

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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SUPREME COURT ISSUES IMPORTANT SENTENCING OPINIONS IN KIMBROUGH AND GALL

On December 10, 2007, the United States Supreme Court ruled 7-2 that the federal guidelines on sentencing for crack cocaine violations are advisory only, rejecting a lower court ruling that they are effectively mandatory. Judges must consider the crack cocaine guidelines, but may conclude that they are too harsh when considering the disparity between punishment for crack cocaine and powder cocaine.

The Supreme Court in Kimrough relied on later reports from the Sentencing Commission that the crack/powder disparity does not meet the statutory objectives of 18 U.S.C. §3553(a), and the Commission's earlier unsuccessful attempts to achieve a reduction in the crack/powder ratio. While the sentencing court must give respectful consideration to the guidelines, the sentencing statute permits the court to tailor a sentence in light of other §3553(a) factors. As a result, the district court's 4 ½ year reduction in sentence to 15 years was upheld as reasonable in Kimrough.

That same day, the Supreme Court issued its opinion in Gall v. United States, also 7-2. In Gall, the district court sentenced the defendant to 36 months probation for his involvement in an "ecstasy" conspiracy where the guidelines called for a sentence of 30-37 months.

The Supreme Court in Gall clarified that the very deferential "abuse of discretion" standard applies for appellate review of the reasonableness of the sentence. Reviewing courts may no longer employ rigid mathematical formulas by using a departure percentage as the standard for determining justifications for a specific sentence. In addition, a reviewing court may no longer require that extraordinary or highly unusual circumstances exist before a variance may be deemed reasonable.

Based on these criteria and the abuse of discretion standard of review, the Supreme Court in Gall overturned the Eighth Circuit Court of Appeals by finding the probationary sentence reasonable. The downward variance was properly based on the defendant's voluntary withdrawal from the conspiracy and positive post-offense rehabilitation.

Needless to say, the Kimrough and Gall cases will directly affect federal sentencing practices at the district level. The district court judges are no longer limited to the two-level crack cocaine sentencing reduction found in the 2007 amendments to the Federal Sentencing Guidelines. All creative and compelling arguments for a variance sentence must be considered under the §3553(a) factors. Any such variance, upward or downward, will be subject to an abuse of discretion standard on appeal.

RECENT 4TH CIRCUIT APPLICATION OF GALL AND KIMBROUGH

On December 28, 2007, the Fourth Circuit Court of Appeals issued a published opinion in United States v. Pauley. In Pauley, the Court applied the holdings of Gall and Kimbrough in the context of a child pornography case.

Pauley pleaded guilty to one count of possessing child pornography. The unusual facts of the case involve Pauley, a middle school (later high school) teacher, being approached by a female student who asked whether he was interested in paying her for nude pictures she took of herself. Pauley agreed and pictures were exchanged during successive school years. When both Pauley and the student moved to high school, she proposed to take pictures of herself and another female student. The pictures were taken, but the other student informed authorities, who recovered the pictures.

At sentencing, the district court calculated Pauley's advisory Guideline range to be 78 to 97 months in prison. After hearing arguments from the parties, the district court imposed a sentence of 42 months in prison, for numerous reasons:

1. in buying the nude photographs each time, Pauley initially was approached by the victim with such a proposal;
2. fewer than two dozen pornographic photographs were taken with the victim's Polaroid camera;
3. the victim's face did not appear in any of the photographs;
4. Pauley displayed deep remorse;
5. besides the criminal conduct at issue, Pauley was a model citizen and a good father and teacher;
6. as a result of his conviction, Pauley lost his teaching certificate and his

7. state pension;
8. Pauley agreed to a lifetime of supervised release;
9. no other child pornography was found in Pauley's house; and
10. the counseling Pauley would receive during incarceration would rehabilitate him.

