

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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NEW FEDERAL BUREAU OF PRISONS DEVELOPMENTS AND RESOURCES

On December 13, 2002, the Department of Justice issued an opinion letter concluding that the Bureau of Prisons does not have the authority to designate an inmate to a community confinement center for service of a term of imprisonment. Until then, the BOP would oftentimes accept a Court's recommendation that a defendant serve up to an 18-month sentence at a CCC. At the DOJ's directive, the BOP promulgated new rules adopting the DOJ opinion. Under these new rules the BOP will no longer designate defendants to a CCC, and, significantly, would redesignate defendants who had already been designated if they had more than 150 days remaining to service. CCC's.

A number of district court rulings have stayed the new BOP rules pending § 2255 review. *Shawn Lyn Cutler v. United States*, CR 01-439 (D.D.C. Jan. 24, 2003)(granting a 2255 motion in part and enjoining the BOP from transferring defendant from CCC to prison based on principles of equitable estoppel and due process); *Matthews v. Federal Bureau of Prisons*, CV 03-33-S-BLW (D. Idaho Jan. 27, 2003)(granting petitioner's temporary restraining order forbidding BOP transfer of defendant from CCC to prison); *Iacoboni v. United States*, CA 03-3005-MAP (D. Mass. January 10, 2003)(ordering BOP to not transfer petitioner from CCC until court has opportunity to consider "serious and substantial questions" raised by the change in BOP policy). These § 2255's attack both the DOJ analysis itself and BOP's passage of the

new rules in violation of the Administrative Procedures Act.

A wealth of information is available at the Bureau of Prisons web-site located at www.bop.gov. Under the FOIA/Policy section, you will find policy statements that outline the Intensive Confinement Program (Boot Camp); substance abuse programs; and security designation/classification procedures. Defendants with computer Internet access will find very useful information under the Inmate Information section. The BOP describes prison life and most available programs relating to work; education; substance abuse programs; visitation; furloughs, etc. The BOP also provides an Inmate Locator that can find any inmate in the prison system based on name, DOB, or inmate registration number.

ASSISTANCE AND TRAINING RESOURCES

For quite some time now, Jay T. McCamic and Christine B. Stump have acted as Resource Counsel for the panel attorneys here in the Northern District of West Virginia. Resource Counsel provide needed assistance to panel attorneys in those districts that lack a Federal Defender Office.

Given that the Federal Public Defender Office for Northern West Virginia is now up and running, the Resource Counsel contract will expire on April 30, 2003. Congratulations to Jay and Christine on jobs well done.

As of now, panel attorneys are invited to contact the Federal Public Defender Office at (304) 622-3823 if there is any assistance needed in the defense of federal criminal cases under the Criminal Justice Act. The office will provide one-on-one consults and roundtable sessions on difficult issues that arise; panel attorneys will have access to a well-stocked criminal law library, a brief bank, and free computer assisted legal research; in-district training sessions and workshops will be available for CLE credits; and notice will issue that relates to training opportunities available outside the district. The Federal Defender Office looks forward to providing whatever assistance panel attorneys might require.

As to available training, the Judicial Training Center of the Defender Services Division sponsors periodic seminars at no cost for CJA panel attorneys. Those seminars in the next few months that are reasonably close to home include: Regional CJA Seminar (broad overview of federal criminal defense practices), May 29-31, Savannah, Georgia; and Trial Advocacy Skills, June 26-28, Williamsburg, Virginia.

Scholarships are also available to attend a 2-week course offered by the National Criminal Defense College in Macon, Georgia. This is an intensive course that develops trial advocacy skills through large class sessions and small group practical exercises. There are two sessions: June 15-28 and July 13-26. Call the Federal Defender Office for more details on these programs.

NEW WEST VIRGINIA NORTHERN U.S. DISTRICT COURT WEB-SITE CONNECTIONS

The Clerk's Office recently added a "Public

Defender/CJA Information" section to its web-site at www.wvnd.uscourts.gov. This section allows access to commonly used CJA forms; the CJA 20 Quick Reference; and outside links to helpful criminal defense sites. These sites include the Defender Services Division Training Branch which provides a brief bank by subject matter, i.e. *Apprendi* issues; discovery; drugs; firearms; motions; search & seizure; sentencing, etc. The other site link is to the National Association of Criminal Defense Lawyers. This site has timely information and a "Lawyers Reference" section also containing brief bank materials.

CRIMINAL JUSTICE ACT PANEL QUESTIONNAIRE RESULTS

With the assistance of the Clerk's Office, the Federal Public Defender recently sent out questionnaires to the 191 attorneys who are currently listed on the CJA panel here in the Northern District of West Virginia. The questionnaire sought updated contact information; litigation experience; listings for an expert witness/defense services bank; and preferences for training and CLE sessions.

Almost 100 responses were received by mail and fax. Given that most criminal defense lawyers are hopeless nonconformists by nature, the response rate was somewhat better than expected.

Six attorneys specifically asked to be removed from the CJA panel.

