

# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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VOL. IV, NO. 1

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## **AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE**

Congress took no action on amendments to the Federal Rules of Criminal Procedure, Evidence and Appellate Procedure, and these changes took effect December 1, 2005:

Criminal Rules: Rule 5 was amended to permit the government to employ “reliable electronic means” to transmit a warrant. Rule 32.1 was changed to permit parties to submit documents electronically to the court in proceedings involving revocation of probation or supervised release. Rule 40 has been revised to rectify a conflict between Rule 32.1, which allows the court to set release conditions for an arrestee who failed to appear in another district, and Rule 40 which previously did not provide the same authority to arrestees who merely violated another condition of release. Rule 41 is changed to authorize the court to issue a search warrant based on information communicated by reliable electronic means, and to transmit a warrant by the same means. Rule 58 was amended to clarify that a defendant who is not in custody is entitled at an initial appearance to the same advice concerning the right to a preliminary hearing as one who is being held in custody.

Evidence: Rule 404(b) was changed to clarify that evidence of a person’s character or trait of character is never admissible to prove conduct in a civil case. Rule 408 now allows statements or conduct in settlement negotiations indicating fault to

be used in subsequent criminal cases. The amendments prohibit use of these statements to impeach a witness via prior inconsistent statement or contradiction. Finally, the new rule bars a party from offering its own settlement offer or statements in settlement negotiations. Rule 606(b) was amended to provide, in conformity with case law, that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. Rule 609(a)(2), regarding impeachment by evidence of a criminal conviction, was amended to mandate admission of a conviction only if it “readily can be determined to have been a crime of dishonesty or false statement,” such as perjury or false statement.

Appellate Rules: Rule 25 allows courts to adopt local rules for electronic filing. Rule 32.1 was created to require the federal appellate courts to permit the citation of judicial opinions, orders, judgements, or other written dispositions that have been designated as “unpublished” or “non-precedential.”

## **ELECTRONIC FILING OF PRE- SENTENCE REPORT OBJECTIONS**

The Clerk’s Office asked that a reminder be issued concerning the electronic filing of pre-sentence report objections. At present, there is no mechanism for United States Probation to get these objections when filed electronically unless the attorney sends a hard copy to Probation. ECF will be changed soon to alleviate this problem.

## **LOSS OF CIVIL RIGHTS FOLLOWING FELONY CONVICTION UNDER WEST VIRGINIA LAW**

Clients often request information about the manner in which a felony conviction affects certain civil rights, including the right to hold public office, to vote, to serve on a jury and to possess firearms. These issues are addressed under West Virginia law as outlined below.

In determining whether a person's civil rights have been restored, courts must look to the whole law of the state. United States v. Metzger, 3F.3d 756, 758 (4th Cir. 1993); United States v. McLean, 904 F.2d 216, 218 (4<sup>th</sup> Cir. 1990).

### **1. Right to Hold Public Office**

#### **A. State Legislature**

The Constitution of West Virginia prohibits any person "who has been . . . convicted of bribery, perjury or other infamous crime" from serving in the West Virginia legislature. West Virginia Constitution, Article VI, §14. A felony conviction is an "infamous offense." State of West Virginia v. Maynard, 170 W.Va. 40, 289 S.E.2d 714, 718 (1982).

Right to serve in the State legislature is permanently lost following a felony conviction.

#### **B. Other Elective Offices**

A person convicted of bribery or attempted bribery of a State of West Virginia executive, judicial officer or member of the legislature is constitutionally permanently

disqualified from holding any office in West Virginia. West Virginia Constitution, Article VI, §45.

No person convicted of a felony by any court in or out of the State of West Virginia may "while such conviction remains unreversed, be elected or appointed to any office under the laws" of West Virginia. West Virginia Code §6-5-5. The statutory phrase "remains unreversed" is construed to disqualify a person from holding public office only until after the full penalty of the law is paid, i.e. complete the sentence of incarceration and any post-release supervision. Webb v. County Court of Randolph County, 113 W.Va. 474, 168 S.E. 760 (1933).

Right to serve in other elective offices in West Virginia is only temporarily lost while criminal sentence is being served unless conviction involves bribery of a state official.

### **2. Right to Vote**

The Constitution of West Virginia and a state statute provide that "no person . . . who is under conviction of a felony . . . shall be permitted to vote while such disability continues." West Virginia Constitution, Article IV, §1; West Virginia Code §3-1-3. The words "under conviction" and "while such disability continues" have been construed to mean disenfranchisement does not continue after the punishment has been served. Osbourne v. Kanawha County Court, 68 W.Va. 189, 69 S.E. 470 (1910).

Right to vote in state and federal elections reinstated once felon fully completes sentence.

### 3. Right to Serve on a Jury

According to West Virginia Code §52-1-8: “A prospective juror is disqualified to serve on a jury if the prospective juror:

- (5) Has lost the right to vote because of a criminal conviction; or
- (6) Has been convicted of perjury, false swearing or other infamous offense.”

As a felony offense has been deemed an “infamous offense,” Maynard, supra, and there is no other limiting language contained in the statute, the right to serve on a jury is permanently lost to a convicted felon. See: Berger v. United States, 867 F.Supp. 424, 429-430 (S.D.W.V. 1995).

Pursuant to 28 U.S.C. §1865, the right to serve on a federal jury is denied to those “convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.”

### 4. Right to Possess Firearms

Under West Virginia Law, persons convicted of “a crime punishable by imprisonment for a term exceeding one year” or “a misdemeanor offense of assault or battery . . . in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant’s child or ward or a member of the defendant’s household at the time of the offense or has been convicted in any court of any jurisdiction of a comparable

misdemeanor crime of domestic violence” are prohibited from possessing firearms. West Virginia Code §61-7-7(a)(1), (8).

A person prohibited from possessing a firearm under West Virginia law may petition the Circuit Court to regain the ability to lawfully possess firearms. West Virginia Code §61-7-7(c).

But see In re Petition of Parsons for Restoration of Civil Rights, — S.E. —, 2005 WL 3210603 (W.Va.), where the West Virginia Supreme Court recently held that the use of §61-7-7(c) for one convicted of a misdemeanor crime of domestic violence would violate federal law. As a result, one convicted of a misdemeanor crime of domestic violence in West Virginia may no longer apply for reinstatement of the right to possess firearms. Parsons is somewhat anomalous as felons convicted under West Virginia law may still petition the Circuit Court for the restoration of the right to possess firearms.

The only recourse for those convicted of a federal felony is found in 18 U.S.C. §925(c). It states that such person may petition the Attorney General for the right to lawfully possess firearms. However, since 1992, Congress has not appropriated funds to the Bureau of Alcohol Tobacco & Firearms (ATF) for processing such applications. United States v. Bean, 537 U.S. 71 (2002). Until a change in fiscal policy, the use of §925(c) for restoration of the right to possess firearms for federal felons is not possible.

## **HOURLY RATE INCREASES FOR CRIMINAL JUSTICE ACT PANEL ATTORNEYS**

The fiscal year 2006 Defender Services appropriation (Public Law 109-115) includes funds to raise the non-capital hourly panel attorney compensation rate from **\$90 to \$92**, and the maximum hourly capital rate from **\$160 to \$163** (for federal capital prosecutions and capital post-conviction proceedings), for attorneys appointed under the CJA. These new hourly compensation rates will apply to work performed on or after January 1, 2006. Where the appointment of counsel occurred before this effective date, the new compensation rates apply to that portion of services provided on or after January 1, 2006.

Please make sure to note these rate changes on all CJA-20 vouchers submitted in the future.

## **NEW FEDERAL PUBLIC DEFENDER WEBSITE AVAILABLE**

The Federal Public Defender for the Northern District of West Virginia recently posted a new website that contains excellent resources for federal criminal practitioners and clients. It is found at: <http://wvn.fd.org>

The Home page includes links to our mission statement, a district-wide map and a Federal Criminal Case Timeline and Client Handbook.

