimited access to computer assisted legal research. CJA Attorneys here in the district are invited to contact the Defender Office to use Westlaw and Lexis for case-related research at no cost. This service also includes access to ChoicePoint and AutoTrac, investigative search tools used to locate witness related information.

METHADONE TREATMENT AND SAFE DOSAGE REDUCTION BEFORE SENTENCING

It has become much more common to represent defendants who are actively involved in a methadone treatment program during the pendency of a federal criminal case. However, the treatment program's goal of long-term methadone use for patient stability and opiate craving control is oftentimes incompatible with the time schedules encountered in a federal criminal case.

The Federal Bureau of Prisons will not prescribe methadone to an inmate who begins serving a federal sentence, with the exception of a pregnant woman who can document prior methadone use. Further, it may be detrimental to an individual's health to go quickly from a normal daily methadone dosage of between 90 to 160 mg's to nothing upon incarceration.

Most federal criminal cases last between four to six months. According to health experts, a decrease in methadone of 3 to 5 mg's per week is considered medically safe, and it will avoid major opiate cravings.

Two area methadone treatment clinics are listed below, and defense counsel should work closely with the defendant and the treating methadone clinic to insure a safe reduction in dosages while the criminal case is pending.

Clarksburg Treatment Center, Inc.
(304) 622-7511

The Martinsburg Institute
(304) 263-1101

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Pollard, 389 F.3d 101 (4th Cir. 2004).

- Sentence of probation, rather than suspended sentence, does not violate Alabama v. Shelton requirement that defendant have appointed counsel before court accepts guilty plea.

United States v. Turner, 389 F.3d 111 (4th Cir. 2004).

- Court refuses to require per se rule disqualifying from jury service depositors of a robbed bank.

United States v. Bundy, WL 2914107 (12/17/04).

- Valid conditional guilty plea preserves for appellate review only "case-dispositive" pre-trial issues.

- Issue is case-dispositive if: 1) a ruling in defendant's favor would require dismissal of charges or suppression of material evidence, or 2) a ruling in government's favor would require affirming the conviction.

United States v. Perez, WL 2998770 (12/29/04).

- Very detailed analysis of Leon good-faith exception to warrant requirement.

- Court overturns finding affidavit in support of search warrant was "bare-boned."

United States v. Douglas L. Johnson, ___ F.3d ___ (4th Cir. 2004)(12/29/04).

- After government files downward departure motion pursuant to 18 U.S.C. §3553(3), district court may impose a sentence below guideline range even though defendant is subject to statutory minimum sentence that exceeds guideline range.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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FEBRUARY 2005

BOOKER AND FANFAN DECIDED: A NEW ERA IN FEDERAL SENTENCING

On January 12, 2005, the U.S. Supreme Court decided the consolidated case of *United States v. Booker*, No. 04-104 and *United States v. Fanfan*, No. 04-105. This landmark decision will usher in a new era in federal sentencing practice and provides new opportunities in sentencing advocacy. Below are highlights of the decision. The majority decision is in two parts. The first part, written by Justice Stevens for a 5-4 majority (Scalia, Souter, Thomas and Ginsburg), finds the Guidelines violate the Sixth Amendment and are thus unconstitutional. The second part, written by Justice Breyer for a different 5-4 majority (Rehnquist, O'Connor, Kennedy and Ginsburg), remedies this finding by making the Guidelines advisory, mandating that the courts must consider the Guidelines (among other traditional factors) when rendering a sentence, and finding that appellate courts can review sentences for "reasonableness". The full opinion can be accessed at the Supreme Court's website at www.supremecourtus.gov/opinions/04pdf/04-104.pdf. Below are the highlights of the decision:

First Holding: Current Administration of the Guidelines Violates Defendants' Sixth Amendment Rights

Pursuant to 18 U.S.C. Section 3553(b), the Guidelines are mandatory, and thus create a "statutory maximum" for the

purpose of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court applied the reasoning in *Blakely v. Washington*, and finds that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Under the current administration of the Guidelines, judges find these facts, and, thus, they are unconstitutional.

Second Holding: The Guidelines are Advisory and Sentences are Reviewable for "Unreasonableness"

Given the Court's first holding, the Court "excises" 18 U.S.C. section 3553(b)(1) and section 3742 (e) from the Sentencing Reform Act and declares the Guidelines are now "advisory." Pursuant to section 3553(a), district judges need only to "consider" the Guideline range as one of many factors, including "the need for the sentence...to provide just punishment for the offense, §3553(a)(2)(A), to afford adequate deterrence to criminal conduct, §3553(a)(2)(B), and to protect the public from the further crimes of the defendant §3553(a)(2)(C)." The Sentencing Reform Act, absent the mandate of §3553(b)(1), authorizes the judge to apply his own perceptions of just punishment, deterrence and protection of the public even when these differ from the perceptions of the U.S. Sentencing Commission. The Sentencing

Reform Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range) based on an “unreasonableness” standard.