The Government appealed, arguing that Pauley's sentence was unreasonable. The Fourth Circuit unanimously rejected that argument. In doing so, it set forth the procedure to be used in a post-*Gall* world:

Recently, the Supreme Court decided two cases which together explain in detail the mechanics of *Booker*'s remedial holding. See *Gall v. United States*, No. 06-7949, 2007 WL 4292116 (U.S. December 10, 2007); *Kimbrough v. United States*, No. 06-6330, 2007 WL 4292040 (U.S. December 10, 2007). In *Gall*, the Court instructed that the sentencing court should first calculate the applicable Guidelines range. 2007 WL 4292116, at *7. This starting point furthers Congress' desire for efficient administration and nationwide consistency in sentencing. *Id.* After calculating the Guidelines range, the sentencing court must give both the government and the defendant 'an opportunity to argue for whatever sentence they deem appropriate.' *Gall*, 2007 WL 4292116, at *7. The sentencing court should then consider all of the §3553(a) factors to determine whether they support the sentence requested by either party. *Id.*; see also *Kimbrough*, 2007 WL 4292040, at *10 (noting that, while § 3553(a) requires the sentencing court to give due consideration to the Guidelines, *Booker* allows the sentencing court to fashion the sentence in light of other statutory considerations). In so doing, the sentencing court may not presume that the

Guidelines range is reasonable. *Gall*, 2007 WL 4292116, at *7. In the event the sentencing court decides to impose a variance sentence, i.e., one outside of the recommended Guidelines range, the sentencing court 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.' *Id.* As noted by the *Gall* Court, it is an 'uncontroversial' proposition that a 'major departure should be supported by a more significant justification than a minor one.' .

Reviewing Pauley's sentence, the court held that the district court's variance "is reasonable and premised on the factors set forth in §3553(a)."

The Pauley opinion is notable for several reasons. First, the 4th Circuit no longer employed mathematical percentages or guideline levels in deciding whether the scope of the variance was reasonable. This was a common practice before Gall. Second, the use of an abuse of discretion standard will now matter greatly. Here, Pauley's sentence was unanimously upheld showing due deference for the district court's findings and ruling.

2007 CRACK COCAINE GUIDELINE AMENDMENTS GIVEN RETROACTIVE EFFECT BY THE SENTENCING COMMISSION

Only one day after the Kimbrough and Gall opinions issued, the Sentencing Commission unanimously voted to give retroactive effect to its recent amendments to the Federal Sentencing Guidelines that reduce penalties for crack cocaine offenses. On December 11, 2007, the Commission effectively lowered each crack cocaine drug quantity category by two offense levels.

The number of federal inmates affected by this decision is great. According to data contained in the Commission's "Analysis of the Crack Cocaine Amendment If Made Retroactive" (available at www.ussc.gov), 19,500 offenders nationally appear to be eligible to seek a reduced sentence under the new crack amendment. Of these, 470 were sentenced in the Northern District of West Virginia. Of the total number of offenders, 85.9% are Black, 7.6% are Hispanic, and 5.8% are White. 94.2% are male and 5.8% are female.

The Commission further voted this change will be effective on March 3, 2008. This will provide the courts with several months to address the logistics involved in such a venture. However, it is an open issue as to whether the Commission's use of 3/3/08 as an operative date can bar the district court from immediately considering a motion for reduced sentence pursuant to 18 U.S.C. §3582(c) and U.S.S.G. §1B1.10. After Booker, all aspects of the Federal Sentencing Guidelines are advisory in nature. As such, a district court may have immediate authority to consider and reduce a previously imposed sentence.

To date, the Federal Public Defender Office has filed six motions on behalf of defendants for immediate release based on the crack cocaine guideline reductions when coupled with the time these defendant have already served in custody. No action has yet been taken on these motions.

Absent an immediate release issue, motions to reduce sentence can be addressed by the courts on and after 3/3/08.

Representatives from the court units (Judges; Clerk's Office; U.S. Attorney; Federal Public Defender; Probation) for the

top 30 districts impacted by the retroactivity decision will be meeting in Charlotte, North Carolina on January 17-18, 2008. This includes every district within the Fourth Circuit. The purpose of this summit will be to meet with members of the Sentencing Commission, Bureau of Prisons and Administrative Office to share ideas on implementation.

As soon as additional information becomes available, it will be provided to CJA Panel Attorneys who have ex-clients eligible for such reductions. If anyone has an immediate release issue, please call the Defender Office at (304) 622-3823.

FISCAL YEAR 2008 APPROPRIATIONS UPDATE

In late December, Congress passed an omnibus budget package that was later signed by the President. This package includes fiscal year 2008 appropriations for Defender Services which pays for CJA Panel Attorney representation. There will be a \$6 increase to the non-capital rate to \$100 per hour, and a \$4 adjustment to the capital rate to \$170 per hour, effective for work performed on and after January 1, 2008.