The Contact Us page has office hours information and a listing of staff and office locations, including directions and maps.

A Plans and Rules page provides the Criminal Justice Act plans from the district and the Fourth Circuit Court of Appeals; the WVND local rules and rules relating to electronic filing; and links to the Federal Rules of Evidence, Criminal Procedure and Appellate Procedure.

The News and Case Summaries page has .pdf versions of all previously posted editions of the *West Virginia Northern Federal Defender Quarterly*, federal sentencing and practice information and blogs to case law updates at the circuit and Supreme Court levels.

A CJA Members page lists available training, all CJA forms are now on-line, and a Reference Materials section has links to numerous resources relating to federal criminal defense.

Finally, a Links page provides immediate access to the websites for the WVN district court, the Fourth Circuit, and the United States Supreme Court; there are links to the Sentencing Commission and the Federal Sentencing Guidelines; the Federal Bureau of Prisons and its Inmate Locator; various Executive Branch agencies including the Department of Justice and its United States Attorney Manual; links to criminal defense resources; and, finally, links to West Virginia criminal justice agencies.

Members of the CJA panel are urged to save the website as a favorite and regularly consult these materials. Suggestions for the inclusion of additional materials are welcome. Please call (304) 622-3823.

**2006 LITIGATION SEMINARS  
OFFERED BY DEFENDER SERVICES**

**Winning Strategies Series**

Miami Beach, FL - February 9-11, 2006  
San Diego, CA, June 8-10, 2006.

The annual Winning Strategies Series presents a varied program offering topics of interest to both experienced and new panel attorneys in large and small group settings.

**Sentencing Advocacy Workshop**

Miami Beach, FL - March 2-4, 2006

This program presents a comprehensive approach to sentencing advocacy in a federal criminal case and provides valuable information on the Federal Sentencing Guidelines and sentencing practices in the post-Booker era.

**Law and Technology Workshops**

Boston, MA - April 20-22, 2006  
Chicago, IL - July 27-29, 2006

This workshop focuses on the use of courtroom technology to advance the persuasiveness of witness examination and argument skills. Participants will receive hands-on training with such programs as Trial Director and Power Point.

The Federal Public Defender Office has laptop computers available with these programs for any CJA panel member who wishes to attend the seminar or use the programs at trial.

**Complex Litigation Seminar**

Atlanta, GA - September 7-9, 2006.

This seminar addresses cases

involving voluminous discovery, joint defense agreements, gang cases defense, wire taps, CCE and RICO cases.

All seminars offered by Defender Services are at no cost and CLE credits are available. Registration forms are available at <http://wvn.fd.org> or by calling the Federal Public Defender Office at (304) 622-3823.

**LISTING OF AVAILABLE  
SUBSTANCE ABUSE TREATMENT  
PROGRAMS IN WEST VIRGINIA**

One facet of a criminal case may include the defendant's need for substance abuse treatment and counseling. The West Virginia Department of Health and Human Resources has posted a listing of all substance abuse treatment centers available within the state. Go to:

[www.wvdhhr.org/idep/aids.htm](http://www.wvdhhr.org/idep/aids.htm) At that page, scroll to the bottom and look for this manual: "HIV/AIDS, STD & Substance Abuse Services & Resource Manual."

**FEDERAL SENTENCING GUIDELINE  
AMENDMENTS**

Two new emergency guideline amendments recently took effect. In response to the Intelligence Reform and Terrorism Prevention Act of 2004, an amendment to the sentencing guideline for obstruction of justice was promulgated. This amendment provides a 12 level increase in the base offense level when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable. This amendment became effective on October 24, 2005.

An emergency amendment implementing the directive in the Family Entertainment and Copyright Act of 2005 with respect to intellectual property crimes also became effective on October 24, 2005. It provides a two-level enhancement if the offense involved a pre-release work. It also explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item.

The Sentencing Commission promulgated a new guideline for aggravated identity theft consistent with the new statutory provisions enacted by Congress that provide for consecutive mandatory minimum sentences of two and five years, depending on the underlying associated offense involving the misuse of stolen identification. The antitrust guidelines were also amended in response to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increased the statutory maximum term of imprisonment from three years to ten years. These amendments became effective November 1, 2005.

### **POST-BOOKER SENTENCING STATISTICS**

The United States Sentencing Commission publishes monthly statistics on post-Booker cases and has also compiled this data by Circuit. These reports are available at [www.ussc.gov](http://www.ussc.gov). On the whole, there has not been a dramatic change in the sentences imposed since Booker issued January 12, 2005. The Commission reported that of the 37% of the sentences imposed below the guideline range, 9.5% of the cases mentioned Booker or 18 U.S.C. §3553(a) as factors supporting the reduced sentence. 61.7 % of

the cases have been sentenced within the advisory guideline ranges.

### **2005 EDITION OF ERRORES JURIS**

Alex Bunin, the Federal Public Defender for the Northern District of New York, has issued his 2005 edition of Errores Juris. The publication is over 60 pages in length, and it provides case citations and descriptive bullets of all court of appeals criminal cases from across the country that were remanded because of reversible error. The case listing has subject matter headings and is a great research tool.

A .pdf version can be found and downloaded or copied from the “News and Case Summaries” page of the Defender web site at <http://wvn.fd.org>

### **FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES**

United States v. Amaya-Portillo, 423 F.3d 427 (4<sup>th</sup> Cir. 2005).

- Since Maryland crime of cocaine possession is classified as a misdemeanor even though it carries a maximum sentence of four years, district court erred in finding conviction met definition of “felony” under the Controlled Substances Act, 21 U.S.C. §802(13), and “aggravated felony” under U.S.S.G. §2L1.2(b)(1)(c).

United States v. Thompson, 421 F.3d 278 (4<sup>th</sup> Cir. 2005).

- Prior conviction exception to Apprendi allows district court to find Armed Career Criminal status applies, and that burglaries were committed on separate occasions.

United States v. Moye, 422 F.3d 207 (4<sup>th</sup> Cir. 2005).

- Evidence presented at trial that defendant fled from a burglarized building did not support an inference that consciousness of guilt was the product of the federal firearms offenses charged, and, as a result, the district court abused its discretion in allowing the government to present this same argument in closing.
- Defendant's mere presence at burglarized building failed to support inference that defendant aided and abetted the possession of stolen firearms; post-verdict MJOA granted.

United States v. Scott, 424 F.3d 431 (4<sup>th</sup> Cir. 2005).

- When the government seeks to establish constructive possession in a §922(g)(1) felon in possession of a firearm case, it must prove that the defendant intentionally exercised dominion and control over the firearm, or the defendant had both the power and intention to exercise dominion and control over the firearm.

United States v. Morris, 429 F.3d 65 (4<sup>th</sup> Cir. 2005).

- Fourth Circuit Court of Appeals joins nine other circuits to hold that a petitioner in a §2255 action cannot for the first time raise a Booker claim retroactively.
- Booker claim is not a new “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”

United States v. Forrest, 429 F.3d 73 (4<sup>th</sup> Cir. 2005).

- Relying on the Supreme Court's recent decision in Gonzales v. Raich, 125 S.Ct. 2195 (2005), Court finds under plain error analysis that there is no Commerce Clause violation

for federal prosecution of local, intrastate activity involving the production and possession of child pornography.

United States v. Gilbert, — F.3d —, 2005 WL 3293896 (4<sup>th</sup> Cir.).

- Court rejects “innocent possession” defense to §922(g) felon in possession of a firearm prosecution where defendant claims possession was both transitory and without illicit motive.
- Court finds such defense wholly absent from the statutory text and declines to subvert congressional scheme by creating a judicially crafted defense.

United States v. Alerre, — F.3d —, 2005 WL 3213303 (4<sup>th</sup> Cir.)

