

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. V, NO. 1

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CJA PANEL ATTORNEY TRAINING OPPORTUNITIES IN 2007

The Training Branch of the Office of Defender Services has announced the training opportunities being offered to CJA panel attorneys in 2007. These seminars are offered at no cost. Travel and per diem assistance may be available from Defender Services based on need. CLE credits are available.

Sentencing Advocacy Workshop Phoenix, AZ - March 8-10, 2007

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 Dallas, TX - April 19-21, 2007 Santa Monica, CA - July 26-28, 2007

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 installed for any CJA panel member who wishes to attend the seminar or use the programs at trial.

Winning Strategies Seminar

Albuquerque, NM - February 8-10, 2007.

This seminar focuses on the nuts and bolts of federal criminal defense with an emphasis on sentencing guidelines and sentencing mitigation.

Multi-Track Training

Baltimore, MD, September 6-8, 2007

This seminar is open to both Federal Defender personnel and experienced panel attorneys and will present more in-depth training on multiple criminal defense topics.

Additional information is available on the Defender Services website at www.fd.org

POST-BOOKER SENTENCING STATISTICS AND UPDATE

The United States Sentencing Commission publishes quarterly statistics on post-Booker cases and has also compiled this data by circuit and district. These reports are available at www.ussc.gov under the Booker/Fanfan prompt. Through the 4th quarter of fiscal year 2006, from October 1, 2005 to September 30, 2006, 11.9% of cases across the country received sentences below that called for by the guidelines (not including government sponsored motions such as §5K1.1 and early disposition reductions). In the Fourth Circuit, 9.9% of the cases received such reductions, while 9.6% of the cases in the Northern District of West Virginia received similar relief.

In what could lead to the most important development in federal sentencing since Booker, the Supreme Court has granted certiorari in two federal sentencing appeals. One case is from the Fourth Circuit, Rita v. United States. The second case is Claiborne v. United States from the Eighth Circuit.

The Court will address whether it is consistent with Booker to accord a presumption of reasonableness to within-guidelines sentences. Until the Court rules on this issue, counsel must preserve the trial court record in appropriate cases by claiming the presumption of reasonableness makes the guidelines *de facto* mandatory and in contravention of Booker, thereby requiring all the Fifth and Sixth Amendment protections otherwise available under a mandatory guideline scheme (right to jury trial, proof beyond a reasonable doubt, etc.).

PENDING DISCOVERY RULES CHANGE AND REVISION TO U.S. ATTORNEYS' MANUAL

The Criminal Rules Advisory Committee has voted to send a proposed change to Rule 16 of the Federal Rules of Criminal Procedure to the Judiciary's Standing Committee. The proposed rule change would add a new subsection: (H) **Exculpatory or Impeaching Information**. Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

This proposed rule has been aggressively

fought by the Department of Justice in part because the new rule removes any "materiality" analysis from the disclosure decision. In an attempt to convince the Criminal Rules Advisory Committee to reject the proposed rule change, the Department of Justice pointed to its own revision of its U.S. Attorneys' Manual. A new section, USAM §9-5.001, provides new policy regarding disclosure of exculpatory and impeachment information. This new section and the entire U.S. Attorneys' Manual is available at www.usdoj.gov

Until (or if) the proposed change to Rule 16 takes effect, USAM §9-5.001 can be used in support of requests for exculpatory and impeachment information.

POSSIBLE CIVIL COMMITMENT AS "SEXUALLY DANGEROUS PERSON" UNDER ADAM WALSH ACT AND RISK OF SELF-INCRIMINATION WHILE IN BOP's SEX OFFENDER PROGRAMS

One aspect of the recently passed Adam Walsh Act allows for the civil commitment of "sexually dangerous persons" pursuant to 18 U.S.C. §4248. A "sexually dangerous person" is one who "has engaged or attempted to engage in sexually violent conduct or child molestation and . . . suffers from a serious mental illness, abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247. As a defendant approaches his sentencing release date, the government can move for civil commitment under this new act, possibly for life.

Exposure to civil commitment proceedings

should call into question a defendant's decision to participate in the Bureau of Prisons' Sex Offender Treatment and Management Programs. These programs subject participants to polygraph exams and penile plethysmography, and the participants are either required or actively encouraged to admit previously undetected offenses and bad thoughts. The BOP keeps a record of all this.

This information can later be used against the defendant in a civil commitment proceeding to establish he is a "sexually dangerous person." At a minimum, clients charged with sex offenses should be advised that anything they disclose in the sentencing process or in the BOP's sexual offender programs may later be used to commit them once the criminal sentence is fully served.

NEW FEDERAL RULES TAKE EFFECT DECEMBER 1, 2006

Criminal Rules: Criminal Rule 5 (Initial Appearance), Criminal Rule 32.1 (Revoking or Modifying Probation or Supervised Release), and Criminal Rule 41 (Search and Seizure)(allowing the government to transmit certain documents to the court by reliable electronic means), Criminal Rule 6 (Grand Jury)(technical amendment implementing the Intelligence Reform and Terrorism Prevention Act of 2004); Criminal Rule 40 (Out of district arrest(expressly authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who fails to appear and violates any other condition of release), Criminal Rule 58 (Petty Offenses and Other Misdemeanors)(eliminates a conflict between the rule and Criminal Rule 5.1 concerning the right to a preliminary hearing and clarifies the advice that must be given to a defendant during an initial

appearance).

