WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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GUIDELINE AMENDMENTS IN RESPONSE TO PROTECT ACT

The PROTECT Act included a directive that the Sentencing Commission promulgate new amendments that would reduce the frequency in which courts depart below the sentencing guidelines. In response, the Commission implemented an amendment affecting several guideline departure provisions and it was effective October 27, 2003.

The amendment prohibits several grounds for departure, including (1) the defendant's acceptance of responsibility; (2) defendant's mitigating role in the offense; (3) defendant's decision to plead guilty or enter into a plea agreement; (4) defendant's payment of restitution; (5) and defendant's gambling addiction. The amendment also prohibits armed career criminals and sex offenders from being considered for downward departure, and it limits the extent of a §4A1.3 departure for career offenders. In addition, the amendment imposes increased restrictions on departures for aberrant behavior, family ties and responsibilities, victim's conduct, coercion and duress, and diminished capacity.

Findings provided by the Commission call into question the need for such changes. A vast majority of downward departures across the country in the last ten years were either initiated by the government, or used in "fast track" immigration cases.

Both the new amendment and the Commission's report can be found on its web site at www.ussc.gov.

ASHCROFT MEMORANDUM AND ITS EFFECT ON PLEA NEGOTIATIONS

This edition of the *Quarterly* includes an attached verbatim copy of a Department of Justice policy statement issued several months ago by United States Attorney General John Ashcroft. Known affectionately as the "Ashcroft Memorandum," it contains a detailed directive that essentially guts independent charging decisions made by each United States Attorney in his or her respective district. The memorandum in part requires pleas to the most serious, readily provable offense, demands that an §851 information be filed to double statutory enhancements in drug prosecutions, and limits dismissal of a §924(c) firearm count that carries a mandatory minimum consecutive sentence.

Implementation of the Ashcroft Memorandum in this district will make federal plea negotiations more difficult, and it will likely result in an increase in the number of jury trials as guideline ranges are trumped by more lengthy statutory penalties.

However, the memorandum is certainly subject to interpretation. Specific sections can and should be used to a defendant's advantage when negotiating with a federal prosecutor. One need not accept a general reference to the Ashcroft Memorandum if used to curtail meaningful plea negotiations.

ELECTRONIC COURT FILING AND PRACTICE UNDER THE CRIMINAL JUSTICE ACT

The United States District Court for the Northern District of West Virginia is scheduled to implement its Case Management/Electronic Court Filing (CM/ECF) system in the Fall of 2004. CM/ECF is an Internet-based document filing system. All pleadings and court filings normally submitted and received as "hard copy" will soon be immediately available via the Internet in a portable document format (PDF). The Clerk's Office will provide a log-in and password to each attorney using the system. Training sessions will be available.

In a federal criminal case, one can expect to submit and receive charging documents, pleadings, motions, memoranda, voir dire questions, jury instructions, and orders via the CM/ECF system.

More information will become available through the Clerk's Office as the CM/ECF system nears its operational date. However, any CJA Panel Attorney utilizing the CM/ECF system will need to acquire the following equipment and software: a Pentium PC with at least 64 MB RAM; Windows 95; Internet Explorer; Internet access (broadband recommended) with e-mail address; Adobe Acrobat Reader and Writer Programs; and a Scanner.

2004 EDITION OF ERRORES JURIS

Alex Bunin, the Federal Public Defender for the Northern District of New York and the District of Vermont, recently issued his 2004 Edition of Errores Juris (previously entitled "Reversible Errors"). The publication is well over 50 pages in length, and provides case citations and descriptive bullets of all courts of appeals criminal cases across the country that were remanded because of reversible error. The case listing has subject matter headings and is a great research tool.

There are over 180 CJA Panel Attorneys here in the Northern District of West Virginia, and it would be cost prohibitive to copy and mail this edition to everyone. However, the Federal Public Defender Office will e-mail the publication as a PDF or WordPerfect attachment to anyone with an interest. Please call (304) 622-3823; provide your e-mail address; and the Errores Juris 2004 Edition will be forwarded.

NEW CJA PANEL ATTORNEY LISTSERVE E-MAIL SYSTEM

After almost eighteen months of occupying temporary space inside the federal courthouse in Clarksburg, the Federal Public Defender Office will finally be moving to permanent office space. The Federal Defender will operate from the third floor of the Huntington Bank Building located on West Pike Street in Clarksburg. This new and additional space will allow the Defender Office to operate a Listserve e-mail system for CJA Panel Attorneys and others active in the Northern West Virginia federal criminal defense bar.