UPCOMING WINNING TRIAL STRATEGIES SEMINAR

The Training Branch of Defender Services will present the latest Winning Trial Strategies seminar from February 14-16, 2008 in New Orleans. Winning Strategies is a valuable educational opportunity that focuses on the nuts and bolts of federal criminal practice. The entire agenda for the seminar is posted at www.fd.org. Attendance is free for CJA Panel Attorneys and Defender Services will offer financial assistance for travel, hotel and per diem expenses to qualified individuals.

NEW BOP SEARCH PROCEDURES FOR ALL VISITORS

Effective January 15, 2008, the Federal Bureau of Prisons will implement new search procedures for all persons attempting to gain access to its institutions, with the exception of low security camps. All visitors will be required to submit to and clear electronic searches. There will also be x-ray machine searches of all belongings brought into the institution.

BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, 5TH EDITION AVAILABLE ONLINE

The Federal Judicial Center has posted the Benchbook for U.S. District Court Judges, 5th Edition online at <http://cwn.fjc.dcn>. The Bench Book is 170-pages in length and includes detailed discussion and case citations for all aspects of civil and criminal cases. For example, the criminal section includes detailed background information on those issues that often arise in Criminal Pre-Trial; Plea Taking; Criminal Trial; Capital Cases and Sentencing.

It is likely your district court judge and his or her law clerks have referenced the Benchbook. You too might wish to review the information so you can have a better idea where the court might be starting from. (There are even civil and criminal contempt sections should you plan on "pushing the envelope" during your proceeding).

REALIGNMENT OF COUNTIES WITHIN THE DISTRICT

Effective November 1, 2007, the United States District Court for the Northern District of West Virginia realigned four of its 32 counties in the Divisions as follows: 1) Tyler County will move from the

Clarksburg Division and become part of the Wheeling Division; 2) Preston County will move from the Elkins Division and become part of the Clarksburg Division; 3) Lewis County will move from the Clarksburg Division and become part of the Elkins Division; and 4) Mineral County will move from the Elkins Division and become part of the Martinsburg Division.

For CJA Panel Attorneys, some of the practical effects will include: all USP Hazelton cases will now be heard in Clarksburg; and those attorneys with an office in one of these four counties will begin receiving cases in the new division.

CJA PANEL ATTORNEY ACCESS TO WESTLAW AND LEXIS THROUGH THE FEDERAL PUBLIC DEFENDER

On December 21, 2007, Defender Services issued a directive barring Federal Public Defender Offices from allowing CJA Panel Attorneys use of Westlaw and Lexis for case-related research at no cost. According to Defender Services, CJA Panel Attorneys are not considered federal judicial employees, and their access to free computer assisted legal research violates the terms of the national contracts negotiated with Westlaw and Lexis.

Hopefully, Defender Services can renegotiate this issue with the CALR providers once the current national contract expires.

NOTICE FOR LAST MINUTE FILINGS OF REVOCATION OF PRE-TRIAL RELEASE

Court units recently met to discuss the United States Probation practice of filing last minute petitions seeking the revocation of a defendant's pre-trial release. Oftentimes,

these filings are entered under seal less than 24-hours before the next scheduled court hearing. As a result, the defense is unprepared to address the underlying allegations at that court appearance.

It was decided that United States Probation will notify defense counsel, via email, should any such petition seeking the revocation of pre-trial release be filed under seal within this window of time.

The email addresses for all panel attorneys were shared with United States Probation for this reason. If you do not receive such notice in future cases, please contact the United States Probation Officer who filed the petition.

APPLICATION OF "SAFETY VALVE" PROVISIONS FOR PROTECTED LOCATION COUNTS INVOLVING SMALL AMOUNTS OF DRUGS

Over the last several years, there have been more federal drug prosecutions here in the district involving the distribution of relatively small amounts of controlled substances within a protected location, i.e. within a 1000' of a school, park, government subsidized housing unit, etc. This can result in a guideline sentence that falls below the mandatory minimum one-year sentence called for by 21 U.S.C. §860(a).

In these cases, it is important to remember the rather confusing interplay between the "safety valve" provisions found in the federal statutes and the Federal Sentencing Guidelines.

A defendant charged with a §860(a) protected location violation will be eligible for the 2-level guideline reduction found in U.S.S.G. §2D1.1(b)(11)(eff. Nov. 1, 2007) if "he meets the criteria set forth in

subdivisions (1)-(5) of subsection (a) of §5C1.2 . . .” These five subdivisions in §5C1.2 require findings that the defendant does not have more than 1 criminal history point; the defendant did not use violence or possess a firearm/dangerous weapon; the offense did not result in death or serious bodily injury; the defendant was not a leader/organizer; and the defendant truthfully debriefed before sentencing. If a defendant meets these five criteria, a 2-level guideline reduction is required. United States v. Warnick, 287 F.3d 299 (4th Cir. 2002).

