

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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CJA PANEL ATTORNEY SEMINAR COMING IN JULY

Please mark your calendars for a two day CJA panel attorney seminar that will be held July 23-24, 2009 at the Waterfront Place Hotel in Morgantown, West Virginia. Co-sponsored by the Federal Public Defender Offices for the Northern and Southern Districts of West Virginia, the seminar will include sessions on: The Art of Cross-Examination; Use of Capital Mitigation Strategies for Departures and Variances; Defending a Child Pornography Case; Fourth Circuit and Supreme Court Updates; Traumatic Brain Injury; U.S. Probation Drug Court and Intensive Supervision; CJA Administrative Updates; and an Ethics Issues Panel.

This seminar is available at no cost to all CJA panel attorneys. The West Virginia State Bar has approved the course for 12.0 hours of CLE credits, including 1.8 hours for ethics.

The seminar will take place from 8:30 a.m. to 5:00 p.m. on Thursday, July 23rd, and from 8:30 a.m. to 12:30 p.m. on Friday, July 24th.

To reserve a room at the Waterfront Place Hotel at the government rate of \$83 per night, please call (304) 296-1700 no later than June 24, 2009. Also, to reserve a seat at the seminar, please call CJA Panel Administrator Lisa Coleman at (304) 622-3823.

NEW HOURLY RATE AND CASE MAXIMUM INCREASES

Congress recently authorized and provided funding to raise the non-capital hourly compensation rate from \$100 to \$110 per hour, and the capital rate from \$170 to \$175. These new hourly compensation rates apply to work performed on or after **March 11, 2009**. In addition, there were increases in the case compensation maximum as follows:

- felonies at the trial level: \$7800 to \$8600.
- appeals: \$5600 to \$6100.
- misdemeanors: \$2200 to \$2400.

Please note these increases on your CJA-20 and CJA-30 vouchers. Updates to the CJA Compensation Policy Manual used here in the district will be emailed to CJA panel attorneys.

SERVING SENTENCING DOCUMENTS ON UNITED STATES PROBATION

CJA panel attorneys are reminded that all documentation relating to sentencing should be served on the United States Probation Office when filed on ECF or submitted to the Court and opposing counsel. This includes sentencing memoranda, motions for departure and variance, etc. This uniform practice will better provide United States Probation with updated information concerning contested matters at sentencing. Such materials are normally not available to Probation via ECF.

UPDATE ON DISTRICT'S CRACK COCAINE RE-SENTENCING CASES

On March 20, 2009, the Defender Office and the Stanford Law School Supreme Court Litigation Clinic filed its petition for writ of certiorari to the United States Supreme Court in United States v. Gena Dunphy. The Court is requested to resolve a circuit-split by holding the Federal Sentencing Guidelines are merely advisory in a re-sentencing proceeding pursuant to 18 U.S.C. §3582(c)(2). This would allow a Court to give more than a 2-level reduction suggested by the Commission. Here is its summary statement of reasons for granting the writ:

Federal courts across the country are divided over whether federal district courts must treat amended sentencing guidelines ranges as binding when imposing new sentences under 18 U.S.C. §3582, or whether this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), requires that they be treated as only advisory. This question is important and arises frequently, particularly in the context of the amended guidelines for crack cocaine offenses. This is such a case and is an ideal vehicle for resolving the split of authority. The Fourth Circuit's holding that district courts must treat the Guidelines as binding in 18 U.S.C. §3582 proceedings also is wrong. This Court held in *Booker* that the Guidelines violate the Sixth Amendment when they require a longer sentence than is otherwise allowed based on the elements of the crime of conviction. *Id.* at 244. Such is the case here. Furthermore, treating the Guidelines as binding when constructing a new sentence flouts *Booker's* mandate that binding guidelines are no longer an open choice. *Booker*, 543 U.S. at 263; accord *United States v. Spears*, 129 S. Ct. 840, 842 (2009)

(per curiam) (Guidelines are advisory only) (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 560 (2007)).

It is no answer to claim, as the Fourth Circuit does and the Sentencing Commission suggests, that proceedings under Section 3582 do not constitute full resentencings. That is just a label. District courts impose new sentences under Section 3582 the same way they conduct other resentencings. And whenever a court reopens a sentence and constructs a new one, it must do so in accordance with the law that exists at the time the new sentence is imposed, not just with (retroactive) sentencing guidelines. *Booker* is the law; this Court should instruct the federal courts of appeals again that they must follow it.