The current state of federal sentencing is still uncertain. The majority in *Booker* all but invites Congress to act: “The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution, that Congress judges best for the federal system of justice.” Over the course of the next several months, Congress will grapple with its response, if any. This can include the greatly increased use of mandatory minimum sentences, or implementation of the “Bowman-fix,” named for law school professor Frank Bowman who advocates removal of the upper range guidelines cap and replacement with the statutory maximum sentence. Under this scenario, the guidelines again become mandatory.

While the *Booker/FanFan* decision continues the uncertainty about federal sentencing, and that uncertainty will only be resolved over time as the courts, Congress and the U.S. Sentencing Commission act, there are ideas developing about factors to consider in representing our clients. The following are some thoughts:

- Prohibited/Discouraged Factors no longer prohibited/discouraged. The guidelines had listed a number of factors that were prohibited or discouraged at sentencing. Since the guidelines are now advisory, defense counsel should be able to raise age, education and vocational skills,

mental and emotional conditions, physical condition, employment record, family ties and responsibilities, role in the offense, military, civic and charitable service, and lack of guidance as a youth to persuade a judge to give a lower sentence. See U.S.S.G. §5H1.1-§5H1.12 (Nov. 2004)

- Also, consider raising other factors, such as surrender of suppression motions, economic costs of incarceration, and other costs of conviction (such as deportation) to obtain a lower sentence.
- Get the formerly prohibited/discouraged or other persuasive factors into the Presentence Investigation Report. Since the Guidelines are advisory, there is no bar to this.
- No longer have to argue that a lesser sentence is outside of the heartland (although you may still want to) since with “advisory” Guidelines, the judge does not have to “depart” from anything.
- The Feeney Amendment, otherwise known as the Protect Act, mandating de novo review of downward departures, is no longer in effect.
- Custodial Zones on the Sentencing Table Now Advisory - If the Guidelines are “advisory”, the zones on the sentencing table should also be advisory. Hence, it should be possible to get a non-custodial sentence in Zone D.

- Move to Strike or Dismiss Cases Indicted with Sentencing Allegations. Since *Booker/Fanfan* did not engraft the Sixth Amendment right to a jury trial on the Guidelines, think about filing motions to strike the sentencing allegation language in the indictment as surplusage or dismissing the indictment altogether. A sample of such motion can be found on the Defender Services website at www.fd.org.
- In cases in which you have already pled but are awaiting sentencing, and your facts are sympathetic, you may want to try and withdraw the plea based on the Booker intervening decision. See *United States v. Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004)(permitting withdrawal of plea in light of intervening authority)
- If the court never deviates from the Guidelines calculations, you may consider arguing that the court is sentencing under a de facto mandatory and thus unconstitutional system. In one of the first post-*Booker/Fanfan* written opinions, Judge Cassell in the District of Utah states that “the Guidelines should be followed in all but the most exceptional cases.” The full opinion may be accessed at www.utd.uscourts.gov/reports/wilson/pdf.

Of special import are those cases no longer pending at the district court level – either on direct appeal or subject to collateral review. The *Booker/Fanfan* opinion clearly applies to those cases still

subject to direct appeal. However, the Court warns that not every previously imposed sentence gives rise to a Sixth Amendment violation. Lower courts are instructed to employ “plain error” review, and, in drug cases, those defendants who stipulated to a specific drug quantity have already admitted to important facts used to impose sentence. In addition, the Fourth Circuit’s holding in *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), will affect cases on direct appeal. The Fourth Circuit exhibited impressive foresight when ruling last year that district courts should impose dual sentences – one under the guidelines and one under §3553, as if the guidelines were inapplicable.

Finally, the *Booker/Fanfan* opinion never addresses whether its holding applies retroactively to cases on collateral review. It remains to be seen whether the holding of *Booker/Fanfan* will apply in the §2255 context. Courts must address whether a Sixth Amendment violation, as well as a Fifth Amendment Due Process violation for being convicted and punished using less than a beyond a reasonable doubt standard of proof, can be remedied through a habeas corpus petition.

2005 DEFENDER SERVICES TRAINING EVENTS FOR CJA PANEL ATTORNEYS

Winning Strategies Series

Seattle, WA, March 31-April, 2, 2005

Minneapolis, MN, July 21-23, 2005

Philadelphia, PA, September 15-17, 2005

Contact:

Karren_Holsendorff@ao.uscourts.gov (For registration information).