However, if this reduction, coupled with an additional reduction for acceptance of responsibility, lowers the guideline range below one year, *the defendant will still be subject to the one year mandatory minimum sentence called for by §860(a)*. This is because the authority to sentence below a mandatory minimum sentence is found only at 18 U.S.C. §3553(f). The text of §3553(f) states that this statutory “safety valve” provision applies only for offenses under “21 U.S.C. 841, 844, 846.” There is no mention of a §860(a) protected location offense in the statutory safety valve provision. As a result, courts have consistently held that the one-year mandatory minimum sentence must apply. See: United States v. Phillips, 382 F.3d 489 (5th Cir. 2004).

In practice, the only way to avoid a one-year mandatory minimum sentence for a §860(a) protected location count is to avoid the count altogether. A defendant who distributes a small amount of drugs within a protected location must convince the government to consider a charge other than a §860(a) violation. In the alternative, such a defendant could provide substantial assistance in order to warrant a motion filed under 18 U.S.C. §3553(e). Only this statute will allow the district court to sentence below the one-year mandatory minimum. A substantial

assistance motion filed under U.S.S.G. §5K1.1 allows only for a guideline decrease that cannot fall below any otherwise applicable statutory mandatory minimum sentence.

UPDATE ON CJA MEMBERS ONLY PAGE ON FEDERAL PUBLIC DEFENDER WEBSITE

CJA Panel Attorneys here in the district were recently contacted about a CJA Members Only page that will soon be available at the Federal Public Defender website at <http://wvn.fd.org>. This page will be password protected so that only the panel will have access. The Members Only page will include motions; memoranda; briefs and other work-product in .pdf format and accessible through a detailed subject matter index.

Password request letters were sent out and received by most CJA Panel Attorneys. The Members Only page is now operating under “test mode” and will soon be available for panel use. Once the page is up and running, attorneys will receive a letter with background information and password access confirmation.

If anyone has work-product for posting on the new Members Only page, please submit it to Brian_Kornbrath@fd.org

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

For the last several months, the CJA Panel Attorneys have received daily email access to slip opinions issued by the Fourth Circuit Court of Appeals. This practice will continue. An additional resource is the 4th Circuit blog located under the News and Case Summaries page of the Defender website.

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UPDATE ON CRACK COCAINE SENTENCING GUIDELINE AMENDMENTS

Last month the district court judges entered re-sentencing orders for those inmates eligible for a two level reduction under retroactive application of the 2007 crack cocaine Guideline amendments who had projected release dates in 2008 and 2009. The next batch of inmate motions will be filed on behalf of those eligible for release in 2010 and 2011.

The Northern District of West Virginia had 616 inmates who were potentially eligible for a sentence reduction. Area task forces comprised of members from the United States Attorney Office; United States Probation; Federal Public Defender Office; and Clerk's Office continue to meet in an effort to resolve these cases.

On April 16, 2008, the Sentencing Commission posted proposed amendments to §2D1.1 and §1B1.10 to alleviate the unfairness associated with crack cocaine sentences where other drugs were involved. For example, under the prior conversion tables, 19 grams of crack cocaine resulted in a base offense level of 24. A case involving 7 grams of crack cocaine and one gram of powder cocaine resulted in a base offense level of 26 – two levels higher.

The proposed amendment will revise the manner in which combined offense levels are

determined in cases involving crack cocaine and one or more other controlled substance. The amendment modifies the Drug Equivalency Tables to provide that 1 gram of crack cocaine again equals 20 kilograms of marijuana (for all the drug conversion tables). Thereafter the combined offense level for multiple drugs is reduced by two levels. An exception to this rule applies if it would result in a combined offense level that is less than the offense level applicable if the offense involved only the other controlled substance, i.e. the controlled substance(s) other than crack cocaine.

The effective date of this proposed amendment is May 1, 2008. In addition, the Commission made this amendment retroactive in §1B1.10. This means crack cocaine inmates who earlier could not receive a 2-level reduction because the old tables resulted in no guideline change may now be eligible for a reduction

If you have a former client with questions concerning the re-sentencing process, please refer them to the applicable Federal Public Defender Office where the original sentencing took place – the Clarksburg office for Clarksburg and Elkins cases (304) 622-3823; the Wheeling office for Wheeling cases (304) 233-1217; or the Martinsburg office for Martinsburg cases.