A Listserve is an unmoderated, membership restricted, e-mail forum for a limited audience. In this case, the Listserve will be available to only those federal criminal defense attorneys who practice here in Northern West Virginia. Such restriction will allow for more robust and candid communications while, at the same time, protecting defense-based materials. Participants can seek and share information, obtain copies of pleadings and other work

product, and receive updated information relating to federal criminal practice and procedure.

Over the course of the next several weeks, the Federal Public Defender Office will be contacting each CJA Panel Attorney to confirm e-mail addresses and interest in participating in Listserve access.

LENGTH OF SUPERVISED RELEASE TERM IN §841(b)(1(C) DRUG PROSECUTIONS

Defense counsel should be aware of a published Fourth Circuit opinion that addresses the amount of time that a defendant can be placed on supervised release following conviction and sentence for violating 21 U.S.C. §841(b)(1)(C) – a twenty year count drug trafficking count.

In *United States v. Pratt*, 239 F.3d 640 (4th Cir. 2001), the Fourth Circuit compared the "impose a term of supervised release of at least 3 years" language of §841(b)(1)(C) with that portion of 18 U.S.C. §3583(b)(2) which states that "except as otherwise provided, the authorized term[] of supervised release . . . for a Class C . . . felony [is] not more than three years."

The *Pratt* Court found §3583's three-year maximum term of supervised release would render superfluous §841(b)(1)(C)'s use of the words "at least three years." The Court in Pratt recognized that its holding could result in an §841(b)(1)(C) defendant receiving a term of supervised release of up to life.

Because of *Pratt*, counsel should be prepared to argue why 3 years is a sufficient amount of time for a defendant to abide by conditions of supervised release.

THIRD LEVEL ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY

One fallout from the recent Feeney Amendments to the Sentencing Guidelines includes a revision to U.S.S.G. §3E1.1. Now the Court must receive a government motion before providing a third level downward adjustment for acceptance of responsibility.

According to § 3E1.1, the government's motion for the third level reduction for acceptance of responsibility must state that "the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently . . ."

Implementation of the recent amendment to §3E1.1 has spawned allegations of government abuse. In some districts, no §3E1.1 motion is made by the government where a defendant litigates pre-trial motions, such a motion to suppress evidence or statements. There was at least one instance where the federal prosecutor intended to withhold the §3E1.1 motion unless defendant agreed to a plea agreement along with an information, rather than require the case be presented to a grand jury for indictment. Such practices undercut the language of § 3E1.1 which is concerned with the time and effort expended in *trial* preparation.

Several Federal Defender Offices have briefed the issue and provided sample memoranda. This work product is available should any attorney experience this practice.

FOURTH CIRCUIT ROUND-UP

United States v. Walters, 359 F.3d 340 (4th

Cir. 2004).

- Virginia juvenile adjudications are not "convictions" within the meaning of §922(g)(1), being a felon in possession of a firearm.
- Court utilizes state law interpretation to decide issue.
- Holding may be helpful here in West Virginia where WV Code §49-7-3 states "nor shall any child be deemed a criminal by reason of such adjudication."

United States v. Pressley, 359 F.3d 347 (4th Cir. 2004).

- Third felony that took place after act that led to federal firearms prosecution could not be used as predicate conviction for Armed Career Criminal status.
- Predicate offenses triggering ACC sentence must be committed before the federal offense.

United States v. Smith, 359 F.3d 662 (4th Cir. 2004).

- Larceny from the person of another is crime of violence for career offender guideline.
- Court considers elements of offense under state law (Virginia).

United States v. Mayo, 361 F.3d 802 (4th Cir. 2004).

- Court overturns suppression order, finding that police had *Terry* grounds to stop and frisk defendant.
- Defendant walking in high crime area, and placed hand in pocket once police arrived; pocket appeared to contain something heavy; and defendant acted in evasive and suspicious manner.

United States v. Reevey, __ F.3d __, 2004 WL 737365 (4th Cir.(Md.)), 4/7/04.

- Two level sentencing enhancement under U.S.S.G. §2B1.3 for a threat of death during car jacking (defendant threatened to shoot victim) constitutes impermissible double counting where defendant also convicted of §924(c) – possession of firearm during crime of violence.

(Unpublished)

United States v. Lesczynski, 86 Fed. Appx. 551, 2004 WL 144132 (4th Cir. (Va.)), 1/28/04.

- Court overturns two level obstruction of justice enhancement under U.S.S.G. §3C1.1 where defense witness arguably testified falsely at trial.
- Any obstruction increase requires finding that defendant induced or procured false testimony, and no such evidence exists on this record.