The Winning Strategies seminars this year will address various areas of federal criminal practice, generally spinning off of Fourth, Fifth, and Sixth Amendment issues, with a half day committed to federal sentencing law and practice. The seminar will feature a number of break-out sessions, to give participants a choice of topics, and allow for smaller classes. Sessions will provide innovative ideas for seasoned CJA practitioners. Newer CJA practitioners will find sessions to give them the information they need to build an effective federal practice.

Sentencing Advocacy Workshop

April 29-May 1, 2005

Location TBD

Contact:

Karen_Holsendorff@ao.uscourts.gov (For registration information).

The Sentencing Advocacy Workshop focuses on an often neglected, yet extremely important area of practice. Since approximately 97% of federal criminal cases proceed to the sentencing phase, and the recent developments in federal sentencing law have resulted in a new sentencing landscape, participation in the Sentencing Advocacy Workshop should not be missed. The program presents a comprehensive approach to sentencing advocacy. Participants will learn a process for the development of a persuasive, fact-based sentencing theory, and the advocacy skills necessary to advance that theory in writing and during sentencing hearings. Among other subjects, presentations and demonstrations will address changes in federal sentencing law, judging at sentencing, use of a sentencing specialist,

storytelling, and persuasive writing. The workshop consists of plenary sessions and small group breakouts. In the small group breakouts, participants will use a case of their own to brainstorm facts, develop a theory and theme, tell a story, and persuasively write a portion of their sentencing memo or downward departure motion.

Trial Advocacy Workshop

June 23-25, 2005

San Francisco, CA

Contact: :

Karen_Holsendorff@ao.uscourts.gov (For registration information).

The Trial Advocacy Workshop focuses on the use of courtroom technology to advance the persuasiveness of witness examination and argument skills. Participants will enhance their cross examination, direct examination, and closing argument skills by applying courtroom technology, such as Trial Director and Power Point. Since many federal courtrooms are now “wired” with the latest computer technology, and this technology has proven to be persuasive and effective, participation in the Trial Advocacy Workshop will be particularly timely. Faculty will conduct presentations and demonstrations on evidentiary issues associated with using technology, using Power Point and Trial Director in the courtroom, cross and direct examination, closing argument, among other topics. There will also be small group breakouts in which participants will apply the skills presented in the plenary sessions to the facts of the mock case with which they will be provided. Each participant will practice

cross examination, direct examination, and closing argument using the Trial Director and Power Point technology.

Complex Litigation Seminar

August 18-20, 2005

Location TBD

Contact: :

Karen_Holsendorff@ao.uscourts.gov (For registration information).

These 2005 seminars for CJA panel attorneys are offered at no cost. Please use the Defender Services contacts listed above to make reservations for the upcoming seminars.

FEDERAL BUREAU OF PRISONS DISCONTINUES USE OF INTENSIVE CONFINEMENT CENTERS

Effective January 7, 2005, the Federal Bureau of Prisons will no longer accept inmates into the Intensive Confinement Center (Boot Camp) Program. The three federal facilities in Pennsylvania, Texas and California will become regular minimum security facilities in June when the last classes graduate. The Intensive Confinement Center Program was one of the few available that could result in a lower federal sentence upon completion. In addition, the program provided first-time offenders with valuable interpersonal skills and it stressed self motivation and personal responsibility. The BOP cited a "lack of cost effectiveness" to support its decision.

STAFFED FEDERAL DEFENDER OFFICE SLATED TO OPEN IN MARTINSBURG

On February 7, 2005, a staffed Federal Defender office will open at the U.S.

Courthouse in Martinsburg, West Virginia. The mailing address, telephone number and facsimile number is:

Federal Public Defender Office
217 West King Street; Room 237
Martinsburg, West Virginia 25401
Phone: (304) 260-9421
Fax: (304) 3716

This Martinsburg staffed office will operate from inside the federal courthouse until permanent space is obtained in the local business district.

We are pleased to announce that Assistant Federal Public Defender Brian C. Crockett was recently hired and will work from this location. Mr. Crockett graduated from WVU Law School, he clerked at both the state and federal levels, and he was a litigation associate at Bowles Rice McDavid Graff & Love in Martinsburg.

Until further notice, CJA panel attorneys are requested to continue contacting the Clarksburg Defender Office with any concerns relating to CJA Appointments. All case related rotational appointments will issue from that location. Please call either Administrative Officer Eugene Weekley or Legal Secretary Lisa Coleman at (304) 622-3823.

STAFFED FEDERAL DEFENDER OFFICE IN WHEELING DELAYED

Due to GSA construction delays, the opening of the staffed Federal Defender Office in Wheeling will be postponed until late March of this year. Upon completion, this Defender Office will operate from the second floor inside the federal courthouse.