Evidence Rules: FRE 404 (Character Evidence/Other Crimes)(clarifies that evidence of a person's character is never admissible to prove conduct in a civil case), FRE 408 (Compromise and Offers to Compromise)(resolves conflicts in caselaw about statements and offers made during settlement negotiations admitted as evidence of fault or used for impeachment purposes), FRE 606 (Competency of Juror as Witness)(clarifies that juror testimony may be received only for very limited purposes, including to prove that the verdict reported was the result of a clerical mistake), FRE 609 (Impeachment by Evidence of Conviction of Crime)(permits automatic impeachment only when an element of the crime requires proof of deceit or if the underlying act of deceit readily can be determined from information such as the charging document).

Appellate Rules: FRAP (Filing and Service)(authorizes courts to adopt local rules requiring electronic filing), FRAP 32.1 (Citing Judicial Decisions)(new)(permitting citation to unpublished decisions after January 1, 2007 and requiring copy be attached to brief).

For the complete text of these rules, go to:
<http://www.uscourts.gov/rules/>

FEDERAL RESOURCES IN LIEU OF DETENTION

The Administrative Office and the Office of the Federal Detention Trustee has authorized expenditures for alternatives to detention such as a halfway house, use of electronic monitors and GPS units, and

substance abuse, mental health treatment and drug testing. These financial resources are provided to United States Probation to target medium to high risk defendants who would potentially be detained if it were not for the availability of these alternative to detention funds.

If CJA counsel have a client that might fall in this category, it may be useful to contact the United States Probation Office here in the district to determine if a funded release plan is possible.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Chase, 466 F.3d 310 (4th Cir. 2006).

- Court upholds plea agreement language used by federal prosecutors here in NDWV that limits third-level reduction for acceptance of responsibility to defendants who both pay \$100 special assessment and fully cooperate with government.

- Court bases its opinion on the contractual nature of plea agreements and the terms contained therein.

United States v. Hecht, 470 F.3d 177 (4th Cir. 2006).

- Court joins five other circuits in holding that mandatory sentencing language found in 18 U.S.C. §3553(b)(2) (sentencing for child crimes and sexual offenses) violates Booker.

- As a remedy, the mandatory language found in §3553(b)(2) is replaced with an advisory Guidelines regime under which sentences are reviewed for reasonableness.

United States v. Jones, – F.3d –, 2006 WL 3759378, 4th Cir.

- Interstate transportation of a minor for purposes of prostitution, in violation of 18 U.S.C. §2423(a), does not require proof that the defendant knew that the victim was under eighteen years of age.

- The term “knowingly” applies only to the transportation aspect of the offense, as applying the term to the age of the alleged victim would defeat the purpose of the statute, i.e. the protection of minors from such misconduct.

United States v. Smith, – F.3d –, 2006 WL 3823174, 4th Cir.

- Defendant argued that if sentences within the Guideline range are presumptively reasonable because the Guidelines incorporate the 3553(a) factors and 3553(a) requires the court to impose the least harsh sentence possible to achieve those goals, then the harshest sentence that can be imposed is the low end of the Guideline range.

- Court rejected this argument by explaining it: “rests on a logical fallacy: the fact that a sentence at the lowest end of the guidelines range could be reasonable if the sentencing judge concluded it was sufficient does not mean that the sentencing judge must conclude that it is sufficient. It is the sentencing judge who must initially determine what is sufficient. To hold that the lowest sentence in an applicable guidelines range is always sufficient would rob § 3553(a) of its force.”

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. V, NO. 2

APRIL 2007

NEW CRIMINAL JUSTICE ACT PANEL ADMINISTRATOR ON BOARD

The Federal Public Defender Office is pleased to announce the recent hiring of a full-time Criminal Justice Act Panel Administrator whose primary job duties will include a full range of panel management services, including coordination of panel appointments, maintenance of panel lists and appointment records, preparation and review of panel forms and vouchers, and assisting CJA Panel attorneys with the administrative aspects of federal criminal cases. Filling this position will better allow the Defender Office to coordinate more regular training opportunities for panel attorneys and the local bar.

Many of you are familiar with Lisa Coleman, our Legal Secretary who was previously handling many of these same duties. Lisa has accepted the CJA Panel Administrator position and looks forward to devoting full attention to the panel by working with you and the other court units.

In the next several weeks, Lisa will provide each of you with a listing of the specific services available. A short questionnaire will be provided concerning subject matter for upcoming CLE seminars and whether you would prefer shorter course offerings at each point of holding court, or full-day seminars at one central location within the district. In addition, a CJA Compensation Manual will be drafted and provided. This manual will offer a straight forward explanation of the

CJA payment process based on requirements found in the *Guide to Judicial Policies and Procedures* and our Local Amended Criminal Justice Act Plan, etc.

If you have any questions concerning your particular case or CJA matters, please call Lisa Coleman at (304) 622-3823.