Of those who defended federal criminal cases in this district and elsewhere over the last three years, 33 attorneys handled one to five cases; 31 attorneys handled five to ten cases; 20 attorneys handled ten to twenty cases; and 8 attorneys handled twenty plus federal criminal cases.

Of those with federal criminal jury trial experience in the last five years, 51 attorneys had no such experience; 26 attorneys handled one or two trials; 12 attorneys had three to five jury trials; and 3 attorneys had over five jury trials.

Finally, the questionnaire asked that each attorney pick the top four choices for training from the following menu: CJA forms and vouchers; bail and detention; discovery and pre-trial motions; search and seizure issues; career offender/armed career criminal/penalty enhancement; trial advocacy skills; federal sentencing guidelines; appellate practice; Bureau of Prisons policy and procedures; and new procedural and substantive developments in federal criminal practice.

The top three choices were clearly federal sentencing guidelines; new developments; and discovery and pre-trial motions. Only a few selected CJA forms and vouchers; bail and detention; and appellate practice. The four remaining categories each received about the same number of votes and fell in the middle ground.

SENTENCING COMMISSION ADOPTS EMERGENCY GUIDELINE AMENDMENTS

The U.S. Sentencing Commission adopted an emergency amendment to provisions of the guidelines that cover fraud and theft offenses. The amendment was effective January 25th and will remain in effect until it is replaced by a permanent measure November 1st. The amendment will mean higher potential sentencing ranges in several situations, including cases in which the loss exceeded \$200 million, and cases in which the offense endangered the solvency or financial security of a large or publicly traded company, or the

solvency or financial security of 100 or more victims.

New congressional obstruction of justice offenses, i.e. 18 U.S.C. §1519, which covers destruction of records in federal investigations and bankruptcy, was assigned to U.S.S.G. § 2J1.2 Base offense levels increased from 12 to 14; and the guideline amendment adds two levels if the offense involved a large quantity of documents; a targeted selection of documents; or was otherwise extensive. New 18 U.S.C. § 1520, which covers destruction of corporate audit records, is assigned to a guideline provision that governs false statements in certain required records, U.S.S.G. §2E5.3.

The Commission also adopted tougher sentencing guidelines for campaign finance violations for offenders who make or receive illegal campaign contributions worth \$5000 or more. Enhancements are based on the size of the illegal contribution; the source (foreign national or foreign government); and whether threats/intimidation were involved. These guidelines also became effective January 25th.

GIDEON TURNS 40!

March 18, 2003 will mark the 40th anniversary of the landmark 1963 U.S. Supreme Court decision in Gideon v. Wainwright, 372 U.S. 333 (1963). One year later, Congress passed the Criminal Justice Act. Visit the special web site at www.nacdl.org/gideon to find “Gideon at 40: Fulfilling the Promise.” Articles there both commemorate the promise of Gideon, and reflect on the very real pressures facing the Sixth Amendment right to counsel today.

FOURTH CIRCUIT ROUNDUP

Published Cases:

United States v. Carter, 300 F.3d 415 (4th Cir. 2002).

- defendant may be sentenced to multiple terms of imprisonment for two §924(c) violations where the violations arose from a single underlying predicate drug trafficking offense; conflict with six other circuits.

Rouse v. Lee, 314 F.3d 698 (4th Cir. 2003).

- Court employs “equitable tolling doctrine” to excuse federal habeas petition filed one day beyond AEDPA one-year statutory deadline.

United States v. Mackins, 315 F.3d 399 (4th Cir. 2003).

- unpreserved plain error review and preserved harmless error review result in different outcomes under *Apprendi* where indictment failed to allege drug quantity; only latter standard of review warrants relief.

United States v. Miller, 316 F.3d 495 (4th Cir. 2003).

- guidelines permit court to use intended loss when calculating sentence under old §2F1.1, even if this exceeds the amount of loss actually possible in a medical services, over-billing fraud case.

United States v. Dixon, 2003 U.S. App. LEXIS 1486 (1/30/03).

- in determining whether prior criminal conduct is similar to the offense of conviction for purposes of a possible upward departure under §4A1.3, a district court may consider not only the elements of the offense of conviction, but also any relevant conduct associated with that offense.

Allen v. Lee, 2003 U.S. App. LEXIS 1967 (2/14/03).

- Court grants habeas relief in death

penalty, police-shooting case based on *Batson* violations and faulty jury instruction relating to need for unanimous finding on mitigating circumstances.

Unpublished Cases:

United States v. Williams, 2003 U.S. App. LEXIS 1402 (1/29/03).

- Armed Career Criminal increase to level 34 under guidelines, §4B1.4, for use or possession of firearm in connection with crime of violence or controlled substance offense, requires proof that the firearm giving rise to the § 922(g) charge and the §4B1.4 increase be one and the same.

United States v. Crumbliss, 2003 U.S. App. LEXIS 1685 (1/31/03).

- Court refuses to follow 2nd and 7th Circuits which hold that downward departure for extraordinary medical condition is not warranted if BOP has ability to treat condition; trial court did not abuse its discretion when departing from guideline range of 37-46 months to probation with home confinement where defendant suffered from diabetes; required amputation of two toes; and suffered nerve damage in lower extremities.