Defender Services has posted a Crack Re-Sentencing web page at www.fd.org with articles, memoranda, briefs and court decisions addressing the issue.

Attorney Dan Ringer from Morgantown, who hosts Law Works on West Virginia Public Television, will tape an episode this month on the crack cocaine guideline amendments and their effect here in West Virginia. Dan's guests will include Federal Public Defender Brian Kornbrath and Attorney Stephen Jory of Elkins. The episode airs on WV Public Television on April 17, 2008 at 8:30 p.m.

DISTRICT COURT DECISION IN UNITED STATES v. PYLES REINSTATED

On April 4, 2008, the Fourth Circuit Court of Appeals issued an unpublished opinion overturning its earlier ruling in United States v. Pyles, 482 F.3d 282 (2007). The defendant in Pyles faced a guideline range of 63 to 78 months for aiding and abetting the distribution of crack cocaine. The district court (Keeley, J.) sentenced the defendant to probation with home detention based on extraordinary post-offense rehabilitation. However, the Fourth Circuit overturned the sentencing order finding the extent of the variance was substantively unreasonable.

A petition for certiorari was granted by the Supreme Court following its decision in Gall v. United States. The Supreme Court in Gall clarified that the very deferential "abuse of discretion" standard applies for appellate review of the reasonableness of the sentence. Reviewing courts may no longer employ rigid mathematical formulas by using a departure percentage as the standard for determining justifications for a specific sentence. In addition, a reviewing court may no longer require that extraordinary or highly unusual circumstances exist before a variance may be deemed reasonable

Following remand and based on these criteria, the Fourth Circuit reversed itself. The probationary sentence in Pyles was reinstated. Congratulations to CJA Panel Attorney James Zimarowski of Morgantown for a great win.

NEW MILEAGE RATE

Effective March 19, 2008, the Administrative Office announced that the mileage rate for use of a privately owned vehicle increases to 50.5 cents per mile. Please use this new rate for any case related travel on and after this date.

SECOND CHANCE ACT OF 2007 SIGNED INTO LAW

This month the President signed into law the Second Chance Act of 2007. This legislation authorizes \$362 million to expand assistance to inmates recently released from incarceration. Passage of the Act highlights a new political approach to crime prevention besides long-term incarceration. The Act seeks to promote public safety by reducing the risk of recidivism through funded programs to include: mentoring programs, drug and alcohol treatment programs, education and job training, alternatives to prison for parents convicted of non-violent drug offenses, support programs for children of incarcerated parents, and early release of certain elderly inmates.

Still pending before Congress is the Drug Sentence Reform Act of 2007. This bipartisan legislation, if passed, will further alleviate the disparity between penalties for crack cocaine versus powder cocaine. In addition, the Act increases some of the drug quantities needed to trigger 5 and 10 year mandatory minimum sentences.

UPDATE ON CJA MEMBERS ONLY PAGE ON FEDERAL PUBLIC DEFENDER WEBSITE

A CJA Members Only page will be available at the Federal Public Defender website at <http://wvn.fd.org> in April. This page will be password protected so that only the panel will have access. The Members Only page will include motions; memoranda; briefs and other work-product in .pdf format and accessible through a detailed subject matter index. Password confirmation letters will be sent out to all CJA Panel Attorneys later this month.

If anyone has work-product for posting on the new Members Only page, please submit it to [Brian Kornbrath@fd.org](mailto:Brian_Kornbrath@fd.org)

UPDATE ON CJA COMPENSATION POLICY MANUAL

Final edits are underway for a CJA Compensation Policy Manual for CJA Panel Attorneys here in the Northern District of West Virginia. The manual contains detailed information about appointments, compensation and record keeping, reimbursable expenses and voucher review.

The 2008 manuals will be mailed to the CJA Panel in April and will be accessible on the Federal Public Defender website.

DEFENDER SERVICES STUDY REGARDING CJA PANEL ATTORNEY USAGE OF EXPERT WITNESSES AND INVESTIGATORS

The Office of Defender Services is presently conducting a nationwide study of CJA Panel Attorney usage of expert witnesses and investigators. These resources are available with prior approval of the district court by use of the CJA-21 form. According to

Defender Services, there has been a marked decrease in the use of these resources by panel attorneys. The goal is to gather data and reach out to the panel attorneys to insure these resources are utilized in appropriate cases.