CJA INCREASE IN HOURLY RATES PRESENTLY PENDING

The attorney compensation rate under the Criminal Justice Act is tentatively scheduled to increase from \$92.00 per hour to \$94.00 per hour, effective April 1, 2007. The compensation rate for federal death penalty cases will likely increase from \$163.00 per hour to \$166.00 per hour that same date. These cost of living adjustment increases apply for all work performed in an open case on and after the effective date, but the increases are still subject to congressional approval. This vote will occur later in April.

If and when this action passes, some CJA-20 and CJA-30 vouchers will require the use of two rates of pay if the case was opened before and closed after April 1st.

A list-serve message will be sent to all panel attorneys once Congress finally acts on this issue.

As a reminder, the mileage rate for use of personal vehicles increased to \$0.48.5 per mile, effective February 1, 2007.

A Rate History sheet for all hourly and mileage rates is available on the Defender website under the CJA Members page located at <http://wvn.fd.org>

U.S. CURRENCY NO LONGER ACCEPTED BY CLERK'S OFFICE FOR PAYMENT OF \$100 SPECIAL ASSESSMENTS

Following a recent financial audit, the Clerk's Office has announced it will no longer accept U.S. currency as payment for the \$100 special assessment in federal felony cases. This assessment is usually due on or before the day of sentencing based on language contained in most of the plea agreements offered by the government.

Please inform your clients and their families that the Clerk's Office is now authorized to accept only certified checks or money orders for the special assessment payments. Make these payable to "Clerk of Court."

CLIENT CONTACT PRIOR TO FIRST COURT APPEARANCE

The magistrate judges here in the district recently voiced a common concern about some attorneys not meeting with clients before the first court appearance. This can include both the initial appearance or the arraignment where detention may be an issue if the government so moves. According to the judges, some defendants exhibit confusion and consternation at the first hearing because valid questions and concerns were not addressed by the defense attorney prior to the hearing.

The judges have asked that all attorneys insure that a client meeting takes place before

the first appearance. It should go without saying, but this is vitally important. If such a meeting is not possible at the office or the regional jail before the hearing date, this can take place the day of the hearing, either in the courthouse or in the U.S. Marshal lock-up. In an emergency situation, the judges may entertain a request for a short delay of the hearing so that the client meeting can take place. However, it is the attorney's responsibility to arrive well before the hearing begins so that an effective client meeting can occur prior to the actual hearing.

DETAILED OBJECTIONS TO REPORT AND RECOMMENDATIONS REQUIRED, OR ISSUES DEEMED WAIVED ON APPEAL

In United States v. Midgette, – F.3d –, 2007 WL 572127, (2/26/07), the Fourth Circuit Court of Appeals rejected grounds presented in support of a suppression claim because these grounds were not included in the defendant's objections to the magistrate judge's report and recommendations below. This R&R was accepted by the district court prior to the direct appeal.

In order to leave no doubt on this issue, the Court in Midgette stated that "we now hold that to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground of the objection."

The defendant in Midgette argued that a warrantless search by a probation officer violated both the Fourth Amendment and it failed to comply with North Carolina's

probation law. However, in an objection to the R&R, the defendant only challenged the finding that the probation officer complied with state law. Defendant did not challenge the constitutionality of the probation law itself, nor the supposed lack of reasonable suspicion present to support the warrantless search initiated by the probation officer. As a result, the Court in Midgett found the latter issues waived for purposes of appeal.

Based on Midgette, it is important that each and every finding relied upon in the R&R to deny relief be attacked to preserve later appellate review.

DISCOVERY RESTRICTION PROVISION OF ADAM WALSH CHILD PROTECTION AND SAFETY ACT OVERTURNED

One aspect of the new Adam Walsh Child Protection Safety Act includes a prohibition of copying computer hard drives seized as part of a child pornography investigation. Before the Act, mirror image copies of the hard drive were regularly provided to defense counsel and defense experts with an appropriate protective order limiting its use.

On January 25, 2007, a district court judge in the Eastern District of Virginia found, based on extensive expert testimony, that a reasonable computer expert would not agree to take a case in which he was required to examine the hard drive on government premises because of the expense and difficulty of moving equipment to a government facility and the inability to provide adequate assistance under those conditions. Thus, the district court held, because “ample opportunity” for inspection was not available at the government facility, a

mirror image copy of the computer hard drive had to be provided to the defense expert.

A similar issue may arise in your defense of child pornography cases involving the use of a computer. A copy of the district court memorandum and order in United States v. David L. Knellinger is available on the home page of the Defender Services website at www.fd.org

PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

The United States Sentencing Commission has compiled numerous proposed guideline amendments that will likely take effect November 1, 2007. The entire text of these guideline amendments may be found on the Commission’s website at www.ussc.gov

The amendments implement a number of provisions of the USA Patriot Improvement and Reauthorization Act and the Adam Walsh Child Protection Safety Act. Other areas affected by the proposed guideline amendments include narco-terrorism; immigration; and drugs. Following public comment, the Commission may also act favorably on a new compassionate release amendment; a newly structured criminal history scheme where less serious crimes are no longer counted; and the Commission may finally address its crack cocaine policy and the unfairness of the 100:1 crack to powder ratio.

A more detailed discussion of the 2007 Federal Sentencing Guideline amendments will be provided later in the year once the Commission renders its final decisions on these proposals.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Tucker, 473 F.3d 556 (4th Cir. 2007).