NEW ACCESS TO FEDERAL CRIMINAL LAW BLOGS

A new feature was recently added to the Defender Services website at www.fd.org. This link will provide you with access to federal law blogs that contain timely information about federal criminal law developments. The features are broken down by Circuit, and provide detailed information about cutting edge issues. This site is certainly worth a regular visit.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Dickey-Bey, – F.3d –, 2004 WL 2998787, 4th Cir. (Md.), 12/29/04.

- Warrantless arrest of defendant outside Mail Boxes Etc. after his pickup of sealed package containing cocaine; police search defendant's vehicle about 30 feet away.
- Court finds police had probable cause to believe defendant knowingly possessed cocaine.
- Court further finds police had independent probable cause to believe that defendant's automobile was being used as an instrumentality of crime to support its search.

United States v. Ickes, – F.3d –, 2005 WL 14907, 4th Cir. (Va.), 1/4/05.

- Term "cargo" under 19 U.S.C. §1581(a) allows border search of computer and disks found in vehicle that contain evidence relating to child pornography.
- No First Amendment expressive materials exception to Fourth Amendment border search doctrine.

Unpublished Cases:

United States v. Beard, 2005 WL 32831 4th Cir. (Va.), 1/7/05.

- Detailed factual analysis used to overturn district court's suppression order; district court erred in finding defendant was "in custody" before *Miranda* warnings necessary.

United States v. Husband, 2005 WL 44942 4th Cir. (Va.), 1/11/05

- Defendant pleads guilty to eight counts of sexual exploitation of a minor; district court imposes 87-months for each count *consecutively* for a total of 696 months.
- Court finds no violations of Rule 11 or Sentencing Guidelines.

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JUNE 2005

CRIMINAL JUSTICE ACT PANEL ATTORNEY TRAINING SEMINAR COMING WEEK OF JUNE 13 - 17, 2005

A Criminal Justice Act Panel training seminar will be available at no cost the week of June 13th. These 3.5 hour sessions will be held at those locations listed below:

Clarksburg/Elkins: U.S. Courthouse in Clarksburg, second floor courtroom, Tuesday, June 14th at 1:00 p.m.

Wheeling: U.S. Courthouse in Wheeling, first floor jury assembly room, Thursday, June 16th at 10:00 a.m.

Martinsburg: U.S. Courthouse in Martinsburg, first floor magistrate courtroom, Monday, June 13th at 10:00 a.m.

Each session will lead off with a hands-on presentation by Chief Deputy Clerk Danny W. Armstrong who will explain the Case Management/Electronic Case Filing (CM/ECF) system. Criminal filings must be made through the CM/ECF system starting July 1, 2005. There will also be an update on the new monetary caps for CJA cases and the proper use of CJA forms and vouchers. The remainder of the session will be devoted to new developments since *Booker/Fanfan* issued, and there will be a discussion of recent U.S. Supreme Court and Fourth Circuit Court of Appeals rulings. West Virginia CLE credits will be afforded. A detailed agenda and RSVP request form will be sent to all CJA Panel attorneys by separate mailing.

BOOKER/FANFAN DEVELOPMENTS

The landmark case of *Booker/Fanfan* issued January 12, 2005. The U.S. Supreme Court held that the Federal Sentencing Guidelines are now merely advisory and not mandatory. The sentencing court must not only consider the applicable guideline range, but also the other statutory sentencing factors listed in 18 U.S.C. §3553(a).

Since *Booker/Fanfan* there have been scores of opinions that issued at the district court and appellate levels. An excellent compilation of *Booker/Fanfan* developments may be found on the home page of the Defender Services website at www.fd.org. The "Blakely/Booker/Fanfan Opinions, Briefs and Other Information" tab will allow access to a regularly updated publication entitled "Outline of Post-Booker Decisions." This publication provides a detailed outline of important cases by circuit. In addition, you will find a regularly updated "Booker Litigation Strategies" publication that provides practice points and case law for the defense of a federal criminal case throughout its various procedural stages. There are "Court Opinions/Orders by Circuit" and "Briefs and Motions by Circuit" sections. The latter section includes sample motions and memoranda relating to sentencing issues in the post-*Booker* era.. Finally, there is an article entitled "108 Sentencing Mitigation Factors." All of these resources are regularly updated as additional case law develops. Periodic review of these materials is strongly suggested.

U.S. MARSHALS SERVICE PRISONER TRANSPORT AND REGIONAL JAIL OVERCROWDING

The U.S. Marshals Service has a 60-bed regional jail contract for pre-trial detainees held in the district. However, the number of federal prisoners held monthly now averages 130 to 135 inmates. This has resulted in the regular transfer of inmates to area regional jails to alleviate overcrowding at any one particular facility. Court units will be working towards a solution to this problem.

