

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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UPCOMING TRAINING OPPORTUNITIES IN 2004

The Defender Services Division of the Administrative Office of U.S. Courts will sponsor several Criminal Justice Act seminars and workshops in 2004. These sessions are free to all CJA Panel Attorneys and include:

Sentencing Advocacy Workshop

San Antonio, Texas, 3/11 - 3/13

This program presents a comprehensive approach to sentencing advocacy within the confines of the Federal Sentencing Guidelines.

Winning Strategies 2004

Santa Fe, New Mexico, 4/22 - 4/24

Boston, Massachusetts, 5/20 - 5/22

Memphis, Tennessee, 7/29 - 7/31

The Winning Strategies seminars this year will concentrate on statement cases, and topics include: 5th Amendment case law and suppression motions, statement issues in multi-defendant cases, the role of culture in confessions, mental health issues, as well as more general topics such as Guidelines amendments and Supreme Court updates.

Trial Advocacy Workshop

Williamsburg, Virginia, 6/24 - 6/26

This workshop will focus on the use of courtroom technology, such as Trial Director and Power Point presentation.

Immigration Crimes Seminar

San Diego, California, 8/26 - 8/28

This seminar is intended to be a comprehensive training on effective advocacy in the defense of clients charged with immigration offenses.

Tuition and program materials are free to all CJA Panel Attorneys. Enrollment is limited. If interested, please contact the Federal Public Defender for Northern West Virginia at (304) 622-3823 for application forms and further information.

FEDERAL DEATH PENALTY DEFENSE TRAINING

A four-day "Life in the Balance" training program will be offered in Memphis, Tennessee, March 13 -16, 2004. This seminar will focus on the training needs of counsel who have not tried a capital case or who are new to the federal death penalty. There will be 4-5 breakout sessions focusing specifically on the federal death penalty. Scholarships are offered to CJA Panel Attorneys.

By statute, 18 U.S.C. § 3005, a capital defendant is allowed two counsel, one of which "shall be learned in the law applicable to capital cases." This "Life in the Balance" training program is a great first step for those attorneys who wish to participate in death penalty litigation. Call the Federal Defender Office at (304) 622- 3823 for further details.

DEATH PENALTY DEFENSE

INTERNET ASSISTANCE

An excellent resource for death penalty defense issues is available at the web site maintained by the Capital Defense Network at www.capdefent.org. The site is regularly updated by resource counsel with new information that can be found under the “What’s New” section

FEDERAL DEATH PENALTY FACTS

Since 1988, the federal government has taken to trial a total of 82 federal death penalty cases involving 124 defendants in 94 trials. These 124 defendants were culled from a pool of 305 against whom the Attorney General had authorized the government to seek the death penalty.

The majority of these 305 defendants avoided trial by negotiated guilty plea, or when the government dropped its request for the death penalty, or dismissed the charges entirely. Eight were found not guilty of the capital charge. Two were declared innocent. One was granted clemency. There have been three executions. Juries or judges have rejected the death penalty 61 times and voted for death 33 times.

AMENDMENT TO FEDERAL EVIDENCE RULE 608(b)

Effective 12/1/03, Rule 608(b) of the Federal Rules of Evidence was amended. The deleted text of the old rule is in [brackets]; the new text is underlined:

(b) Specific instances of conduct. – Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ [credibility] character for truthfulness, other than

conviction of crime, may not be proved by extrinsic evidence.

The Committee Notes explain that the change was made to make it clear that the absolute bar on extrinsic evidence “applies only when the sole reason for proffering that evidence is to attack or support the witness’ character for truthfulness.” According to the Committee, “the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. The apparent intent of the amendment is to circumscribe an overinclusive interpretation of “credibility.”

NEW MILEAGE REIMBURSEMENT RATE FOR CASE RELATED TRAVEL

Federal Travel Regulations were recently amended. Effective January 1, 2004, CJA Panel Attorneys are authorized 37.5 cents per mile for all case related travel. The travel rate for case related mileage before 1/1/04 remains at .36 cents per mile. Please note this change when submitting CJA payment vouchers.

MY LITTLE RED RULES BOOK

An updated version of the My Little Red Rules Book is available from the Federal Defender Office of Eastern Washington and Idaho. This pocket-sized, soft-bound booklet contains selected provisions from the U.S. Constitution; the Federal Rules of Evidence with Annotations; selected Federal Rules of Criminal Procedure; the federal bail and Jencks act provisions; and a Drug Quantity and Sentencing Table. Booklets cost \$5.50 each. Please send a check to the Federal Defender Office for Eastern

Washington, 10 North Post #700, Spokane,
WA 99201

DOCUMENTING DEFENDANT'S DECISION NOT TO FILE AN APPEAL

A majority of the federal criminal case dispositions in this district include a plea agreement containing an appeal rights waiver provision. The waiver addresses both direct appeal rights and collateral review pursuant to 28 U.S.C. § 2255. In these cases, defendant and counsel execute the plea agreement, it is ultimately accepted by the court, and sentencing takes place. Pursuant to the waiver provision, no criminal appeal is ever filed.