- Court overturns 144-month variance fraud sentence as unreasonable where guideline range was 30 to 37 months in prison.
- Although defendant's risk of recidivism could justify a variance sentence, the district court did not justify the extent of the variance imposed.
- Many of bases articulated by district court for the sentence imposed were already taken into account by the guidelines.

United States v. Buckner, 473 F.3d 551 (4th Cir. 2007).

- Following warrantless seizure of home computer based on wife's consent, husband moved to suppress evidence.
 - Wife lacked actual authority to consent to search of husband's password protected computer files she could not access.
 - However, police justified in relying on wife's consent under apparent authority doctrine as computer leased in wife's name and her name was associated with underlying on-line fraud allegations.

United States v. Nicholson, 475 F.3d 241 (4th Cir. 2007).

- Court grants petitioner's §2255 finding that trial counsel labored under an actual conflict of interest.
- In felon in possession of a firearm prosecution, petitioner argued he only possessed firearm based on threats received from and fear of third-party.
- Trial counsel represented this third-party, and failed to move for downward departure for petitioner on this stated ground.

United States v. Kimbrough, 477 F.3d 144 (4th Cir. 2007).

- After police locate drugs inside residence, show drugs to defendant's mother and allow her to meet with the defendant in their presence; the defendant then provides incriminating information based on questions posed by his mother.
- Defendant's statements not subject to suppression based on Miranda violation as no police questioning involved.
- Evidence failed to support claim that mother's questioning of son was functional equivalent of police questioning.

United States v. Muhammad, 478 F.3d 247 (4th Cir. 2007).

- Under "plain error" review, Court overturns defendant's sentence as district court failed to provide defendant with opportunity to allocute before imposition of sentencing.

United States v. Cooper, – F.3d –, 2007 WL 914314 (4th Cir.)(3/28/07).

- Defendant was convicted of 9 counts of violating the Clean Water Act by knowingly discharging sewage waste from a trailer park into a nearby creek.
- Defendant moved for judgment of acquittal claiming the government failed to prove he knew the creek constituted "waters of the United States."
- The Court rejected this argument, finding that the "waters of the United States" element was purely jurisdictional and the defendant need not have knowledge of what makes the offense a federal one.

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JULY 2007

CRACK COCAINE SENTENCING POLICY

In May 2007, the Sentencing Commission issued its fourth Federal Cocaine Sentencing Policy report to Congress. In it, the Commission advocates for modifications to the current statutory penalty structure and use of mandatory minimum sentences, and the 100:1 disparity between crack cocaine and powder cocaine. It remains to be seen whether Congress will act on the Commission's recommendations. The entire report is available on the Commission's website at www.ussc.gov

In the mean time, the Commission has issued its 2007 guideline amendments that take effect November 1, 2007. This includes an amendment to USSG §2D1.1 which lowers current crack cocaine offense levels by two-levels for each quantity based category.

It is still unclear whether the Commission's guideline amendment will have retroactive effect so that previously sentenced defendants can motion for a reduced sentence pursuant to USSG §1B1.10 and 18 U.S.C. §3582(c). At present, some district court judges here in NDWV are continuing pending crack cocaine sentencing hearings until after November 1st so that defendants can take advantage of this guideline reduction should it take effect thereafter.

CJA INCREASE IN HOURLY RATES

Effective May 20, 2007, the attorney compensation rate under the Criminal Justice Act increased from \$92.00 per hour to \$94.00 per hour. The compensation rate for federal death penalty cases increased from \$163.00 per hour to \$166.00 per hour that same date. These cost of living adjustment increases apply for all work performed in an open case on and after the effective date.

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UPCOMING FEDERAL CRIMINAL LITIGATION SEMINAR

The Federal Public Defender Office for the Northern District of West Virginia and WVCLE are co-sponsoring a full-day seminar on Federal Criminal Litigation at the West Virginia College of Law in Morgantown on Friday, September 14, 2007.

Subject matter includes: Confronting the Adam Walsh Child & Protective Safety Act of 2006; Experts - When You Should Consider Using Them and How to Obtain Their Services; Supreme Court and Fourth

Circuit Update; How to Get a Below Guideline Sentence in a Post-Booker World; Demystifying Mental Health Experts; Effective Use of Courtroom Technology; and Ethical Problems Facing a Criminal Defense Lawyer.

This seminar is available at no cost to CJA panel attorneys in the Northern and Southern Districts of West Virginia. The WV State Bar will authorize CLE accreditation.

Please mark your calendars for this upcoming event. A package that includes a detailed agenda; a listing of area hotels; and an RSVP form will be mailed out later this summer.

NEW UNITED STATES MARSHAL SERVICE LOCAL POLICIES AND PROCEDURES MANUAL

The United States Marshal for the Northern District of West Virginia recently issued a comprehensive manual that contains important information relating to its daily operations. The policies explain all aspects of detention and issues that regularly affect detainees such as area detention facilities, medical care, prisoner complaints, requests to marry, special productions (death in family), etc. The manual also provides detailed information concerning service of process and obtaining fact witnesses. In the near future, the USM manual will be posted on its website. Until then, copies of the manual are available at the Defender Offices in Clarksburg, Wheeling and Martinsburg.