However, for the foreseeable future, CJA Panel attorneys should always call ahead to the regional jail before travel to insure client availability. A client's repeated transfer to the area's regional jails during the pendency of the case is likely. While this problem relates mostly to the Clarksburg point of holding court, regular telephone confirmation will avoid unnecessary travel time and wasted trips. The telephone numbers for area regional/county jails are:

Central R/J, Sutton, 765-7904
Eastern R/J, Martinsburg, 557-0045
North-Central R/J, Greenwood, 873-1384
Northern R/J, Moundsville, 843-4067
Taylor County Jail, Grafton, 265-3807

Later this year, the Tygart Valley Regional Jail located in Coalton, West Virginia will go on-line.

In addition to regional jail contacts, you can call the U.S. Marshals Service in Clarksburg at (304) 623-0486 to receive daily updates on prisoner transfers between our regional jails.

WHEELING FEDERAL PUBLIC DEFENDER OFFICE NOW OPEN

A third staffed Federal Defender Office opened in May in Wheeling, West Virginia. Contact information is: Federal Public Defender, 1125 Chapline Street, Room 208, Wheeling, WV 26003, Tel. (304) 233-1217. The Wheeling Federal Public Defender Office is located on the second floor of the U.S. Courthouse across from Judge Stamp's courtroom. This office is presently staffed by Assistant Federal Public Defender L. Richard Walker and Legal Secretary Georgiann Martin.

The Wheeling CJA Panel attorneys now have access to case-related computerized legal research at no cost. Both Westlaw and Lexis are available with print capabilities. Please call ahead to schedule a research session. The same access is available at the Clarksburg Defender Office (304 622-3823) and the Martinsburg Defender Office (304) 260-9421.

UPDATE ON USE OF ELECTRONIC EQUIPMENT IN THE COURTHOUSE

The district court judges are in the process of amending Local Rule LR Gen P 83.10 to allow attorneys the use of cell phones, camera phones, personal data assistants (PDA's), Blackberrys, laptop computers and other related devices while inside the federal courthouse. The amended rule will grant attorney access to these devices but insure there is no device noise during courtroom proceedings (the dreaded cell phone ring), and there are no pictures taken or audio recordings made within the facility, including inside the courtroom itself and where the grand jury meets.

**DEFENDER SERVICES TRAINING
OPPORTUNITIES FOR CJA PANEL
ATTORNEYS**

The following training sessions are still available this year at no cost through Defender Services for CJA Panel attorneys:

2005 WINNING STRATEGIES SERIES

Minneapolis, MN - July 21-23, 2005

Philadelphia, PA - September 15-17, 2005

TRIAL ADVOCACY WORKSHOP

San Francisco, CA - June 23-25, 2005

COMPLEX LITIGATION SEMINAR

San Francisco, CA - August 18-20, 2005

Please contact the Clarksburg Federal Defender Office at (304) 622-3823 to receive a course agenda and reservation form. The WV State Bar will provide CLE credits for these CJA seminars.

**EFFORTS TO REDUCE IN SIZE AND
REFORMULATE CRIMINAL JUSTICE
ACT PANEL IN DISTRICT**

As many of you know from the recent mailings and telephone contacts, efforts are underway in this district to reformulate and reduce in size the number of attorneys who participate on the Criminal Justice Act Panel. At present, there are over 200 members listed on the district's CJA Panel. This number is far greater than the CJA Panels in other districts, and it conflicts with language in the local CJA Plan requiring a panel "small enough so that panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work, thereby provide high quality of representation."

To date, responses to the mailings and telephone contacts have resulted in about 110 attorneys who indicated a continued desire to remain on the CJA Panel. All re-application forms are presently pending before the CJA Panel Selection Committee. That Committee will soon meet and make recommendations to the district court judges. An updated listing of all participating CJA Panel attorneys will be provided once this reformulation process concludes.

**STATE/FEDERAL PRISON
POPULATION AND LIFE SENTENCES**

According to "Prisoners in 2003," the Justice Department Bureau of Justice Statistics' most recent annual report on the state of prisons in the United States, on January 1, 2004, 2,212,475 persons were behind bars in the U.S. This works out to one in every 140 U.S. residents, the highest rate of incarceration in the entire world.

The Sentencing Project released a study showing that the number of prisoners now serving life sentences has increased 83 percent in the past 10 years. Nearly 128,000 people, or one of every 11 offenders in state and federal prisons, are serving life sentences. In 1992, 70,000 people had life sentences. The study also shows that the amount of time served by defendants given life sentences increased from an average of 21 years to 29 years between 1991 and 1997. These numbers were compiled from the Federal Bureau of Prisons and state correctional agencies.