However, it is now becoming somewhat common for defendants to file an ineffective assistance of counsel claim months later. The defendant will allege that he asked his attorney to file notice of appeal, and that request was never acted upon. Usually these petitions are drafted by other inmates somewhat familiar with the law. In particular, the Fourth Circuit has held that trial counsel's failure to file notice of appeal when requested constitutes ineffective assistance of counsel, and requires a district court to grant the § 2255 motion so as to allow a criminal defendant to take a direct appeal. United States v. Peak, 992 F.2d 39 (4th Cir. 1992). Moreover, a defendant's allegations, standing alone, will often require an evidentiary hearing because a credibility issue exists – essentially a swearing match between defendant and trial counsel over whether an appeal was ever requested. There were two such proceedings here in the district in the last month.

Any practitioner wishing to avoid the

prospect of testifying at such a hearing in the future should at least consider the use of documentary evidence to confirm a defendant's decision not to appeal. This documentation should be produced *after* sentencing, but within 10 days of entry of the written judgment. This can include a letter to the inmate explaining the right to appeal; the rights waiver provision of the plea; an assessment that no non-frivolous issues exist for an appeal; and a recommendation that no appeal be filed. The letter would normally close by requesting that the client contact the attorney by mail or phone before a date certain, otherwise, it would be understood that all appeal rights are waived. Other documentation can include a signed declaration from the defendant, stating that appeal rights were discussed *after* sentencing, and defendant agrees that no appeal notice need be filed.

Courts have held that a district court need not hold an evidentiary hearing in a § 2255 case when the issue of the prisoner's credibility can be conclusively decided on the basis of documentary testimony. Frazer v. United States, 18 F.3d 778 (9th Cir. 1994). Documenting a defendant's post-sentence decision not to pursue an appeal is a simple clerical task that might be used to avoid future litigation.

PRETRIAL RELEASE AND THE MEANING OF "COMMUNITY TIES"

Title 18 U.S.C. § 3142(g) outlines the criteria used by the Court when deciding whether to release or detain a defendant during the pendency of a federal criminal case. These criteria include "length of residence in the community" and "community ties."

An important consideration under §3142 is whether “community” means only within the charging district, i.e. the Northern District of West Virginia, or any other “community” within these United States. Support for the latter interpretation can be found in *United States v. Dominguez*, 783 F.2d 702 (7th Cir. 1986); *United States v. Himler*, 797 F.2d 156 (3rd Cir. 1986); and *United States v. Townsend*, 897 F.2d 989 (9th Cir. 1990).

In those cases where the defendant has strong ties to a community outside this district, and defendant can be successfully monitored by another jurisdiction’s United States Probation Office, the Court may be receptive to this more expansive interpretation of “community.”

FOURTH CIRCUIT ROUND-UP

United States v. Stockton, 349 F.3d 755 (4th Cir. 2003).

- Court uses de novo standard of review to overturn district court decision to depart downward from Sentencing Guidelines.
- In footnote 4, the Court addresses whether the Ex Post Facto Clause precludes use of the PROTECT Act amendments which require de novo review of certain departure decisions.
- Court holds that application of de novo standard of review pursuant to §402(d) of PROTECT Act does not implicate Ex Post Facto Clause because change in standard of review merely changes who within the federal judiciary makes a particular decision, not the legal standards for that decision.

United States v. Pratt, 351 F.3d 151 (4th Cir.

2003).

- Court finds F.R.C.P. Rule 43 violation exists where case agent enters jury deliberation room, over objection, to cue up audio tape without defendant or his counsel present; majority finds harmless error; dissent finds government failed to prove harmless beyond a reasonable doubt.

United States v. Higgs, 2003WL22992273, 4th Cir. (Md.), 12/12/03.

- Extending the Supreme Court’s holdings in *Apprendi* and *Ring*, Court holds that death penalty indictment must allege statutory intent factor found in 18 U.S.C. § 3591(a)(2), and at least one statutory aggravating factor, 18 U.S.C. § 3592(c).
- Assuming indictment defective, Court does not find such error “structural,” therefore, harmless error review possible.

Unpublished:

United States v. Fitzgerald, 80 Fed.Appx. 857 (4th Cir. 2003).

- Court provides detailed *Daubert* analysis and upholds district court order excluding government expert testimony about the patterns of typical child molesters.