- Court provides clarification on distinction between criminal standard and civil standard where a physician is charged with drug distribution charges under 21 U.S.C. §841(a).
- A criminal prosecution requires proof beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice, and the physician's authority to prescribe drugs is being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose, i.e. the personal profit of the physician.

Frazer v. South Carolina, — F.3d —, 2005 WL 3312813 (4<sup>th</sup> Cir.).

- State defendant expected two five year sentences to run concurrent, but state judge imposed consecutive sentences and a fine four times greater than allowed by statute.
- Court of Appeals joins 3<sup>rd</sup> Circuit in finding that Roe v. Flores-Ortega is not a

“new rule” applying the *Strickland* standard to a claim of ineffective assistance of counsel on appeal.

- In failure to file appeal claim, petitioner may meet deficient performance prong by showing either that he decided to appeal and communicated decision to counsel, or facts and circumstances of case prove that counsel should have consulted petitioner about appeal.

- Prejudice prong met by showing that non-frivolous issues could be appealed or a defendant who received reasonable advice from counsel about an appeal would have instructed counsel to appeal.

*United States v. Nunez*, — F.3d —, 2005 WL 3481537 (4<sup>th</sup> Cir.).

- District court abused its discretion in allowing government to reopen its case after summations and jury deliberations had begun to introduce DEA Investigative Report that allegedly contained detailed admissions of defendant that also implicated co-defendant.

- Report gained distorted importance and prejudiced co-defendants who lacked ability to cross-examine DEA agents, provide additional evidence or address report in summation.

- Reversible error and new trials ordered.

*United States v. El Shami*, 12/27/05, 044662P, Westlaw citation currently unavailable.

- Defendant’s illegal re-entry following deportation conviction overturned as trial record supported successful collateral attack of the underlying deportation order pursuant to 8 U.S.C. §1326(d).

- No record that INS ever provided defendant and his counsel with written notice of deportation hearing, and defendant later ordered deported in absentia.

- Lack of notice precluded use of administrative remedies against deportation and judicial review, and defendant proved deportation was unfair as mitigating factors weighing against deportation existed.

*Unpublished Opinions:*

*United States v. Wilder*, 2005 WL 2662418, 10/19/05, 4<sup>th</sup> Circuit.

- District court failed to consider applicability of “safety valve” provision and whether the presence of firearms was proven.

- Findings on these sentencing factors were mandatory and the failure to make such findings made the imposed sentence unreasonable.

*United States v. Belyea, II*, 12/28/05, 044415U, Westlaw citation currently unavailable.

- Defendant moved for admission of expert testimony relating to false confessions made during police interrogations.

- District court denied use of expert witness with explanation that whether a confession is false is “something juries decide all the time, and I don’t need an expert to help them in that respect.”

- District court abused its discretion by failing to hold a *Daubert* hearing and deciding admissibility under Rule 702.

- Court finds phenomenon of false confessions is counter-intuitive to lay people.

- Court further finds motion for new trial based on newly discovered evidence should have been granted where new witness took responsibility for stealing firearms and admitted defendant was not present.

# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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## **BOOKER SENTENCING UPDATE**

On March 16, 2006, the United States Sentencing Commission issued its 277-page tome entitled “United States Sentencing Commission Report on Impact of United States v. Booker on Federal Sentencing.” The 8-page Executive Summary of the Commission’s findings is enclosed as an attachment to this edition of the *Quarterly*.

The Summary addresses both national sentencing trends and regional and demographic differences in sentencing practices. Appendix information includes Post-Booker Departure/Variance Rate by Circuit and District. This same information is available on the Commission’s website at [www.ussc.gov](http://www.ussc.gov) under “Booker/Fanfan Information.”

As of February 1, 2006, the national average for departures below the guideline range was 3.2% and the national average for variances below the guidelines (18 U.S.C. §3553(a) reductions) was 9.3%. Here in the Fourth Circuit, those percentages were 2.5 % and 9.6%, respectively. The Northern District of West Virginia recorded 2.0% of its cases as downward departures, and 6.6% of its cases as variances below the advisory guideline range.

Several recent opinions from the Fourth Circuit Court of Appeals addressing sentencing issues are sufficiently noteworthy to include here rather than in the Round-Up

section at the end of this edition. In United States v. Clark, 434 F.3d 684 (4<sup>th</sup> Cir. 2006), the district court was found to have acted unreasonably when it based a downward variance on the supposed disparity between sentences imposed in state drug cases when compared to those handed down in federal court. However, Clark did not impose a per se ban on this variance justification by noting there “may be unusual cases when, despite the disparities among federal defendants created by the consideration of state sentencing practices, the sentence imposed will yet be reasonable in light of all the section 3553(a) factors, because state sentencing practices will inform the proper consideration of factors other than [the need to avoid unwarranted sentencing disparities].”

The “need to avoid unwarranted sentencing disparities” factor found in §3553(a)(6) was also used in United States v. Eura, 2006 WL 440099, to overturn a downward variance based on the inherent unfairness in the 100:1 ratio between crack cocaine and powder cocaine sentencing practices. Both the Fourth Circuit and the First Circuit in United States v. Pho, cite, have now rejected this categorical approach. However, the Court in Eura noted there may be cases in which some of the §3553(a) factors will warrant a variance from the advisory sentencing range in a crack cocaine case.

In United States v. Moreland, 437 F.3d 424 (4<sup>th</sup> Cir. 2006), the Court found a career offender guideline sentence (360 months to

life), reduced to the mandatory statutory minimum sentence of ten years, to be unreasonable. While agreeing that a downward variance was warranted, the Court found the extent of the variance to be unreasonable as “the circumstances of this case are not so compelling as to warrant the substantial variance imposed by the district court.” Of special interest was the Court’s remand order in Moreland: “ We therefore vacate the sentence and remand for the imposition of a sentence of no less than 20 years imprisonment.” The remand order thus sets the outer limit of a “reasonable” sentence.

#### **FEDERAL SENTENCING GUIDELINES IN THE FOURTH CIRCUIT, 2004 EDITION**

Congratulations to Mary Lou Newberger, Federal Public Defender for the Southern District of West Virginia, and her office for publishing an updated case compilation entitled “Federal Sentencing Guidelines in the Fourth Circuit, 2004 Edition.” A CD-ROM is included along with this mailing that has the updated edition in .pdf format. This edition replaces and updates the manual that last issued in 2000. All relevant case listings through 12/31/04 are included. The office is already working up the next edition which will include Fourth Circuit sentencing practices after Booker.

#### **LITTLE RED BOOK - 2006 EDITION**

The Federal Public Defender Office for the Eastern District of Washington and Idaho has published the 2006 edition of the My Little Red Rules Book. This pocket-sized booklet includes provisions from the U.S. Constitution; Federal Rules of Evidence;

Selected Federal Rules of Criminal Procedure; the Bail Reform Act; and Sentencing Table. The Red Book can be ordered for \$6.00, checks payable to the above-listed Defender Office, at 10 North Post 200, Spokane, Washington 99201.

#### **ACCESS TO WINNING TRIAL STRATEGIES SESSION MATERIALS**

The Office of Defender Services Training Branch website at [www.fd.org](http://www.fd.org) now posts all program materials for its Winning Trial Strategies training sessions. These materials are posted by year under “Training and Publications.” The 2006 materials include over twenty chapters on such topics as: Use of Experts; Discovery Issues; Use of Topics and Themes in Opening Statements and Closing Argument; Defending a Methamphetamine Case; Computer Crimes; Crawford Confrontation; Use of Mitigation Specialists for Sentencing; Wiretaps, and Supreme Court Updates, etc. Earlier session materials from 2003, 2004 and 2005 are also posted and available. These materials are extremely helpful and contain a wealth of information.

All Defender Services training programs offered to CJA panel attorneys in 2006, including the Winning Trial Strategies sessions, are posted on our website at <http://wvn.fd.org> under the “CJA Members” page.