LIMITATION ON USE OF DOCUMENTATION TO SUPPORT STATUTORY ENHANCEMENTS BASED ON PRIOR CONVICTIONS

The U.S. Supreme Court issued its decision in *Shepard v. United States* on March 7, 2005. On its face, it merely requires that, for statutory enhancements based on prior convictions, proof must be limited to a few reliable documents (the charge, plea agreement, colloquy, or explicit findings made at the plea hearing).

Fifteen years before, in *Taylor v. United States*, the Court put similar restrictions on reviewing prior convictions that were the result of trials. *Shepard* involved prior guilty pleas.

The difference is that in some jurisdictions guilty pleas do not generate very descriptive paperwork. Judgments may be unclear about the actual conduct of conviction. The dissenters worried this will make these enhancements much harder to get in some districts.

It is the dicta in *Shepard* that is interesting. In *Almendarez-Torres v. United States*, the Court held that such enhancements do not need to be submitted to juries. One year later, in *Apprendi v. New Jersey*, Justice Thomas changed his mind. He stated he was wrong in *Almendarez-Torres*, and that prior convictions, increasing the maximum potential sentence, must be tried to juries like other elements. Since *Almendarez-Torres* was a 5-4 ruling, in theory, that shifted the Court to the opposite result.

Now, in *Shepard*, Justice Thomas again reminds his brethren that he still wants

to change his vote and protect the right to jury trial even for statutory enhancements based on prior convictions.

The only lesson learned by *Shepard* is to keep objecting to statutory enhancements for prior convictions that were not proven to a jury beyond a reasonable doubt. This occurs regularly in drug, gun and immigration cases. The Supreme Court may very revisit this issue in the foreseeable future.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Shank, 395 F.3d 579 (4th Cir. 2005).

- FRCP 35(a) imposes a 7-day jurisdictional time limit on the district court's ability to correct sentence.
- defendant's filing of motion to correct sentence within 7-day period does not toll rule's effect, and district court must actually rule during this window of time.

United States v. Smith, 396 F.3d 579 (4th Cir. 2005).

- evasive behavior by a motorist to avoid police roadblock may contribute to reasonable suspicion.
- under totality of circumstances, police possessed reasonable suspicion that motorist was engaged in criminal activity.

United States v. Stevenson, 396 F.3d 538 (4th Cir. 2005).

- detailed legal analysis relating to appellate court's deference to trial court's factual

findings even when they are based on review of documentation and not on traditional witness credibility.

- affirms finding through use of “clearly erroneous” standard that defendant abandoned privacy interest in apartment by referring to himself as “former renter” in property receipt provided to girlfriend.

United States v. Woolfolk, 399 F.3d 590 (4th Cir. 2005).

- “restraint resulting from federal action” required before Speedy Trial Act time limits are triggered.
- requires showing that government has knowledge individual is being held by state authorities only to answer to federal charges.

United States v. Hughes, 401 F.3d 540 (4th Cir. 2005).

- en banc ruling that applies plain error review and finds district court violated Sixth Amendment by imposing sentence exceeding the maximum authorized by jury findings alone.
- where Sixth Amendment violation present, Court will presume defendant suffered prejudice.
- detailed analysis of Booker/Fanfan.

United States v. Brown, 401 F.3d 588 (4th Cir. 2005).

- anonymous 911 call that black male seen with firearm does not present Terry grounds to support stop.
- no probable cause to support public intoxication arrest under Virginia law where defendant only appears to have been drinking and is not impaired.
- firearm seized ordered suppressed under

fruits of poisonous tree analysis.

United States v. Evans, 404 F.3d 227 (4th Cir. 2005).

- review of Sell v. United States factors to determine if government made sufficient showing to involuntarily medicate a defendant for the purpose of rendering him competent to stand trial.
- district court ruling in favor of involuntary medication overturned and remanded for more specific findings that relate specifically to manner in which medication would significantly further government’s prosecutorial interest was medically appropriate.

United States v. Mashburn, 2005 WL 940493, 4th Cir. (N.C.), 4/25/05.

- police claim that defendant “looking at 5 years for gun on top of 5 years for methamphetamine” does not render defendant’s later statements involuntary.
- while defendant’s pre-Miranda statements ordered suppressed, defendant’s post-warning statements deemed admissible.

United States v. White, 405 F.3d 208 (4th Cir. 2005).

- Court distinguishes Booker/Hughes plain error review for case involving Sixth Amendment violation (imposition of sentence based on facts not found by jury) and for case involving non-constitutional error (imposition of sentence under mandatory guideline regime).
- in latter category, Court will not presume prejudice or notice error regardless of effect on the outcome (structural error).