NEW FEDERAL PUBLIC DEFENDER OFFICE STAFF MEMBERS

The Federal Public Defender Office is pleased to announce the hiring to two new staff members who will begin next month.

Katy Ratai was hired as a fourth Assistant Federal Public Defender and will begin on May 26, 2008 in Clarksburg. Ms. Ratai is a West Virginia University College of Law graduate who has worked for the last two years in the Kanawha County Public Defender Office.

Eddy Colindres was hired as a second Investigator and will begin on May 12, 2008 in Martinsburg. Mr. Colindres graduated from American University in Washington, D.C. and previously worked as an investigator with the Public Defender Services in Washington, D.C.

WINNING STRATEGIES SEMINAR

The next Defender Services Winning Strategies seminar will take place June 12-14, 2008 in Scottsdale, Arizona, and offers both new and experienced CJA Panel Attorneys the opportunity to attend presentations on criminal defense topics of interest in both large and small group settings. The presentations focus on the nuts and bolts of federal criminal practice including the sentencing guidelines, sentencing mitigation, and the Federal Rules of Criminal Procedure. Sessions focusing on the impact of cases such as Rita, Booker and Crawford, and Fourth, Fifth and Sixth

Amendment issues are also included. In addition, participants can expect presentations on trial skills such as cross examination, defending gang cases and attacking wiretap evidence. Also included are presentations on the use of technology in the courtroom and an explanation of CJA guidelines and procedures.

Registration information and financial assistance forms (air travel, hotel and per diem expenses) are available on the Defender Services website at www.fd.org

SUPREME COURT RULES THAT FELONY DUI IS NOT CRIME OF VIOLENCE

On April 16, 2008, the Supreme Court ruled in Begay v. United States, that a felony DUI does not meet the definition of “violent felony” as found under the Armed Career Criminal section, 18 U.S.C. §924(e). Until this ruling, courts were using these convictions to increase a firearm possession penalty to the 15-year mandatory minimum.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Mitchell, 518 F.3d 230.

- Court overturns aggravated identity theft conviction. The plain meaning of 18 U.S.C. §1028A requires the use of a means of identification that “may be used to identify a specific individual.” Here, the defendant had a fake ID in the name of “Marcus Jackson.”

- Court found that a name standing alone would not be sufficient to meet this requirement. Evidence failed to prove defendant presented himself as a real Marcus Jackson.

United States v. Hairston, 2008 WL 886156.

- Court overturns felon in possession of a firearm convictions where exposure to Armed Career Criminal status was never explained to defendant during Rule 11 guilty plea hearing.

- While Rule 11 does not require courts to inform defendants of what Guideline range might apply, it does require notification of any applicable statutory ranges. Further, error was not harmless. Defendant ordered to be allowed to withdraw guilty pleas.

United States v. Ellis, 2008 WL 341711.

- In a rare unpublished decision, the Court overturned a district court’s refusal to grant a continuance where a defense voice identification expert was unavailable for trial. Even under an abuse of discretion standard, the trial court was found to have acted improperly.

United States v. Humphrey, 2008 WL 1732931.

- In an unpublished decision, the Court rules, post-Gall, that the district court’s upward departure from a 46 to 57 month guideline range to 91 months was not an abuse of discretion.

- Here, the defendant was convicted of being a felon in possession of a firearm following a stand-off with the West Virginia State Police. The district court based the increased sentence on defendant’s prior criminal record and the need to protect the public from further crimes. Even under the abuse of discretion standard, the Fourth Circuit noted this was a close question and hinted the outcome might have been different absent a district court reduction for time spent in state custody.

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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JULY 2008

NEW FOURTH CIRCUIT PLAN FOR COMPOSITION OF CJA APPELLATE PANEL

The Fourth Circuit Court of Appeals recently adopted a new Plan for the Composition and Administration of the CJA Appellate and Capital Appellate Panels. The new plan establishes a committee which will review applications for appointment to this panel.

In order to be considered for this panel, all CJA panel members here in the Northern District of West Virginia must complete an application no later than August 1, 2008. This application will be screened by the committee based on experience and interest in federal criminal appellate work.

The Court's practice of appointing trial counsel to continue appellate representation will continue. However, if trial counsel is permitted to withdraw, any new appointment on appeal will be made from this new CJA Appellate Panel.