#### **VERA REPORT ON GOOD COURTS OF APPEALS PRACTICES**

In January, the Vera Institute of Justice published its Good Practices for Panel Attorney Programs in the United States Courts of Appeals. This report follows a

similar publication that related to better CJA practices at the district court level. The entire 43-page report is posted on our website, listed above, under the “News and Case Summaries” section.

The Vera report stresses a flexible approach to continuity of counsel from trial to appeal in order utilize only the most experienced appellate counsel who possess an interest in perfecting the appeal. The report also suggests ways for each circuit to establish and maintain its appellate panel through the selection and appointment process. Finally, the report stresses the need for a fair and expeditious compensation review process, and the need for attorney notice before CJA voucher payment requests might be reduced below the amount claimed.

#### **JUSTIFICATION FOR COMPENSATION IN EXCESS OF STATUTORY MAXIMA**

At present, the statutory maximum allowed for the defense of a trial level felony case is \$7,000. See: 18 U.S.C. §3006A(d)(2). For appeals, the statutory maximum amount is \$5,000. In order to receive payment in excess of these amounts, both district court and Circuit approval is required.

In order to better insure the later receipt of CJA voucher payment requests that exceed these limits, panel attorneys should carefully note the requirements found in the CJA plans of both the Northern District of West Virginia and the Fourth Circuit Court of Appeals.

According to the district’s CJA plan: “Payment in excess of any maximum provided in the previous paragraph may be

made for extended or complex representation whenever the presiding judge . . . certifies that the amount of the excess payment is necessary to provide fair compensation and payment is approved by the chief judge of the Court of Appeals for the Fourth Circuit.”

According to CJA plan of the United States Court of Appeals for the Fourth Circuit: “Counsel claiming in excess of the statutory maximum must submit with his voucher a detailed memorandum supporting or justifying counsel’s claim that the representation given was in a complex or extended case, and that the excess payment is necessary to provide fair compensation. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is ‘complex.’ If more time is reasonably required for total processing than would normally be required in the average case, the case is ‘extended.’”

An attorney is much more likely to receive a claim submitted in excess of the statutory maxima if detailed information is provided to the Court to support that claim. Counsel should note CJA Form-26, the memorandum for claims in excess at the district level, and CJA Form-27, the memorandum for claims in excess at the court of appeals level. Each of these forms may be found on our website at <http://wvn.fd.org> under “CJA Members.”

Regardless of whether these forms are utilized, or the same information is provided in letter format, counsel will more likely receive full payment if the courts are provided with sufficient justification to support the claim.

## **NEW CRIMINAL JUSTICE ACT GUIDELINES FOR VOUCHER REDUCTION PROCEDURES**

On March 14, 2006, the Judicial Conference approved two amendments to Volume 7 of the *Guide to Judiciary Policies and Procedures*. New section 2.22 D. states that CJA payments through “[v]ouchers should not be delayed or reduced [because of] adverse financial circumstances.” This practice was somewhat common at the end of the fiscal year when CJA funding grew limited. An amendment to 2.22 E. states that a CJA attorney now has a right to notice and an opportunity to be heard before a voucher is reduced for reasons other than mathematical or technical errors.

## **NEW WHEELING COMMUNITY CONFINEMENT CENTER**

A new community confinement center opened in Wheeling last month. Bannum of Wheeling began accepting federal inmates on the “back-end” of their sentence as of March 1, 2006. Jeff R. Givens, Chief United States Probation Officer for the Northern District of West Virginia, is attempting to contract with Bannum to house defendants in lieu of pre-trial detention. Bannum of Wheeling can also be used as a condition of probation or supervised release if appropriate.

## **FEDERAL BUREAU OF PRISON’S REFUSAL TO FOLLOW JUDICIAL RECOMMENDATION FOR COMMUNITY CONFINEMENT PLACEMENT**

One aspect of post- Booker sentencing under the now advisory Federal Sentencing Guidelines might include a request for

service of a portion of the sentence at a community confinement center rather than in a federal prison. In United States v. Jones, 352 F.Supp.2d 22 (D. Maine 2005), the district court concluded that the Guidelines did not authorize a downward departure. However, the district court then exercised its discretion under 18 U.S.C. §3553(a) to structure a sentence as if defendant’s guideline range fell within Zone C of the Sentencing Table. The district court then imposed a split sentence even though defendant’s offense level of 13 still fell within Zone D of the Sentencing Table that normally does not allow for split sentences.

While 18 U.S.C. 3553(a) would normally allow a Court to impose a split sentence to include time in prison and time in a community confinement center, it is unlikely the Federal Bureau of Prisons would honor such an order. In 2002, the Bureau found that the “general authority” it had under 18 U.S.C. §3621 to place an offender in a community confinement setting for the entire sentence by employing five statutory criteria was trumped by the language in 18 U.S.C. §3624(c) which only allowed a prisoner to serve no more than 10% of the sentence or six months at a community confinement center. As a result, the Bureau issued a memorandum limiting a prisoner’s residence in a community confinement center to the lesser of 10 percent of the total sentence or six months.

Shortly thereafter, the First Circuit and the Eighth Circuit found this 2002 policy unlawful because it did not recognize the BOP’s discretion to transfer an inmate to a community confinement center at any time and contrary to the plain meaning of §3621.

Goldings v. Winn, 383 F.3d 17 (1<sup>st</sup> Cir. 2004); Elwood v. Jeter, 386 F.3d 842 (8<sup>th</sup> Cir. 2004).

In response to these rulings, the BOP issued new regulations in 2005. See: 28 C.F.R. §§570.20, 570.21. While acknowledging BOP's general discretion under §3621 to place an inmate at a community confinement center at any time, the BOP's new regulations again categorically limit such placement to the lesser of 10% of a prisoner's total sentence or six months. These new regulations were recently deemed contrary to Congress's directives as set out in 18 U.S.C. §3621. Woodall v. Federal Bureau of Prisons, 432 F.3d 235 (3<sup>rd</sup> Cir. 2005).

Given the Federal Bureau of Prison's consistent refusal to exercise its authority under 18 U.S.C. §3621, it is highly unlikely the BOP would honor a court order that a defendant serve a sentence split between federal prison and a community confinement center. In order to structure a sentence to achieve this result, a Court could, as in Jones, impose a split sentence as if defendant faced Zone C sentencing. The judgment order would include a certain period of time in federal custody and a subsequent period of supervised release that includes a condition defendant reside at a community confinement center. Such an order would take the placement issue away from the BOP and give the Court added discretion when structuring a sentence.

#### **IMPOSITION OF A STATE SENTENCE THAT ACTUALLY RUNS CONCURRENT TO A FEDERAL SENTENCE**

Inmates who are in primary state custody when they are sentenced on a federal case are losing substantial credit towards their federal sentences because the BOP narrowly interprets 18 U.S.C. §3585(b)(which governs credit for prior custody). For example, a defendant in state custody appears in the district for a federal prosecution via a writ. After the federal sentence is imposed, the defendant returns to state court for imposition of a state sentence. The state court judge imposes the state sentence to run concurrent to the previously imposed federal sentence. However, under the BOP's interpretation of §3585(b), the defendant will not be taken into "federal custody" until the state sentence has been fully served at a state facility. As a result, the defendant has received a *de facto* consecutive sentence.

There are several ways to avoid this outcome. First, the state prosecutor and state court judge will oftentimes agree to the entry of a personal recognizance bond at the state level so the defendant can immediately thereafter transfer into federal custody. Following imposition of the federal sentence, the state authorities must then issue a writ for defendant's appearance. At that point, the state court can impose a state sentence that truly runs concurrent to the federal sentence. State authorities usually honor such request when they learn the BOP and not the state will be paying the costs of an extended period of incarceration.

In addition, U.S.S.G. §5G1.3(c), as interpreted by the courts, permits a court to impose a lower sentence so that when that sentence is run consecutively to the state sentence, the resulting sentence will amount to a concurrent or partially concurrent

sentence. Courts may also grant a downward departure or variance to achieve this result given the manner in which the BOP interprets §3585(b).