- in case alleging non-constitutional Booker error, defendant has burden to prove actual prejudice.
- defendant failed to meet plain error burden; record as whole provides no basis to conclude treatment of guidelines as mandatory affected district court's selection of sentence.

United States v. Gray, 405 F.3.d 227 (4th Cir. 2005).

- Court affirms district court in allowing government to re-open its case-in-chief after defense moves for judgment of acquittal.
- government allowed to present additional evidence to support mailings in mail fraud prosecution and overcome Rule 29 MJOA.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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REFORMULATION OF CRIMINAL JUSTICE ACT PANEL

Steps taken to reformulate and reduce of the size of the Criminal Justice Act Panel here in the district were recently completed. The judges approved a final listing that includes 45 attorneys for Clarksburg; 14 attorneys for Elkins; 27 attorneys for Wheeling; and 21 attorneys for Martinsburg.

These efforts resulted in a CJA Panel that is about 50% smaller than the old listing, and it includes those attorneys who are both experienced and show a genuine interest in federal criminal defense. The reduced panel size will better allow for compliance with that section of the Local CJA Plan requiring panel members receive “an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide high quality of representation.”

All CJA Panel appointments will continue to be made on a rotational basis from the recently approved listing unless the Court requests a particular appointment. Attorney contacts are regularly documented on personal information sheets. Please call the Federal Defender Office at (304) 622-3823 to request a copy of the new CJA Panel Attorney listing, to review attorney contact information sheets or if you have any questions or concerns.

THIRD-LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY WITHOUT GOVERNMENT MOTION

Since the Feeney Amendment took effect in April 2003, a district judge could not grant a third-level adjustment for acceptance of responsibility unless it first receives “a motion of the government.” U.S.S.G. §3E1.1(b). Both the guideline and applicable commentary hinge this third-level reduction on a “timely” guilty plea that permits the government “to avoid preparing for trial.” In practice, however, federal prosecutors will not motion for this third-level adjustment unless a defendant executes a written plea agreement. These plea agreements contain many provisions advantageous to the government that have little or nothing to do with avoiding trial preparation. Plea agreement provisions include a cooperation clause, relevant conduct stipulations and appeal and habeas waivers that relate to the sentence imposed.

Now, a recent unpublished Fourth Circuit opinion provides support for the third-level adjustment for acceptance of responsibility *even absent a government motion*. In United States v. Catala, 2005 WL 1395163, 6/14/05, the Court found the government’s motion no longer essential in a post-Booker proceeding: “[W]e no longer construe §3E1.3(b) to require a government motion before a district court can award a third-level adjustment.” A district court can make an independent determination based on whether a defendant has sufficiently

assisted “by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial . . .”

In those cases where a defendant decides to plead guilty to the indictment, without the benefit of a written plea agreement, the Catala opinion is very useful if the record supports a timely plea that allowed the government to avoid trial preparation.

INCLUSION OF SUGGESTED DATES IN CONTINUANCE MOTIONS

At a recent meeting, the judges decided that the local rules would be changed to include a requirement that all motions for a continuance include three suggested dates and times that are mutually acceptable to the parties. The moving party should confer with opposing counsel, agree on three new dates and provide this information in the body of the motion. This practice will reduce the need for court staff to contact parties once the continuance motion is filed. Until the local rule change takes effect, CJA Panel Attorneys are asked to initiate and maintain this practice.

USE OF INTERPRETERS FOR CASE RELATED ATTORNEY-CLIENT MEETINGS

At certain points of holding court in the district there has been an increased need for interpreters who can assist in translating at attorney-client meetings. Due to a large influx in the Hispanic population in the Martinsburg area, there is a constant need for Spanish speaking interpreters there. These interpreters qualify as “experts” under the

Criminal Justice Act and panel attorneys can request authorization for the expenditure of funds on the CJA-21 form. If the cost of the interpreter will exceed \$500, there must be *prior* court approval.

Panel attorneys should be aware of the difference between court certified interpreters and those without such certification. Certified interpreters pass vigorous examinations and are authorized to translate court proceedings. As such, the hourly rate charged by certified interpreters is between \$175-\$200. Interpreters without such certification are still fluent in their respective language and extremely useful, but charge far less.

Two such providers in the Martinsburg area include Trans Lingual LLC at (304) 274-5889. The charge is \$50 per hour. Also, Patricia Aragon is a part-time teacher who will work as a Spanish speaking interpreter. Ms. Aragon charges \$40 per hour and may be reached at (304) 754-4702.

Call the Federal Public Defender at (304) 622-3823 for assistance in locating interpreters for the other areas in the district. Also, references from panel attorneys who had luck with a particular interpreter are greatly appreciated.