WINNING STRATEGIES SEMINAR AVAILABLE TO CJA PANEL

The Training Branch of the Office of Defender Services will hold its second 2009 Winning Strategies Seminar in Portland, OR, May 7-9, 2009. Winning Strategies focuses on the nuts and bolts of federal criminal defense practice, including sentencing guidelines and mitigation. This presentation of Winning Strategies includes a bonus as it will present a Persuasive Writing Workshop for trial attorneys that provides a hands-on opportunity for lawyers to learn how to make their writing clear, concise and persuasive. A copy of the draft agenda and application for financial assistance are available at the ODS website at www.fd.org The deadline for hotel registration at the government rate is April 6, 2009.

METH LABS AND ENDANGERING HUMAN LIFE AND THE ENVIRONMENT

The following article was reprinted with the permission of Gene Gietzen, a forensic scientist located in Springfield, Missouri, who has acted as a defense expert in methamphetamine cases:

There is nothing like a good federal case to stimulate the brain activity. For those of you who handle these cases, you know what I am talking about. Not only does the defense have to deal with the facts of the case but they must deal with additional considerations. In the area of clandestine Methamphetamine labs I am referring to “Theoretical Yields” and potentially “Endangering Human Life”. Of the two the latter is often less based on science than the former.

The testimony regarding “Endangering” mostly often comes from the investigating clandestine lab officer. During that testimony one will hear a recantation of how dangerous Meth labs are and how this small lab could have caused an explosion which would result in “urban renewal” for a five block radius.” One hears about how Acetone and Ether are highly flammable, Anhydrous Ammonia fumes are extremely dangerous and so on, and so on. I had the misfortune to listen to this type of testimony and realized what the officer was testifying to was “potential” dangers as opposed to the “real” dangers at the scene. What does this tell us about the dangers at the scene itself?

If you drive, work around the house, basically live, you are exposed to potential dangers on a daily basis. When dealing with “substantial risk” or “endangering” issues,

one must look at the entire scene and even with this, the opinion is still subjective. Outside of opinion evidence, how does one determine whether a particular scene can be considered “endangering?”

The answer did not come from the scientific community, rather the United States Court of Appeals for the Ninth Circuit in United States v. Straten, 466 F.3d 708 (9th Cir. 2006). This case is one I am familiar with as I was involved in the case at the sentencing hearing. I was provided a copy of the judgment of the Court which listed four factors the court should consider:

Factor 1: The quantity of any chemicals or hazardous or toxic materials found at the laboratory and the manner in which the chemicals or substances were stored.

Obviously one can determine the quantity of materials found at a laboratory. But what occurs when the laboratory is not active or found as a “boxed” lab? There is also a question as to whether sealed cans of solvent are considered dangerous.

Factor 2: Manner in which the hazardous or toxic substances were disposed of and the likelihood of the release into the environment of hazardous or toxic substances.

If the evidence shows wet filter papers with sludge in the trash, you could have a problem. Burn piles are another source of evidence of disposal and release into the environment, but there is a caveat. If the burn pile shows debris only, there should be some proof that items contained in the burn pile are from a lab. A recent Meth lab case bore a burn pile that was still afire. The

photos revealed plastic jugs to be present which the investigator opined were evidence of a lab. There was no analysis and the plastic jugs looked more like anti-freeze jugs than plastic solvent containers.

It is not uncommon to find jars with spent solvent which is considered evidence of previous cooks. The presence of these items of evidence, both capped and uncapped, does not indicate the disposal methods.

I want to stress there should be a great deal of awareness paid to any testimony provided regarding disposal and release issues as it can be highly speculative.

Factor 3: Duration of the offense and the extent of the manufacturing process.

This is another factor that may be hard to determine. There are many lab cases where precursor and/or essential chemicals are not present. Without these items no cook can be conducted. Boxed labs are not evidence of the number of cooks and in some instances not evidence of the extent of the manufacturing process.

In areas of the country which use the Anhydrous cook method, it is not uncommon to find the suspects to take the precursor and lithium metal to the site where the anhydrous can be found, add the anhydrous and return to the site which is basically nothing more than the extraction, gassing and filtering process. While there may be evidence of precursor found, the actual cook site may be the vehicle.

The best evidence of the duration of the offense is receipts or other written documentation that are indicative of sales or even manufacturing. These “junior

accountant” cooks hand the government strong evidence of this factor.

Factor 4: Location of the laboratory (residential neighborhood/remote area) and number of human lives placed in a substantial risk of harm.

Apartment buildings or high density neighborhoods can be the “worse case” scenario for this factor. The first thing to determine is whether there is an actual lab present at the site.

One of the least common types of evidence taken at lab sites is air monitoring. The use of organic vapor sniffers or other equipment can demonstrate if there is anything in the atmosphere inside the site that would be considered dangerous, hazardous or toxic. Most often investigators will report “chemical odors” inside the site that are supposed to replace sampling. “Chemical odors” is a generic term that can pertain to a wide variety of odors that may not be related to the Meth lab itself.