INELIGIBILITY FOR LONG-TERM DRUG TREATMENT PROGRAM FOR DEFENDANTS WITH HISTORY OF SOBRIETY

Under the current § 5330.10, Drug Abuse Policy Manual, utilized by the Federal Bureau of Prisons, defendants who cannot document a pattern of substance abuse within twelve months prior to their arrest are not eligible for the 500-hour long-term drug treatment program. Successful completion of such program can result in up to a 12-month reduction in sentence.

Current BOP policy tracks DSM-IV criteria for substance abuse. DSM-IV requires a documented pattern of substance abuse within this twelve month period.

This current BOP policy will actually penalize those defendants who successfully abstain from illegal drugs for some time before the indictment against them issues. In effect, their year-long sobriety will require they serve a longer sentence based on ineligibility for the 500-hour drug program and the corresponding reduction in sentence for its successful completion.

The courts might be receptive to a request for a downward variance under 18 U.S.C. §3553(a) based on this current anomaly.

NEW PROTECTED INFORMATION GUIDELINE

The Sentencing Commission issued an emergency amendment, effective May 1, 2007, for cases involving "Certain Private or Protected Information." This new amendment, found in USSG §2H3.1, implements the emergency directive of the Telephone Records and Privacy Act of 2006 and it refers the offense at 18 U.S.C. §1039 (obtaining confidential phone records) to this amended guideline section.

POST-BOOKER CERTIORARI CASES

The Supreme Court recently dismissed the pending Claiborne case as the defendant was killed while living in St. Louis. In its place, the Court granted cert in Gall v. United States, No. 06-7949. Gall raises an identical issue: whether a district court must have “extraordinary justifications” in order to impose an “extraordinary” below-range sentence.

A case from the Fourth Circuit, Kimbrough v. United States, No. 06-6330, was also granted cert. Kimbrough was a crack case in which the 4th Circuit reversed per curiam the defendant’s below-range sentence, holding that “a sentence that is outside the guideline range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.”

These two cases, along with Rita v. United States, No. 06-5457, which asks whether a presumption of reasonableness should apply to a within range guideline sentence, should soon provide clarity on the district court’s sentencing authority and the true scope of review post-Booker.

POST-BOOKER SENTENCING STATISTICS UPDATE

The United States Sentencing Commission publishes quarterly statistics on post-Booker cases and has also compiled this data by circuit and district. These reports are available at www.ussc.gov under the Booker/Fanfan prompt. From October 1, 2006 through March 31, 2007, 12.0% of cases across the country received sentences below that called for by the guidelines (not

including government sponsored motions such as §5K1.1 and early disposition reductions). In the Fourth Circuit, 8.2% of the cases received such reductions, while 10.6% of the cases in the Northern District of West Virginia received similar relief.

REDUCTION IN SIZE OF CJA PANEL

The current size of the Criminal Justice Act Panel was recently adjusted by the district court judges. Seven of twenty-two attorney applications seeking admission to the panel were granted. Thirty-one lawyers who previously participated on the panel were removed from the listing. Even after voluntary efforts several years ago to reduce the size of the panel, the panel in NDWV was still much larger than those in other districts, including districts that handle many more cases per year.

As of June 15, 2007, the total size of the CJA panel here in the district is 80. This includes 22 attorneys in Martinsburg; 29 in Clarksburg; 19 in Wheeling; and 10 in Elkins.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Mathias, 482 F.3d 743.

- Court holds that defendant who walked away from work release program and was later convicted of escape as codified in Virginia Code §18.2-479(b) is subject to “violent felony” predicate for armed career criminal status.
- Categorical approach used and Court finds there is always a serious potential risk of injury during escape and until capture.

United States v. Blatstein, 482 F.3d 725.

- Utilizing “plain error” review, Court finds that district court failed to give notice to government before imposing a downward variance sentence. Reasonable notice of any variance imposed for a reason not previously identified as a ground for a possible variance is required.

United States v. Hayes, 482 F.3d 749.

- Where defendant was convicted in 1994 of West Virginia misdemeanor battery offense involving his wife, Court holds this conviction is not a misdemeanor crime of domestic violence as defined in 18 U.S.C. §921(a)(33)(A) because the elements of the offense do not establish a domestic relationship between offender and his victim. Court breaks with all other circuits that considered this issue. Unlawful possession of firearm conviction against defendant based on this simple battery conviction overturned.

United States v. Nelson, 484 F.3d 257.

- §924(c) conviction for carrying a firearm during and in relation to a drug trafficking crime constitutes a “felony drug offense” as term defined in 21 U.S.C. §802(44).
- This predicate conviction exposes defendant to increased mandatory minimum sentence at later 21 U.S.C. §841(b)(1)(B) sentencing.

United States v. Stephens, 482 F.3d 669.

- Motion for judgment of acquittal granted on appeal where only evidence to support §924(c) and drug conspiracy allegations was defendant’s unsubstantiated confession. Any such conviction requires independent, corroborating evidence.

United States v. Dugger, 485 F.3d 236.