To greatly increase your chances of receiving a CJA appointment at the Circuit level, please insure that your application is received in a timely fashion. Applications can be found at the Fourth Circuit Court of Appeals website at www.ca4.uscourts.gov

COMMENT PERIOD FOR 2008 DRAFT OF LOCAL RULES FOR WEST VIRGINIA NORTHERN DISTRICT

The comment period remains open for 2008 amendments to the Local Rules used here in the Northern District of West Virginia. Many of these changes will affect the criminal rules. They include the use of a "Standard Discovery Requests" form that will be completed at the arraignment hearing.

To review the proposed rules, please visit the district court's website at www.wvnd.uscourts.gov

UPDATE ON "MEMBERS ONLY" PAGE FOR DEFENDER WEBSITE

The Members Only page of the Defender website became operational on July 7, 2008. Go to the website at <http://wvn.fd.org> Click on the "CJA Members" page and you will get an additional page link to the "CJA Members Login." By clicking this link, you will be prompted to include your user name and password. Information about user names and passwords was previously sent to the CJA panel attorneys in June. If you have not received confirmation concerning your user name and password, please call CJA Panel Administrator Lisa Coleman at (304) 622-3823.

The Members Only page includes samples of motions, memoranda, proposed voir dire

and jury instructions, and appellate briefs. There is also a CJA Members directory that lists panel attorneys by name, address and telephone number for easy contact.

CJA COMPENSATION POLICY MANUAL FOR NORTHERN DISTRICT OF WEST VIRGINIA

In June, the CJA panel attorneys received copies of the CJA Compensation Policy Manual that provides “user friendly” information about compensation, time keeping and records, expenses and use of experts under the Criminal Justice Act. The manual includes an appendix with the various CJA forms along with instructional memoranda for their use.

Periodic changes to the manual, including rate increases, will be forwarded to CJA panel members by email as replacement pages.

Call CJA Panel Administrator Lisa Coleman at (304) 622- 2823 if you need an additional copy of the manual. By the way, Lisa promises to charge \$1 to answer each CJA compensation question if the answer is already included in the manual. So, please read the manual before calling Lisa.

SUPREME COURT LIMITS NOTICE REQUIREMENT FOR VARIANCE AT SENTENCING

On June 12, 2008, in Irizarry v. United States, (No. 06-7517), the United States Supreme Court held that the notice requirement of Federal Rule of Criminal Procedure 32(h) does not extend to a "variance" from the recommended guidelines range. According to the Court, "The due process concerns that motivated the Court to require notice in a world of mandatory

Guidelines no longer provide a basis for this Court to extend the rule set forth in [Burns v. United States, 501 U. S. 129 (1991)], either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(C)." This ruling resolves a circuit split where some circuits, including the Fourth Circuit Court of Appeals, required that the district court provide detailed notice of its intent to vary from the Sentencing Guidelines. See: United States v. Fancher, 513 F.3d 424 (4th Cir. 2008).

This means that counsel must be prepared to address those legal or factual claims that might support a variance sentence pursuant to the factors as outlined in 18 U.S.C. §3553(a). The district court need not give notice of its intent to consider and impose such a variance sentence. Should the district court rely on facts not already found in the record or the pre-sentence report, the Court in Irizarry counsels that a continuance would be in order if the defendant was prejudiced by such lack of notice.

DEFENDER SERVICES SENTENCING RESOURCE PAGE

The Office of Defender Services continues to update its Sentencing Resource page found at www.fd.org

This resource provides detailed information on all aspects of federal sentencing. Recent additions include A Primer on the Flawed Progression of the Child Pornography Guidelines; Deconstructing the Career Offender Guidelines; and Challenging the Use of Uncharged and Acquitted Offenses as Relevant Conduct at Sentencing. Each article was posted within the last month, and they are certainly worth reading if you have such a case/issue pending at sentencing.

2008 AMENDMENTS TO THE UNITED STATES SENTENCING GUIDELINES

The following amendments to the United States Sentencing Guidelines will take effect November 1, 2008:

Court Security Improvement Act. This amendment responds to the new offense at 18 U.S.C. §1521 prohibiting the filing of false liens or other encumbrances against the real or personal property of government employees. Under §2A6.1, there is a 2-level increase if more than two false filings are involved and an upward departure is deemed appropriate if there were substantially more than two filings. An upward departure is also appropriate if the victim suffered substantial pecuniary harm. The guideline notes an Official Victim, §3A1.2, adjustment applies.