Finally, it is worth noting the BOP will not credit any time spent here in the district on a writ of habeas corpus ad prosequendum if the defendant is later returned to state custody for imposition of a state sentence. All time spent here in the district while the federal prosecution proceeds to disposition will be deemed “credited” towards the later state sentence.

### **NEW MILEAGE RATE FOR PRIVATELY OWNED VEHICLES**

Effective January 1, 2006, the mileage rate for travel in a privately owned vehicle was reduced from 48.5 cents per mile to 44.5 cents per mile. This new rate applies to any case related travel on or after the effective date.

As the mileage rates; hourly rates for attorney compensation; and maximum amounts for trial and appellate cases are subject to change, these updated figures can be found under the CJA Rates History section of the CJA Members page on our website.

### **PRACTICE TIPS FOR COURT CALENDERING**

In order for the courts to calendar appearances and effectively allocate resources, the following practice tips are suggested: 1) always abide by the new local rule and include three proposed dates in the continuance motion that are mutually acceptable to both defense counsel and the federal prosecutor; 2) if a contested

evidentiary hearing or sentencing hearing will take much longer than normal due to witness testimony or legal argument, alert the court to this fact and provide an estimate of how long the hearing might be; and 3) avoid raising PSR objections and/or departure and variance requests until the time of sentencing as these issues must first be referenced in the PSR to avoid a later waiver claim.

### **NEW FOURTH CIRCUIT BLOG SITE**

There is now direct access to a website devoted to case summary blogs and analysis of Fourth Circuit Court of Appeals opinions at [www.circuit4.blogspot.com](http://www.circuit4.blogspot.com). The blogs are regularly updated as new opinions issue. The same information can be accessed through the FPD NDWV website at <http://wvn.fd.org> under “News and Case Summaries.”

### **EMERGENCY GUIDELINE AMENDMENT FOR STEROIDS**

The United States Sentencing Commission issued an emergency amendment, effective March 27, 2006, that relates to steroids and it affects §2D1.1. Drug quantity directives are included for steroids. There is now a 2-level increase if the offense involved the distribution of an anabolic steroid or masking agent. An additional 2-level increase applies if the defendant distributed an anabolic steroid to an athlete. And, there is an enhancement under §3B1.3 if the defendant used his or her position as a coach to influence an athlete to use steroids. Let the baseball season begin!

## **AVAILABILITY OF LIST-SERVE FOR CJA PANEL MEMBERS**

For about the last year, the Federal Public Defender Office for the Northern District of West Virginia has had a Yahoo Group list-serve available for CJA panel attorneys. However, there has been only limited use of this forum and we wish to note its continued availability.

A list-serve group is an electronic forum or chat room open to only a limited membership. In this case, the Federal Public Defender acts as the Yahoo Group moderator and only the Federal Public Defender has the ability to add or remove members. At present, only about 44 attorneys of the 109 members of the CJA panel in the district are members of this Yahoo Group.

The benefits of continued use of the Yahoo Group include: 1) the ability to post email type messages to only the criminal defense attorneys included in the group; 2) the ability to receive group responses; and 3) the posting of work product, i.e. Word, WordPerfect and .pdf documents.

Use of the WVN- CJA Yahoo Group is a great way to communicate with colleagues and receive case related tips and information. As a closed group, everyone is assured there will be no unauthorized entry by others.

Now that all CJA panel members have email addresses and website access in order to use the Court's CM/ECF system, we re-invite all CJA panel members to sign up for the WVN-CJA Yahoo Group.

As a separate attachment to this edition of the *Quarterly*, CJA panel members will find

detailed instructions for JOINING THE "WVN-CJAPANEL" GROUP. All attorneys interested in joining this group should contact Lisa Coleman at the Federal Public Defender Office, (304) 622-3823 to insure we have your updated email address. This includes attorneys who might have previously joined the Yahoo Group. Lisa will then forward an electronic invitation to each of you. Simply follow the enclosed instructions for joining the group. Option 1 is more user friendly as it both provides access to the mailing list and access to the group's Yahoo web page.

In addition, we include detailed instructions for READING AND SENDING MESSAGES TO THE WVN-CJA PANEL GROUP. Members can ask case related questions, seek information and tips from others in the group and share electronic work-product. You now have access to the experience and insight of over one hundred federal criminal defense practitioners.

Finally, there are instructions included for attaching work-product to text messages. This is a great way to share and utilize motions, memoranda, jury instructions, etc. as templates for pending cases.

Please consider joining the WVN-CJA Yahoo Group today.

## **FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES**

*United States v. Rodriguez*, 433 F.3d 411 (2006).

- Interesting use of harmless error analysis for pre-Booker imposition of sentence under mandatory guideline scheme.
- Defendant raised and preserved the claim

by objecting at sentencing. The prejudice burden therefore fell onto the government. As the record was silent on whether the district court would have imposed a lower sentence under Booker, defendant's sentence vacated and the case was remanded.

United States v. Baldovinos, 434 F.3d 233 (4<sup>th</sup> Cir. 2006).

- Court holds that Supreme Court analysis in Sell applies to the involuntary use of psychotropic drugs to restore defendant's competency for sentencing proceeding.

United States v. Rizzi, 434 F.3d 669 (4<sup>th</sup> Cir. 2006).

- Court interprets interplay between 21 U.S.C. §879 that allows execution of a search warrant involving controlled substances "at any time of the day or night," and FRCP Rule 41(e) that requires the police to execute a warrant during the daytime unless the judge for good cause expressly authorizes execution at another time.

- Court finds that §879 applies exclusively to drug cases and that when a search warrant involves such violations, the warrant can be served day or night so long as the warrant itself is supported by probable cause.

United States v. Nichols, 438 F.3d 437 (4<sup>th</sup> Cir. 2006).

- Court holds that voluntary statement taken in violation of Miranda and Edwards (police must terminate interview once suspect invokes right to counsel) is admissible during sentencing proceeding.

- Even though §924(c) count dismissed based on 5<sup>th</sup> Amendment violation, district court can utilize §2D1.1(b)(1) firearm enhancement at sentencing by relying on same tainted statement.

United States v. Alvarado, 440 F.3d 191 (4<sup>th</sup>

Cir. 2006).

- Separate sovereign authority exception to double jeopardy protections allows for police interrogation after federal drug trafficking conspiracy complaint issued, even though defendant already had court-appointed counsel in state drug case later dismissed.

- Filing of federal criminal complaint does not trigger Sixth Amendment right to counsel as adversary judicial proceedings have not yet begun.

United States v. Singleton, — F.3d —, 2006 WL 724800 (3/28/06).

- Leon good faith exception to exclusionary rule saves no-knock search warrant issued and based only defendant's 1987 second degree murder conviction.

United States v. Stit, — F.3d —, 2006 WL 742418 (3/26/06).

- \$2255 used to vacate death penalty where retained counsel found to have an actual conflict of interest based on the failure to request court funding for expert witness who would address petitioner's future dangerousness. Such request would have required an examination by the district court of retained counsel's fee arrangement with petitioner, and the possible disclosure that fee payment allegedly stemmed from drug proceeds.

United States v. Simms, — F.3d —, 2006 WL 771468 (3/28/06).

- Maryland "statement of charges" document used as part of guilty plea procedure in state court was properly used by district court and not in violation of Shepard to support a finding that defendant had predicate violent convictions for Armed Career Criminal consideration.

# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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VOL. IV, NO. 3

JULY 2006

## **SENTENCING GUIDELINE AMENDMENTS EFFECTIVE 11/06**

There were a number of significant amendments to the Federal Sentencing Guidelines proposed for November 1, 2006.