- Defendant was arrested, charged and detained for selling crack cocaine in Huntington, West Virginia. While held on pretrial detention, defendant caught selling marijuana in local detention center.
- Defendant’s sale of marijuana while in detention center does not meet the requirements to be considered “relevant conduct” as defined in USSG §1B1.3. As a result, defendant cannot receive two-level guideline increase if object of the offense was to distribute drugs in a prison.

United States v. Pyles, 482 F.3d 282.

- Court overturns as “unreasonable” a probationary sentence in crack cocaine case where guideline range was 63-78 in prison.
- While detailed findings of fact in support of extraordinary post-offense rehabilitation were made by the district court, the Court found the sentence failed to properly account for the need for the sentence to reflect the seriousness of the offense and provide just punishment. According to the Court, such extraordinary post-offense rehabilitation “does not authorize ‘a get-out-of-jail-free card.’”

United States v. Shortt, 485 F.3d 243.

- Doctor convicted of illegally dispensing steroids and growth hormones faced 0 to 6 months guideline sentence. Court upholds as reasonable district court’s upward variance sentence of 12 months in prison.
- Long term nature of misconduct, defendant’s cavalier attitude and perversion of medical expertise, and subversion of professional sports, etc. supported sentence.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. V, NO. 4

OCTOBER 2007

SEQUELS TO BOOKER: RITA, GALL AND KIMBROUGH

The day after the last edition of the Quarterly was printed, the Supreme Court issued its decision in United States v. Rita, Case No. 06-5754. This term Booker will be expanded upon again in two additional cases outlined below.

In Rita, which was decided on June 21, 2007, the issue was whether a presumption of reasonableness for a within guidelines sentence is consistent with Booker. The Supreme Court held 8-1 that appellate courts may indeed apply a presumption of reasonableness in reviewing sentence that fall within the federal guidelines. However, the Court went on to say that such a presumption is not binding on appellate courts and does not apply at all to sentencing courts at the district level.

First, the Court held that in reviewing sentences, courts of appeals may use the presumption that sentences within federal sentencing guidelines are reasonable. In the majority opinion, Justice Breyer states that such a presumption simply reflects the fact that both the Commission which created the guidelines and the sentencing judge are carrying out the same goal of reaching a proper sentence in a particular case.

Second, the Court held that the presumption of reasonableness is not binding on appellate courts. At present, some circuits, including the Fourth, apply this presumption and others

do not, and the Court left this decision to the individual courts of appeals, holding that both approaches are proper under the law.

Third, the Court emphasized that if used at all, the presumption of reasonableness for within guidelines sentencing can only be used by appellate courts reviewing sentences. Such a presumption cannot be used by a sentencing court when determining the proper sentence. The Court reaffirmed that sentencing judges must consider a number of factors other than the federal sentencing guidelines, including those listed in 18 U.S.C. §3553(a). The sentencing court then has the power, and in some circumstances the obligation, to hand down sentences that are outside the normal guideline range.

On October 2, 2007, the Supreme Court heard argument in two additional post-Booker cases: Gall v. United States and Kimbrough v. United States. Gall raises the issue of whether a court must have extraordinary justifications in order to impose an extraordinary below-guideline sentence. The defendant in Gall received a probationary sentence where his guideline range was 30 to 37 months. In Kimbrough, the Supreme Court will address whether, in an advisory guideline regime, the sentencing court can disagree with Sentencing Commission policy (crack cocaine 100:1 disparity). Transcripts of oral argument for Gall and Kimbrough are available on the Supreme Court's website.

DEFENDANT'S ACCESS TO AUDIO/VISUAL DISCOVERY

At a recent criminal trial in Clarksburg, three government witnesses, all previously prosecuted in federal court for drug crimes, testified their attorneys never showed them the video tapes of their controlled buys. These videos were seen by the witnesses for the first time while testifying in court even though the tapes were previously provided to their defense attorneys as part of the government's discovery obligations.

To the extent that any CJA Panel Attorney needs access to equipment for this purpose, the five regional jails here in the district (Tygart Valley, Eastern, North Central, Central and Northern) each have televisions with VCR's and DVD players. The jails simply ask that an advance call be made to reserve the equipment.

In addition, the Federal Public Defender Office has laptop computers available for use from the staffed offices in Clarksburg, Wheeling and Martinsburg. These laptop computers have the Microsoft Media Player software that handles almost every taping program used by the area task forces. CJA Panel Attorneys can call the closest Defender Office to borrow a laptop computer if need be.

DEATH PENALTY STATISTICS ACCORDING TO DOJ

According to information provided by the Department of Justice to a Congressional oversight committee, during 2001-2006:

The Attorney General concurred in 142 local recommendations to seek death, and overruled 17 local recommendations. Of

these, 27 authorizations were withdrawn, and 21 requests to withdraw were denied. There were 24 death sentences and 48 non-death sentences.

The Attorney General directed a capital prosecution in 73 cases where the locals did not want to seek death. Of these, 23 authorizations were withdrawn. There were 6 death sentences and 24 non-death sentences. The Attorney General concurred in 1014 recommendations against seeking death.

These statistics are from a document entitled "DOJ Response to Questions by Senator Feingold." (6/27/07).

ELECTRONIC FILING FOR §2255 CASES

When a motion to vacate conviction or sentence is filed in §2255 habeas cases, the district court clerk's office will open a civil case. However, the civil case is opened only for statistical purposes, and no other filings should be submitted under the civil case thereafter. Instead, all remaining habeas filings should be made in the original underlying criminal file.