The amendment also addresses the new offense at 18 U.S.C. §119, prohibiting the public disclosure of restricted personal information about federal employees, or a witness, juror, or immediate family members with intent to threaten or facilitate a crime of violence against such person. The new amendment is referenced in §2H3.1 and calls for an 8-level enhancement for any §119 violation. A 10-level enhancement applies for a §119 violation if the offense involved the use of a computer. Here, a §3A1.2 adjustment does not apply.

Emergency and Disaster Assistance Fraud Amendment. This amendment makes permanent the temporary amendment passed in February of 2008. Under §2B1.1, there is a 2-level increase if the fraud stems from disaster relief funding, and there is a minimum offense level of 12. The amendment notes a downward departure may apply if the illegally obtained funds were just an extension or overpayment of legitimately received funds.

Animal Fighting Prohibition Act. The gambling offenses guideline at §2E3.1 is amended to include animal fighting offenses. There is a base offense level of 10 if the offense involved an “animal fighting venture.” It notes an upward departure may apply if the offense involved extraordinary cruelty to an animal, such as maiming or death.

Immigration. The immigration guideline at §2L1.2 was amended to clarify that a “forcible sex offense” as defined under a “crime of violence” includes statutory rape where consent was invalid. It also clarifies that an “offer to sell” a controlled substance is a “drug trafficking offense.”

Food and Drug Offenses. There are two changes to §2N2.1 that include a 4-level increase for repeat violators of the Food, Drug and Cosmetic Act, and an upward departure may apply if the offense created a substantial risk of bodily harm or death to others.

All versions of the Federal Sentencing Guidelines are available at the Sentencing Commission’s website at www.ussc.gov under “Publications.”

LATEST INCARCERATION AND SUPERVISION COSTS

The latest figures compiled by the Administrative Office of U.S. Courts and the Federal Bureau of Prisons indicate that the annual costs per inmate for incarceration in 2008 is \$24,922.00. The annual costs for supervision by United States Probation is \$3,621.64 per individual.

These figures may prove helpful when arguing for an alternative to incarceration.

FEDERAL CONVICTIONS REVERSED, 2008 EDITION

Alex Bunin, the Federal Public Defender for the Northern District of New York, has published his 2008 edition of *Federal Convictions Reversed*. This is a collection of cases from the Courts of Appeals and Supreme Court in which the defendant was afforded relief. The publication lists the cases by subject matter, and is a very handy research tool.

Mr. Bunin's publication was posted on our website at <http://wvn.fd.org> under the News and Case Summaries page.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Tate, 524 F.3d 499 (4th Cir. 2008).

Search of defendant's home by warrant was obtained by police who relied on trash-pull evidence and stated in the warrant that the trash was "easily accessible from the rear yard of" defendant's home. The defendant sought a Franks hearing arguing the police omitted a material fact, i.e. the trash was only "easily accessible" because the police trespassed on defendant's property to get the trash. The district court denied the request for a Franks hearing.

On appeal, the Fourth Circuit reversed and held that Tate was entitled to a Franks hearing. The court held that Tate "clearly described the nature of [the officer's] omissions; he gave reasons for why he considered the omissions deliberately deceptive and material; and he proffered evidence in support of his position" which would negate probable cause.

United States v. Evans, 526 F.3d 155 (4th Cir. 2008).

Fraud and identity theft defendant faced advisory Guideline range at sentencing of 24-30 months. The district court imposed a sentence of 125 months in prison. On appeal, defendant argued that his sentence was unreasonable.

After holding the case in abeyance pending the outcome of Gall, the Fourth Circuit affirmed the sentence. The court reviewed the record and concluded that the district court "carefully and thoroughly applied the prescribed sentencing factors" when imposing sentence. Affirmance was necessary, given "the requisite deference we must accord to the considered judgment of the district court."

United States v. Cain, 524 F.3d 477 (4th Cir. 2008).

Following defendant's arrest and presentment at initial appearance for drug dealing, he informed the government he wished to cooperate. Counsel was appointed following the initial appearance. The next day, the police and prosecutor interviewed the defendant without his attorney being present. These statements were later used against the defendant and he moved to suppress based on a Sixth Amendment right to counsel violation.

The Court of Appeals upheld the use of defendant's statements. While noting defendant's Sixth Amendment rights had attached, the court nonetheless held that the record showed defendant's repeated attempts to initiate contact with the DEA agents. Furthermore, defendant was advised of his Miranda rights three separate times, including just before the actual interview.