In regard to immigration, a new specific characteristic requires a two-level enhancement for smuggling a minor (under 16 years of age) not accompanied by the minor's parent or grandparent. USSG §2L1.1(b)(4) & comment (n.1). There is a two-level enhancement and minimum offense level of 18 if an alien was "involuntarily detained through coercion or threat, or in connection with a demand for payment" after the alien was smuggled into the United States or while he was transported or harbored. USSG §2L1.2(b)(8). The Commission added a two-level enhancement for smuggling connected with a commercial organization, involving groups of more than 10 immigrants and endangering the lives of immigrants. USSG §2L1.1(b)(9). The enhancement for smuggling resulting in death is increased to 10 levels, USSG §2L1.1(b)(7)(D), and the cross-reference expanded to include homicide rather than murder. USSG §2L1.1(c)(1). Base offense levels are increased for a person convicted of smuggling inadmissible aliens. USSG §2L1.1(a)(1). The passport enhancement for documents is broadened to include foreign passports as well as United States passports. USSG §§ 2L1.1(b)(5)(B) & 2L2.1(b)(5)(B).

Firearms traffickers, i.e. people who transfer two or more firearms knowing the recipient's possession is unlawful or the intended disposition is unlawful, will receive a two-level enhancement. USSG §2K2.1(b)(5). A firearm with an obliterated serial number results in a four-level increase rather than two. USSG §2K.1(b)(4). Although Congress appealed the assault weapons ban, the Commission retained substantial increases for possession of these weapons. USSG 2K2.1(a). With respect to possession of a firearm in connection with another felony, §2K2.1(b)(6), the Commission explains that the firearm must have facilitated or had the potential for facilitating the offense, except that close proximity is sufficient in burglary and drug offenses. USSG §2K2.1, comment (n. 14(A) & (B)).

In drug cases, steroids were the main focus and earlier temporary amendments were made permanent. Punishment is based on a mixture/substance calculation and fifty tablets equal one unit. USSG §2D1.1(c)(F). There is a two-level enhancement for distribution of steroids to athletes, USSG §2D1.1(b)(7), and coaches are presumed to have abused a position of trust. *Id.* n. 8. With respect to other drugs, the Commission has expanded the death cross-reference to include second degree murder. USSG §2D1.1(d)(1).

The Commission has broadened the scope of the obstruction of justice enhancement to include conduct that occurred "with respect

to” a criminal investigation, which may include conduct that precedes the commencement of the investigation. USSG §3C1.1 & n. 1. The Commission repromulgated a temporary guideline increasing penalties for defendants convicted of making false statements regarding terrorism. USSG §2J1.2(b)(1)(A), (B).

The temporary amendments regarding copyright infringement that became effective in October 2005 have now been made permanent. There is a new specific offense characteristic for false registration of a domain name, and a new guideline for transmission of electronic messages containing “sexually oriented material.”

For misdemeanor cases, USSG §2X5.2 provides a base offense level of 6 for Class A misdemeanors not otherwise covered by the guidelines.

The Commission finally complied with Congress’s directive in 1984 to promulgate a policy statement regarding the power of the court to reduce a sentence on the motion of the Director of the Bureau of Prisons. The policy statement clarifies that this power is not only to be exercised in cases of dire medical need, but may be used any time there are “extraordinary and compelling reasons for sentence reduction.”

All these guideline amendments, as well as applicable guidelines for each year from 1994 to 2005, can be found on the United States Sentencing Commission website at [www.ussc.gov](http://www.ussc.gov) under “Publications” and “Guidelines and Amendments.”

## **EX POST FACTO LIMITATION ON GUIDELINE AMENDMENTS**

Under 18 U.S.C. §3553(a)(4), a defendant is normally to be sentenced pursuant to the guidelines in effect on the date the defendant is sentenced. However, if a guideline amendment becomes effective after the date of the offense of conviction and is detrimental to the defendant, ex post facto limitations mandate that the defendant be sentenced under the more lenient guideline in effect on the date of the offense. United States v. Butner, 277 F.3d 481 (4<sup>th</sup> Cir. 2002); United States v. Lewis, 235 F.3d 215 (4<sup>th</sup> Cir. 2000). As part of any draft pre-sentence report review, counsel should always consider the offense date and make reference to those guidelines in effect at that time. It may be that an earlier calculation more favorable to the defendant is available.

## **UPCOMING CJA TRAINING OPPORTUNITIES**

Space is still available for free training programs available for CJA panel attorneys. The annual Law and Technology Workshop that teaches use of Trial Director and Power Point will be held in Chicago, Illinois from July 27-29, 2006. A 3-day seminar on Complex Litigation Practices will be held in Atlanta, Georgia from September 7-9, 2006. Contact information for these programs can be found at the Defender Services website at [www.fd.org](http://www.fd.org) under Training. The 11<sup>th</sup> Annual National Federal Habeas Corpus Seminar will be held August 24-27, 2006 in Pittsburgh, Pennsylvania. Registration information is available at [www.fapdefnet.org](http://www.fapdefnet.org)

## **SEX OFFENDER MANAGEMENT PROGRAM**

The Federal Bureau of Prisons has established a Sex Offender Management Program at the Federal Medical Center (FMC) in Devens, Massachusetts. The primary goal of the SOMP is to help sexual offenders manage their behavior in order to reduce sexual re-offending. The SOMP is a mandatory program assignment for inmates who have been identified as sex offenders with a Public Safety Factor (PSF) classification and whose security classification is low or medium. The newer program is similar to the Sex Offender Treatment Program at FCI Butner, North Carolina, with the exception that the SOMP program is not voluntary. Any placement opportunity in the SOMP increases with a court recommendation at sentencing. A policy statement is available at the BOP website at [www.bop.gov](http://www.bop.gov)

## **NEW DNA PRIMER AVAILABLE ON CD-ROM**

A new CD-ROM provides detailed information and background on forensic DNA. Entitled "Principles of Forensic DNA for Officers of the Court," the materials were compiled by the National Institute of Justice (a research arm of USDOJ) but with assistance by professionals from several fields, including DNA researchers and practitioners, crime laboratory directors, judges, prosecutors and defense counsel. Any CJA panel attorney with a case involving DNA evidence who wishes to use these materials can call the Federal Defender Office at (304) 622-3823. Additional copies can also be requested from USDOJ if need be.

## **NEW REPORT ON PRISONS AND CONFINEMENT ISSUES**

The Commission on Safety and Abuse in America's Prisons has published a new study entitled "Confronting Confinement." The 122-page study is available at [www.prisoncommission.org](http://www.prisoncommission.org) The Commission's study focuses on conditions of confinement, overcrowding and the prevalence of violence; medical care and institutional inadequacies; and the increased use of high-security segregation practices and the long term effects on the inmate population. Both state and federal institutional practices are addressed by the Commission.

## **COMPUTER AND INTERNET CRIMES DEFENSE MANUAL**

A 52-page manual detailing defense tips in computer and Internet crimes, including child pornography offenses, is available at the Defender Services website at [www.fd.org](http://www.fd.org) under What's New. This manual is a must-read for anyone involved in such a case, and it includes areas such as search and seizure, entrapment defenses and use of the Federal Sentencing Guidelines.

## **FOURTH CIRCUIT CASE SUMMARY ACCESS**

The Northern District of West Virginia Federal Defender website at <http://wvn.fd.org> has added two new publications under its Case Summaries page. The Federal Public Defender Office for North Carolina Eastern has compiled a listing of all notable 4<sup>th</sup> Circuit opinions for 2006, and the Federal Public Defender Office for Virginia Eastern has published a

separate listing of all 4<sup>th</sup> Circuit sentencing cases addressing post-Booker issues. Each of these articles will be updated periodically and available on our website.