FEDERAL CRIMINAL LITIGATION SEMINAR

The Federal Criminal Litigation seminar held at the WVU College of Law in Morgantown on Friday, September 14, 2007 was well-attended and well received. There were 90 attorneys in attendance. Most in attendance are presently on the CJA Panels in the Northern and Southern districts of West Virginia. If anyone wants a copy of the seminar materials, please call the Defender Office at (304) 622-3823.

IMPORTANT CASES DURING 2007 SUPREME COURT TERM

The following criminal cases will be decided by the Supreme Court during its 2007 term:

I. ACCA Issues

Begay v. United States, No. 06-11543: The Supreme Court will be reviewing **whether felony drunk driving is a "violent felony" within ACCA's residual clause**. The Tenth Circuit's opinion is available at 470 F.3d 964.

The Court will also be hearing United States v. Rodriguez, No. 06-1646, which raises the issue of **whether a state drug crime conviction, for which state law authorized a ten-year sentence only because the defendant was a recidivist, qualifies as a "serious drug offense" under ACCA**. The Ninth Circuit's decision affirming that defendant's priors were not "serious drug offenses" under ACCA is available at 464 F.3d 1072.

In Logan v. United States, 06-6911, the Court will decide **whether a conviction that did not result in deprivation of civil rights can be predicate for ACC status**. The Seventh Circuit's opinion is 453 F.3d 804.

II. Waiver of Right to Jury Selection by Article III Judge

The Supreme Court to take on the question of **whether a federal criminal defendant must explicitly and personally waive his right to have an Article III judge preside over voir dire** (and whether the court of appeals erred in subjecting defendant's argument to plain error review)! The case is Gonzalez v. United States, No. 06-11612, and the 5th Circuit's decision can be found at 483 F.3d 390.

III. Fourth Amendment: Search Incident to Arrest

Virginia v. Moore, No. 06-1082:

Defendant was stopped for driving on a suspended license, a Class 1 misdemeanor punishable by a stat max of 1 year in jail, for which he could only have received a summons and not been subjected to a full custodial arrest. Nonetheless, he was arrested in violation of state law. A search incident to the arrest revealed 16 g of crack and \$516 in cash. He was charged with possession with intent to distribute. The state supreme court suppressed the evidence, holding that the outcome was controlled by Knowles v. Iowa, 525 U.S. 113 (1998) (state law permitting full search of car upon issuance of speeding citation violates Fourth Amendment even if officer has probable cause to arrest). The Supreme Court granted cert to decide **whether the Fourth Amendment requires the suppression of evidence obtained incident to an arrest that is based on probable cause, where the arrest violates a provision of state law**. The decision below is available at 636 S.E.2d 395.

IV. 924(c)

In Watson v. United States, 06-571, the Court will decide **whether the mere receipt of an unloaded firearm as payment for drugs constituted "use of a firearm during and in relation to a drug trafficking crime" within the meaning of 18 U.S.C. §924(c)**. The unpublished Fifth Circuit case is available at 191 Fed. Appx. 326 (5th Cir. 2006).

V. Eighth Amendment: Death Penalty / Lethal Injection

Baze v. Rees, No. 07-5439. This case raises a host of issues pertaining to the

constitutionality of lethal injections, including (1) whether the Eighth Amendment prohibits methods of execution that create an unnecessary risk of pain and suffering, as opposed to a substantial risk of the wanton infliction of pain; (2) whether a method of execution creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment where readily available alternatives that impose less risk of pain and suffering could be used; (3) whether the continued use of sodium thiopental, pancuronium bromide, and potassium chloride [the 3 chemicals used in all lethal injection states except NJ], individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering; and (4) and whether substantive due process requires a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected when the effects of such chemicals are reversible if proper action is taken. whether execution by lethal injection violates the Eighth Amendment where the protocol poses a risk of pain and suffering. The decision below is available at 217 S.W.3d 307.

VI. Definition of "Aggravated Felony" for Deportation Purposes

Ali v. Achim, No. 06-1346: Although not strictly speaking a criminal case, this case presents two issues -- whether a crime that is not an aggravated felony can nonetheless be classified as a "particularly serious crime" that bars eligibility for withholding of removal under 8 USC section 1231(b)(3)(B), and the proper scope of review over "particularly serious crime" determinations. The Seventh Circuit's decision is available at 468 F.3d 462.

SPECIFIC JURY FINDINGS REGARDING DRUG WEIGHT REQUIRED FOR CONSPIRACY PROSECUTIONS

In two separate cases now, the Fourth Circuit Court of Appeals has held that in drug conspiracy prosecutions, the jury must make specific findings of fact for drug weights that trigger a mandatory minimum sentence and increased statutory exposure. See: United States v. Collins 415 F.3d 304 (4th Cir. 2005); and United States v. Ferguson, 2007 WL 2274769 (4th Cir. 8/8/07)(unpublished).

In each case, the defendant was convicted and sentenced after the jury only found that the conspiracy, as a whole, was responsible for the threshold amounts of cocaine and marijuana. There were no individualized findings as to the defendant. In both Collins and Ferguson the jury requested guidance during deliberations by asking whether the drug amount listed in the indictment relates specifically to the defendant or the entire conspiracy. In each case, the jury received incorrect supplemental instructions.