POST-BOOKER APPEAL PIPELINE CASES

The Fourth Circuit Court of Appeals continues to grapple with direct appeals that raise unpreserved claims under Booker. In those instances where the district judge committed a Sixth Amendment error by imposing a sentence exceeding the maximum allowed based on only jury found

facts or facts admitted at the guilty plea, the Court will assume prejudice under plain error review. United States v. Hughes, 401 F.3d 540 (4th Cir. 2005). This type of error does not exist if the actual sentence imposed falls within or below the guideline sentence applicable without the judge-found facts. United States v. Evans, 416 F.3d 298 (4th Cir. 2005).

If the only error alleged is a sentence imposed under the then-mandatory guideline scheme (a non-constitutional error), the defendant bears the burden to show prejudice, i.e. a lower sentence would have been imposed the district had such authority. United States v. White, 405 F.3d 208 (4th Cir. 2005).

In United States v. Blick, 408 F.3d 162 (4th Cir. 2005), the Court upheld the sentencing appeal waiver provision found in a written plea agreement, and found that Booker had no effect on the manner in which such waiver provisions are interpreted.

BOP REFERENCE BOOK

An excellent resource book describing the Federal Bureau of Prisons' day-to-day activities was written by Mary Bosworth and is entitled The U.S. Federal Prison System. Each chapter addresses a different area such as: Classifications and Security; Discipline; Substance Abuse Programs; Education; Food and Commissary; Medical Service; Sexual Relations and Violence; Staff; Religion; Work; and Visits, etc. In addition, the book provides detailed write-ups on each federal prison facility. Many include a "Prisoner Comment" section with candid descriptions of what to expect at that facility.

The only criticism is the need for a pocket part describing the newer federal prison facilities that have gone on-line since the book was first published, i.e. FCI Gilmer and USP Hazelton. And look forward to another federal prison in McDowell County, West Virginia sometime in the next few years.

Copies of The U.S. Federal Prison System are available at the Federal Defender Offices in Clarksburg, Wheeling and Martinsburg.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Taylor, 414 F.3d 528 (4th Cir. 2005).

- Court finds no due process or equal protection right to appointment of counsel for Rule 35 sentence reduction proceeding.

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005).

- Court provides detailed findings required before government may use FRE Rule 804(b)(6) hearsay against a "party that has engaged or acquiesced in wrongdoing" that procured the unavailability of the declarant.

United States v. Cheek, 415 F.3d 349 (4th Cir. 2005).

- Court uses prior conviction exception of Apprendi to find that defendant's Sixth Amendment rights were not violated through enhancement of criminal sentence on the basis of three previous convictions that were not alleged in the indictment or admitted by the defendant during his plea hearing.

United States v. Collins, 415 F.3d 304 (4th Cir. 2005).

- Court criticized governments' closing argument as impermissible vouching where prosecutor stated: "The government is always seeking to determine whether [the witnesses] are telling the truth, and we do not take lightly the fact that we have an agreement . . . with each one of those witnesses where they are supposed to tell the truth."

- District court erred by failing to instruct that, for purposes of setting a specific threshold of drug quantity under §841(b), the jury must determine the amount of cocaine base attributable to the defendant using Pinkerton principles, i.e. considering only the drug activity by others that was both within the scope of the agreement and reasonably foreseeable.

- When a prior conviction is used to increase the criminal history, burden falls on defendant to show there was an underlying constitutional defect that raises an inference of the invalidity of the prior conviction, i.e. conviction achieved in violation of Sixth Amendment right to counsel.

Yi v. Federal Bureau of Prisons, 412 F.3d 526 (4th Cir. 2005).

- Court upholds BOP's interpretation of good time credit statute, 18 U.S.C. §3624(b), to require the calculation of credits based on the inmate's actual time served, and not the sentence imposed. (This results in a formula whereby no federal inmate will ever receive more than 47-days good time credit per year, rather than the 54-days good time credit referred to by Congress in the statute).

In Re: Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005).

- Appellants (corporate employees) had no attorney-client relationship with corporate attorneys' internal investigation as there was no evidence investigating attorneys told appellants that they represented them, and there was no evidence appellants ever sought legal advice from investigating attorneys.

United States v. Johnson, 410 F.3d 137 (4th Cir. 2005).

- Where defendant found sitting unresponsive in his car while blocking traffic, police were performing community-care taking function during warrantless search of glove compartment, therefore, motion to suppress evidence denied.

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005).

- Court disallows two-level increase for abuse of position of trust under §3B1.3 where defendant fraudulently asserted he possessed state and federal certification as a bomb-sniffing canine team handler to receive government contracts.

- Arms-length commercial relationship where trust is created by defendant's personality or by the victim's credulity cannot justify the §3B1.3 enhancement.