Other factors that should be taken into consideration are climatic in nature such as temperature, humidity, wind direction and speed.

There is much more to review of “endangering” allegations than just the four factors listed above. As previously indicated, one needs to understand the scene, the synthesis methodology, the chemicals found on site as well as evidence of the knowledge and experience of the cook.

One “endangering” case involved a young child. When the components of a lab were found in the apartment, the child was taken

to the hospital where he was found to be in good health. While at the hospital samples of the child's hair were collected and submitted for toxicological analysis. The lab reported the presence of Meth in the child's hair and thus the inception of the endangerment charge.

Hair grows approximately ½" per month, so the location of the Meth on the child's hair could be an indicator of approximately when it was deposited. In addition, both parents were Meth users evidenced by the presence of pipes and other Meth related paraphernalia. The lab did not section the hair, rather conducted their examination using the entire hair. Without some other form of analysis, the analyst could not opine when or how the Meth was deposited. They did not find any indication of other clandestine lab chemicals in the hair.

Reddish stains were found in a bathtub at a clandestine lab site. The investigator wrote in length about these stains, indicative of a "spill" and how they were consistent with Iodine. There was also evidence these stains had attempted to be cleaned. No samples were taken of the stains; therefore no analysis was conducted to confirm the visual identification.

There is generally a significant lack of analysis on these cases. This is especially troublesome in instances where jars containing a liquid were found, but no identification was made as to the nature of the liquid, except to say it was "endangering", "toxic" or "hazardous" whatever it was.

One very interesting case involved the evacuation of houses in a neighborhood

where a suspected Meth lab was found. The investigators wrote of very strong chemical odors and the need for the immediate turning off of the water heater pilot light as well as other sources of flames/ignition to prevent explosion. The reports read like a "temple of doom" novel. Low and behold the defense got a copy of a video that was taken at the site during the investigation. The Meth investigators had donned Tyvex suits, booties and re-breathers with full face masks to enter the scene. How could they detect chemical odors of that severity? The over-reaction was further evidenced by the "group" shots of all the lab related items. There was a partial bottle of HEET, a partial quart can of Acetone, a half gallon of Coleman Fuel and a bottle of Muriatic Acid – all capped and found either in the garage or under a sink.

I have been involved in excess of 400 clandestine Meth lab cases in my practice. I have found none of them to be identical and each poses their own unique set of evidences and circumstances. Some of them were obviously a danger to human life and the environment, others were not. Assumptions, Speculation and Hypotheticals run rampant in these cases to the point where it is difficult to understand fact from fiction.

I would highly encourage you to gain the assistance of a competent source with knowledge of clandestine labs and the circumstances that could lead to "endangerment" issues. It is only through this method one can truly understand and prepare for court.

DECONSTRUCTING THE GUIDELINES IN FURTHERANCE OF A STATUTORY VARIANCE SENTENCE

For several months now, Sentencing Resource Counsel with Defender Services have been working on a special project called Deconstructing the Guidelines. Resource papers have been made available which critically examine the history and basis of the most frequently encountered provisions of the U.S. Sentencing Guidelines. These resource papers are available at www.fd.org under the Sentencing Resource page.

Judges are now invited to consider arguments that the guideline itself fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 127 S. Ct. at 2463.

To date, these resource papers attack the guideline calculations and bases in support of many of the specific offense characteristics for the following guidelines: career offender; child pornography; firearms; relevant conduct; and tax. Additional resource papers will follow.

The materials available on the Defender Services Sentencing Resource page provide

an excellent starting point when structuring an argument that a variance sentence is more appropriate than that called for by the advisory guidelines.

SENTENCING COMMISSION STUDY ON ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM

The United States Sentencing Commission recently published a report entitled "Alternative Sentencing in the Federal Criminal Justice System." Available in both hard copy and on the Commission website at www.ussc.gov the report provides detailed information on trends and use of penalties other than incarceration. According to the Commission, "criminal justice professionals have argued that dwindling prison space should be reserved for the most serious and dangerous offenders, necessitating a reconsideration of alternative sanctions for first-time and nonviolent offenders."

As even the Commission agrees "effective alternative sanctions are important options," the report's conclusions could be used in support of a downward variance request in your particular case.

HELPFUL BLOG SITES

Supreme Court of the United States Blog at: <http://www.scotusblog.com>

Fourth Circuit Blog at: <http://www.circuit4.blogspot.com>

Professor Douglas A. Berman's Sentencing Law and Policy Blog at: <http://sentencing.typepad.com>