According to the Court, in a drug conspiracy case, the jury must apply a Pinkerton analysis both to the substantive conspiracy charge and to the determination of the threshold quantity of drugs for statutory penalty purposes. This means the jury must determine if the drug amount proven to be distributed by the conspiracy as a whole was within the scope of the defendant's agreement and reasonably foreseeable to the defendant. These findings regarding the threshold quantity of drugs for statutory penalty purposes constitute facts that a jury must find beyond a reasonable doubt.

For example, even if the government has proven the conspiracy as a whole distributed over 50 grams of crack cocaine, the defendant does not face the enhanced 10 to life statutory penalty found in 21 U.S.C. §841(b)(1)(A). Instead, the jury must make additional individualized findings that a particular drug amount was within the scope of the defendant's agreement and reasonably foreseeable to the defendant. Only if this drug amount exceeds 50 grams of crack cocaine can the defendant then face the increased statutory penalties.

In drug conspiracy prosecutions, the defense must request such instructions.

CASE OPENING AND CLOSING STATISTICS FOR FISCAL YEAR 2007

The Federal Public Defender Office is required to track all criminal case appointments during each fiscal year (October 1 through September 30). For fiscal year 2007, the Federal Public Defender Office opened 403 criminal cases at the trial and appeal levels. There were a total of 377 cases closed.

The CJA Panel for the Northern District of West Virginia received 296 criminal case appointments.

2007 DEFENDER SERVICES TRAINING BRANCH MATERIALS NOW AVAILABLE ON-LINE

The Office of Defender Services has posted its 2007 Winning Strategies Series and Sentencing Advocacy Workshop materials on-line at www.fd.org. These materials are found under the Training Materials section of the website.

The Winning Strategies materials include detailed information on such topics as Litigating Multi-Defendant Conspiracy Cases; Defending Illegal Re-Entry Cases; Plea Negotiations and Proffers; Adam Walsh Act of 2006; Computer Crimes; and Mental Health Issues.

The Sentencing Workshop materials include How to Get a Below-Guideline Sentence in a Post-Booker World; Developing Effective Mitigation Evidence; and Current Bureau of Prisons Issues.

These materials, as well as materials from 2005 and 2006 are available for downloading and copying in .pdf format. Please visit the website and access the materials for background and case specific information.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007).

- An attorney renders constitutionally ineffective assistance of counsel if he fails to follow his client's unequivocal instruction to file a timely notice of appeal even though defendant may have waived his right to challenge his conviction and sentence through a waiver provision contained in the written plea agreement.

United States v. Mooney, 497 F.3d 397 (4th Cir. 2007).

- Defendant was convicted of being a felon in possession of a firearm and received a 15-year sentence under the ACCA. However, at the guilty plea hearing, the defendant

repeatedly stated he believed he did nothing wrong as he was justified in possessing the firearm after taking it away from his girlfriend during a fight and before she used it against him.

- Court found that defendant received ineffective assistance of counsel based on attorney advice that defendant failed to meet showing for a justification defense jury instruction.

- Based on state of the law in Fourth Circuit, it was patently inaccurate for defense counsel to have advised defendant and to have represented to the district court that no such defense was available.

United States v. Beasley, 495 F.3d 142 (4th Cir. 2007).

- After jury selection took place, but before the jury was sworn and opening statements were made, the government filed an §851 information alleging defendant had a prior drug trafficking conviction exposing him to increased statutory penalties pursuant to §841(b)(1).

- On appeal, under plain error review, defendant argued the §851 information was untimely as it must be filed “before trial or before entry of guilty plea.”

- Court held that §851 information was not jurisdictional. Rather, it merely allows for increased punishment and does not confer on the district court any additional jurisdictional authority beyond 18 U.S.C. §3231.

- Under plain error review, “before trial” is somewhat ambiguous and, without any controlling precedent discussing the issue, the error, if any, certainly was not plain.

United States v. Washington, – F.3d –, 2007 WL 2378024 (8/22/07).

- At DUI prosecution on federal property, government presented expert testimony from toxicology laboratory. Defendant argued that raw data reports from lab technicians were testimonial hearsay statements under Crawford.

- Court finds, 2-1, that raw data, if “statements,” were statements of the equipment and computer program and not the technicians.

United States v. Saunders, – F.3d –, 2007 WL 2597668 (9/11/07).

- Three defendants allegedly robbed a liquor store in Baltimore. Two of the three robbers were captured just moments later.

Defendant was charged with being a felon in possession of a firearm. At trial, defendant moved to suppress photo array identification by store clerk since it was unnecessarily suggestive and unreliable.

- Court provides detailed analysis to support finding that 6-person photo array was unnecessarily suggestive. Defendant’s photograph was markedly different than the other five given lighting conditions used and backgrounds in each photograph. In addition, the police failed to follow department directives by indicating to the witness that the array may not contain any photos of the actual suspect.

- However, Court affirms identification used at trial. Applying five-factor test to determine reliability of out-of-court identification, Court held that witness’s ability to observe and accuracy of description made earlier identification both reliable and admissible.