### **DANGERS OF WITNESS MISIDENTIFICATIONS**

The Federal Courts Law Review has published Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony by Dr. Henry Fradella. Dr. Fradella, a lawyer and professor of criminology, finds that there are at least 125 criminal cases in which post-conviction DNA evidence has exonerated persons who were mistakenly identified as the perpetrators of serious crimes. Dr. Fradella reviews the scientific literature pertaining to perception and memory and analyzes the complex factors that bear on a human being's ability to remember what occurred during the commission of a crime and to then identify its perpetrator. He concludes that these factors are certainly beyond the common knowledge of jurors and that educating them as to their significance is crucial to the jurors' realistic assessment of the accuracy of the eyewitness testimony they have heard. He therefore urges the courts to abandon their refusal to admit expert witness testimony as to the scientific factors pertaining to the validity and accuracy of eyewitness identification and permit jurors to hear this vitally important information. The entire article can be downloaded from <http://www.fclr> under Articles.

### **NEW COSTS FOR INCARCERATION VERSUS SUPERVISION OF DEFENDANTS**

The Administrative Office of the United

States Courts recently published the fiscal year 2005 costs of supervision as compared to the cost of incarceration and pre-trial detention. The average annual cost for imprisonment at a BOP facility is \$23,431.92. Average annual costs for pre-trial detention are \$22,665.33. Supervision of defendants by United States Probation is \$3,450.00 per year, and similar supervision of those on pre-trial release is \$2,079.52 per year.

The annual savings for structured release under supervision are substantial and this information might prove helpful at detention hearings and sentencing hearings.

### **WORKFORCE DEVELOPMENT THROUGH UNITED STATES PROBATION OFFICE FOR DEFENDANTS UNDER SUPERVISION**

Although in its early planning stages, the United States Probation Office for the Northern District of West Virginia is working towards the development of a program for employment placement of defendants under supervision. This new service is based on the recognition that meaningful employment plays a successful role in the reintegration of defendants and offenders into the community.

At the district level, the program will develop partnerships with potential employers, provide skill assessments, and share information relating to training and employment opportunities.

Questions on this new program can be addressed to Jeff Givens, the Chief Probation Officer at (304) 624-5504.

## **POST-BOOKER SENTENCING STATISTICS**

The United States Sentencing Commission publishes monthly statistics on post-Booker cases and has also compiled this data by circuit and district. These reports are available at [www.ussc.gov](http://www.ussc.gov) under the “Booker/Fanfan” tab.

For fiscal year 2006, from October 1, 2005 through June 1, 2006, the Commission reported that across the country 5.2% of the sentences imposed were below the guideline range based on downward departures. Booker downward variances were at 7.2%.

Here in the Fourth Circuit, 4.0% of the cases were based on downward departures and 7.8% were due to downward variances.

The Northern District of West Virginia had a 2% downward departure rate and a 6.4% downward variance rate.

## **FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES**

*In Re: Jackie Williams*, 444 F.3d 233 (4<sup>th</sup> Cir. 2006).

- Where district court previously granted habeas petition to perfect an appeal, there is no second or successive habeas petition bar under 28 U.S.C. §2244(b) to later habeas filing after direct appeal process completed.

*United States v. Williams*, 444 F.3d 250 (4<sup>th</sup> Cir. 2006).

- No Ex Post Facto concerns when applying Booker remedial holding (guidelines only

advisory) during sentencing for misconduct that occurred before Booker opinion issued

- No presumption of vindictiveness exists where longer sentence imposed on remand and district court follows mandate of Booker and relies on all sentencing factors found in 18 U.S.C. §3553(a).

*United States v. Milam*, 443 F.3d 382 (4<sup>th</sup> Cir. 2006).

- Facts stated in pre-sentence report may not, at sentencing, be deemed admissions by the defendant sufficient to bypass the Sixth Amendment right to a jury trial as articulated in Booker.

- Although not readily apparent from the opinion, this case seems to be a “pipeline” case where the original sentencing took place when the Sentencing Guidelines were mandatory.

*United States v. Johnson*, 445 F.3d 339 (4<sup>th</sup> Cir. 2006).

- Court holds that a properly calculated, within range guideline sentence will be deemed presumptively reasonable on appellate review.

- Court places great weight on two decades of guidelines sentencing policy, claims sentencing factors found in 18 U.S.C. §3553(a) are already incorporated and built into the Guidelines, and claims imposition of a guideline sentence stems from an individualized factfinding sentencing process.

United States v. Montes-Pineda, 445 F.3d 375 (4<sup>th</sup> Cir. 2006).

- Court rejects government contention that it lacks jurisdiction to determine whether a within range guideline sentence was unreasonable and “imposed in violation of law.”

- Court finds district court did not abuse its sentencing discretion in failing to impose a lesser sentence in an immigration case based on the argument that other districts have “fast track” sentencing proceedings where defendants receive lower sentences.

United States v. Revels, – F.3d –, 2006 WL 1134148 (5/1/06), 4<sup>th</sup> Circuit.

- In “pipeline” case where district court imposed both a mandatory guideline sentence and an advisory sentence under the Hammoud holding, the Court finds government meets its harmless error burden where guideline sentence and statutory sentence were identical.

United States v. Davenport, 445 F.3d 366 (4<sup>th</sup> Cir. 2006).

- Due process violation where defendant received no notice that the district court was contemplating a sentence above the advisory guideline range. Notice of intent to depart or impose variance remains a critical part of sentencing post-Booker.

- Length of sentence imposed by district court was unreasonable where 120 month sentence was more than three times the top of the advisory guideline range. Case remanded for

further evidentiary proceedings and opportunity for district court to provide bases for sentence imposed.

United States v. Perez-Pena, – F.3d –, 2006 WL 1791697 (6/30/06), 4<sup>th</sup> Circuit.

- District court acted unreasonably when imposing a below-guidelines sentence to avoid “unwarranted sentencing disparity” between immigration defendants in fast-track districts and immigration defendants in districts without fast-track programs.

- Disparities between fast-track sentences and non-fast-track sentences are warranted and reflect government’s ability to offer plea bargain benefits to only some defendants and not others.

Unpublished:

United States v. Uriel Moren-Mendoza,

- Degree of upward variance deemed unreasonable where district court first found that 16-level guideline enhancement did not apply as defendant’s prior conviction did not meet definition of “drug trafficking offense,” but district court then applied the same de facto enhancement outside the guidelines and under 18 U.S.C. §3553(a).

# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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VOL. IV, NO. 4

OCTOBER 2006

## **CIVIL AND CRIMINAL LOCAL RULES COMMITTEES FORMED**

The district court judges have formed committees to determine what, if any, changes are needed for the Local Civil and Criminal Rules used here in the Northern District of West Virginia. The Committees are presently accepting suggestions from area practitioners for rule changes. If any CJA panel attorneys have specific suggestions or proposed text for a particular rule, please send the information to the Federal Public Defender Office in Clarksburg, or fax the information to (304) 622-4631. The deadline for this requested information is October 31, 2006.

## **COURT RECEIPT OF ELECTRONIC CASE FILING NOTIFICATIONS**

U.S. Magistrate Judge James E. Seibert in Wheeling recently asked that attorneys be informed of the timing involved for court receipt of electronic case filing notifications. If a pleading is filed electronically, a "summary of activity" email is not received by the court until the next business day. As a result, the court cannot immediately act on pressing or last minute motions that are filed unless a courtesy copy is also sent to the court when the electronic filing is made through CM/ECF. This courtesy copy may be sent by email directly to the court or by faxing a hard-copy of the pleading with a request for immediate action. Without this individual notification, the court would not

otherwise review pleadings filed until 9:00 a.m. on next business day. Everyone is asked to keep this in mind when filing in pending criminal cases.

## **NOTICE NEEDED FOR SUBPOENAS AND WRITS OF HABEAS CORPUS AD TESTIFICANDUM**

The United States Marshal requests at least ten (10) days notice for the service of subpoenas, and the requirements for this process are outlined in the "Federal Public Defender's Handbook" posted on the FPD NDWV website at <http://wvn.fd.org> under the CJA Members Reference section. The Handbook provides detailed information on the manner in which the Marshal Service will assist with service of process and witness attendance at court proceedings. However, a writ of habeas corpus ad testificandum requires additional notice of at least three weeks. Depending on the location where the federal inmate/witness is held, it may take the Marshal Service this amount of time to arrange transportation.

