# THE DEFENSE *NEVER* RESTS

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## Continuing to Crack the Disparity

Things are starting to heat up in the world of crack cocaine penalties. On March 17, 2010, the full Senate approved a bill, S. 1789, that would reduce the sentencing disparity between federal crack and powder cocaine offenses. The bill adopts an 18:1 ratio amount of powder cocaine versus crack cocaine triggering the same sentence. As a result, 28 grams of crack cocaine will trigger a 5-year mandatory minimum prison sentence and 280 grams of crack will trigger a 10-year mandatory minimum prison sentence. The bill also would eliminate the mandatory minimum sentence for simple possession of crack. Additionally, the legislation would direct the U.S. Sentencing Commission to enhance penalties for aggravating factors like violence or bribery of a law enforcement officer.

As passed, the legislation would not apply retroactively. The bill now goes to the House of Representatives. The House has its own version which supports a 1:1 crack powder ratio, H.R. 3245. It passed out of the House Judiciary Committee back in July of 2009 but has not advanced in the full House. We are now waiting to see what comes out of the House and how Congress resolves any differences between the bills. It is too early to tell what the final version will look like or if there will be any effort to make it retroactive. However, it does look like things are moving forward again and there likely will be a positive result, though maybe not the 1:1 ratio that we were hoping for. Therefore, it would still be a good idea to delay crack cases as we may well have better mandatory minimums and guidelines to deal with in the near future. The Senate bill gave the Sentencing Commission 90 days after final passage to get the guidelines in line with the new mandatory minimum amounts. The one caveat is that if you are in a court section that is applying the 1:1 ratio as a variance, and can safety valve away from the mandatory minimum, then you may want to proceed with sentencing before Congress acts.

INSIDE


More Clients May Become Eligible for Probation on November 1st....2
Recency Points in Criminal History Category May Be Eliminated on November 1st....3
Padilla v. Kentucky: Defense Attorney Must Inform Non-Citizen of Deportation Risk....3
Update: Supreme Court Will Review $14 Million Verdict Against DA's Office....3
Supreme Court Updates....4-6
Recommended Training Programs for Panel Attorneys....7
Financial Assistance for Trial Advocacy Training....7
CJA Case Budgets....8

# More Clients May Become Eligible for Probation on November 1st

Departures and variances aside, there may be a reason to continue sentencings past Nov. 1st. The USSC has sought amendment of §5C1.1, which will enlarge Zones B & C and make more clients eligible for probation or split sentences. In the past, if the bottom of the guideline range was not greater than 6 months, the guidelines allowed a probated sentence with a condition of home confinement for the minimum term, i.e. no more than 6 months, but after Nov. 1st, this changes to 8 months. In the past you could not get probation without a variance or departure if the smallest guideline number was over 6, now you can get probation with an 8-month bottom of the guideline number. Of course, all of this is premised on Congress' tacit approval of the Commission's proposed amendments. For a full reading of the proposed amendment and its effect see below.

On April 13, 2010, the USSC passed two amendments designed to provide courts with more sentencing options.

1. Part B of the amendment increases Zones B and C by one level in each criminal history category. Clients with ranges of 8-14 months (CHC I-IV) and 9-15 months (CHC V-VI) will fall within Zone B rather than C; clients in a range of 12-18 months (all CHC) will fall within Zone C rather than D.
2. Part A of the amendment provides for a treatment departure from Zone C to Zone B. The amendment clarifies 5C1.1 n.6 by giving examples of when a treatment alternative departure from Zone C to Zone B may be appropriate for drug and alcohol abusers as well as those who suffer from "significant mental illness." Under the terms of the guideline, the court must find (A) "that the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffer from a significant mental illness," and (B) "the defendant's criminality must be related to the treatment problems to be addressed before a departure is warranted." The court should also consider "the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant."

Clients in CH III or above. The guidelines continue to not recommend the use of substitutes for imprisonment for "most defendants with a criminal history category of III or above." USSC 5C1.1, n.7. The Commission, however, voted to remove the statement that "such defendants have failed to reform despite the use of such alternatives." Removal of that language should permit you to argue that your client is an exception to the general rule because he or she has not received treatment or that prior treatment was not adequate to meet the client's needs. It would also give you an opportunity to educate your judge about how relapse is common among drug/alcohol abusers and that mentally ill defendants often lack insight into their illness, which impedes their treatment and medication compliance.