## **REAPPOINTMENT OF CRIMINAL JUSTICE ACT PANEL REPRESENTATIVE**

Jay T. McCamic of Wheeling has agreed to serve another three-year term as the CJA Panel Representative for the district. As a panel representative, Jay continues to communicate with other panel attorneys, the court and the Federal Public Defender about

panel related issues; he sits on various committees in the district, he is available for training opportunities, and he attends the annual CJA Panel Representative conference sponsored by the Office of Defender Services. Jay can be reached at (304) 232-6750. His continued participation as Panel Representative for our district is greatly appreciated.

### **SEARCH AND SEIZURE OUTLINE**

The Federal Public Defender Office for the District of Oregon has published a 44-page Search and Seizure Outline. The outline covers search and seizure from a defense perspective and it sets out the general state of the law, counterpoints to the cases restricting Fourth Amendment rights, and it tracks cases in which defendants have succeeded in suppressing evidence based on creative use of facts and law. The outline is available on the FPD NDWV website under the News and Case Summaries page.

### **BUREAU OF PRISONS MEDICAL CARE LEVEL CLASSIFICATION**

The Federal Bureau of Prisons has implemented a new medical care level classification system to match incoming inmates with institutions that can best meet their medical needs. There are four levels established: Level 1 for inmates who are generally healthy, but have limited medical needs; Level 2 for stable outpatients who require at least quarterly clinical evaluations; Level 3 for fragile outpatients who require frequent contacts to prevent further hospitalization; and Level 4 for inmates who require significantly enhanced medical services available only at a Bureau Medical Center.

Even under the new classification system, the pre-sentence report is the primary resource used by the Bureau when making its placement determinations. Defense counsel should insure that detailed information concerning defendant's medical condition, including actual treatment records and summaries, is shared with United States Probation. Further, a judicial recommendation for incarceration at a particular medical facility is helpful. If BOP placement at that facility is not possible, BOP would be obligated to notify the court by letter, stating it is unable to implement the court's recommendation and providing the reasons for a departure from the judicial recommendation.

### **REASONS WHY YOUR CLIENT WILL NOT RECEIVE UP TO A ONE YEAR REDUCTION IN SENTENCE FOR COMPLETION OF THE BOP'S INTENSIVE DRUG TREATMENT PROGRAM**

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; 5) the current offense is a crime of violence or it involved the use/possession of a firearm; or 6) the current offense involved a sexual abuse offense upon children. The BOP regularly revises its policy statement devoted to the drug program and the statement can be found at [www.bop.gov](http://www.bop.gov)

## **MAJOR NEW SEX OFFENSE BILL**

Congress recently passed, and the President signed, The Adam Walsh Child Protection and Safety Act of 2006. The primary purpose of the act is development of state sex offender registries and a federal database to collect such information. The new act has some of the following features:

- Creates a new offense of failing to register as a sex offender following federal conviction for sex offenses or interstate travel following a similar state conviction.
- Increases the punishment in a false statement case (18 U.S.C. §1001) to 8 years if the matter relates to a specifically listed sex offense.
- Changes supervised release terms for federal sex offenses to at least 5 years and up to life, and includes a mandatory minimum 5 year sentence if certain enumerated offenses are committed while on supervised release.
- A 0-20 year sentence for distribution of date rape drugs over the Internet was created.
- Mandatory minimum sentences are imposed against persons convicted of a federal crime of violence against minors.
- Increases the penalties for enticement cases, child prostitution and sexual abuse of a minor cases.
- Allows a district court to impose a condition of supervised release that a registered sex offender submit to warrantless searches by law enforcement and probation based on reasonable suspicion.
- Amends the Bail Reform Act by adding to the cases in which the government may seek detention.
- The act provides for an increase of at least 200 AUSA's to prosecute offenses relating to the sexual exploitation of children.

## **ASSISTANCE AVAILABLE FOR USE OF POWERPOINT AND TRIAL DIRECTOR PRESENTATIONS**

The Federal Public Defender recently hired a full-time Computer Systems Administrator who can provide technical assistance and support in the use of PowerPoint and Trial Director presentations. Daniel W. Sczerba, who used to work for the U.S. District Court, came on board in July and recently attended a Law and Technology Workshop to better familiarize himself with these programs.

CJA panel attorneys can call Dan at the Clarksburg Defender Office, 622-3823, for assistance with these litigation support programs. Each of the three Defender Offices in Clarksburg, Wheeling and Martinsburg have laptop computers available for in-court use by panel attorneys if need be.

## **BOOKER NEWS**

Amy Baron-Evans, a Sentencing Resource Counsel for Defender Services, recently published an excellent article entitled The Continued Struggle for Just, Effective and Constitutional Sentences After Booker. The article is available at [www.fd.org](http://www.fd.org) under What's New. The article takes issue with the de facto mandatory nature of the guidelines and the presumption of reasonableness used on appellate review for within range guideline sentences.

The Supreme Court hears oral argument on 10/11/06 in Cunningham v. California. The case will address whether a state's advisory guideline scheme allowing for judicial fact finding is unconstitutional. Stay tuned.

## **FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES**

*United States v. Bradley*, 455 F.3d 453 (4<sup>th</sup> Cir. 2006).

- Active participation by judge in plea negotiations results in overturning of conviction and sentence under plain error review.

*United States v. Crudup*, \_\_\_ F.3d \_\_\_, 2006 WL 2243586, 8/7/06.

- Court holds that supervised release revocation sentences should be reviewed to determine whether they are “plainly unreasonable.”

- Court relies on text of 18 U.S.C. §3742(a)(4), a provision not invalidated by *Booker*, which states a defendant sentenced for violating supervised release is authorized to appeal only on the ground his sentence is “plainly unreasonable.”

- When reviewing revocation sentence, Court will first determine whether sentence is procedurally or substantively unreasonable using process outlined in earlier cases, and then whether the sentence is “plainly” unreasonable by relying on the definition of “plain” used in plain error analysis, i.e. clear or obvious.

*United States v. Roper*, \_\_\_ F.3d \_\_\_, 2006 WL 2567014, 9/17/06.

- District court lacks authority to remit previously imposed special assessment given its mandatory nature as outlined in 18 U.S.C. §3013.

*United States v. Curry*, \_\_\_ F.3d \_\_\_, 2006 WL 2466882, 8/28/06.

- In reviewing fraud sentence imposed for reasonableness, Court overturns 70% downward variance from advisory guideline range. Neither unique facts of fraudulent activity nor pre-sentencing payment of restitution warranted the extent of the downward variance.

*United States v. Williams*, \_\_\_ F.3d \_\_\_, 2006 WL 2390661, 8/21/06.

- A physical demonstration performed by the defendant before the jury (trying on fanny pack) is not, without more, testimony that subjects the demonstrator to cross-examination under Rule 611(b) of the Federal Rules of Evidence.

- However, this error is subject to harmless error analysis and Court finds error did not affect outcome of the proceedings.

*United States v. Hurwitz*, 459 F.3d 463 (4<sup>th</sup> Cir. 2006).

- Court splits with six other Circuit Courts that require a search warrant incorporate supporting documentation by reference and that supporting documentation be attached to the search warrant itself upon execution.

- In 4<sup>th</sup> Circuit, it is sufficient if either the warrant incorporates the supporting document by reference or the supporting document is attached to the warrant itself.

- Court sheds light on good-faith instruction used in prosecution of physician charged with illegal drug distribution. A doctor’s good-faith belief in the manner in which he treats his patients is subject to objective, not subjective, criteria.

- Defendant’s drug trafficking convictions overturned based on district court jury instruction that good-faith defense only applied to fraud charges defendant faced.