In addition, National Sentencing Resource Counsel suggest the following ways to help courts find alternatives to incarceration:

- Recognizing pretrial community confinement or home detention. For those of you with judges who cling to the guidelines and statutes, you may need to get creative with the sentencing statutes and recommendations to ensure that your clients get "credit" for their pretrial efforts and spend the least amount of time in community confinement, home detention, or imprisonment (for Class A and B felonies where a minimal term of imprisonment is statutorily required). There does not appear to be any statute prohibiting a court from deciding that a defendant has already satisfied a condition of probation or supervised release. Take for example, the defendant in a 12-18 month range who receives a sentence of probation with twelve months intermittent confinement, community confinement, or home detention. If before sentencing your client has already completed a 60 day residential treatment program and remained on home detention for an additional 2 months, you should be able to ask the court to find that the defendant has already satisfied 4 months of the condition that he spend time in community confinement or home detention. *See also* 18 U.S.C. 3564(a) ("term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court") (emphasis added). The same reasoning applies to defendants sentenced to terms of imprisonment with supervised release. 18 U.S.C. 3583(a) provides that a *term* of supervised release commences after imprisonment, but nothing in the statute precludes a court from finding that a *condition* of supervised release has already been satisfied. Do not be deterred by the general rule that a defendant's presentencing confinement in community confinement or home detention cannot be credited toward the term of imprisonment. *Reno v. Koray,* 515 U.S. 50 (1995). The court is not crediting the time toward time in official detention under 18 U.S.C. 3583(b).

- BOP placement in community confinement for the minimal term of imprisonment. The BOP memo has better options regarding front-end designations to community confinement in structuring sentences. The court can recommend that BOP designate a RRC (Halfway House) placement. These changes may make a difference in your cases and if they have their intended effect of encouraging alternatives to incarceration, we encourage your innovative use of these proposed changes.

# Recency Points in Criminal History Category May Be Eliminated November 1st

On April 7, 2010, the U.S. Sentencing Commission voted to amend the Guidelines Manual by deleting §4A1.1(e) (Two points are added to criminal history score if the defendant committed the offense less than two years after release from imprisonment). The presumed reason for the amendment is that recency points add nothing to the predictive quality of the criminal history score and fail to reflect meaningful differences in offender culpability, as set forth at pp. 90-98 of the Defenders' testimony to the Commission, available at http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf.

The recency amendment (along with other amendments being voted on this cycle) will be sent to Congress on May 1, 2010 and, if no further action is taken, will be adopted on Nov. 1, 2010. This does not mean, however, that courts must continue applying recency points in the interim. The court remains free under 18 U.S.C. § 3553(a) and Supreme Court precedent to disagree with any part of the guidelines on policy grounds. **Defense counsel should argue that courts should not assess recency points now** for the same reason that the Commission recommends abandoning them on Nov. 1st: they do not reflect either increased culpability or an increased risk of recidivism and thus do not serve any sentencing purpose.

The Commission will be announcing all of the pending amendments on its website soon, www.ussc.gov, and SRC will provide a summary of those amendments ASAP.

There may be an additional benefit resulting in a client becoming safety valve eligible because often those two recency points disqualify our clients from the safety valve. After Nov. 1st, if nothing is done by Congress, these recency points will go the way of the dinosaur. There is also a real benefit to continuing sentencings past the Nov. 1st date in any case if it will change the Criminal History Category.

# *Padilla v. Kentucky:* Defense Attorney Must Inform Non-Citizen of Deportation Risk

On March 31, 2010, the Supreme Court issued *Padilla v. Kentucky*, No. 08-651, a landmark Sixth Amendment right to counsel decision that clarifies the obligations of defense attorneys representing non-citizen defendants.

Mr. Padilla, a legal permanent resident from Honduras, was convicted of drug transportation charges in Kentucky state court pursuant to a guilty plea. Faced with deportation, he brought post-conviction proceedings alleging ineffective assistance of counsel. Mr. Padilla claimed that his counsel failed to advise him of the immigration consequences of his guilty plea and even reassured him that he "did not have to worry about immigration status since he had been in the country so long." The Kentucky Supreme Court denied post-conviction relief, holding that the lawyer's erroneous advice did not constitute ineffective assistance of counsel because deportation was only a "collateral" consequence of Mr. Padilla's conviction.

The Supreme Court reversed in a 7-2 decision written by Justice Stevens. The Court noted that deportation is a "particularly severe penalty" that is "intimately related" to the criminal process. Therefore, advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel. A defense lawyer must inquire about a client's immigration status and advise non-citizen clients of the immigration consequences they might face. Importantly, the Court held that the Sixth Amendment requires *affirmative*, competent advice regarding immigration consequences. A defense lawyer's silence regarding the immigration consequences of a guilty plea constitutes ineffective assistance of counsel even if no erroneous advice is given. The Court also endorsed "informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining. It specifically highlighted the benefits and appropriateness of factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

# Update: Supreme Court Will Review $14 Million Verdict Against DA's Office

Our newsletter has been following the tribulations of the $14 million jury verdict against the Orleans Parish District Attorney's Office in favor of exonerated and acquitted John Thompson. In 2007, a federal jury determined that the DA's office was liable for failing to train its lawyers about so-called *Brady* violations, a failure that led to John Thompson's wrongful conviction and death sentence in 1985. As we reported last year, a Fifth Circuit panel initially upheld the $14 million award, before the Fifth Circuit granted the DA's request for *en banc* review. The *en banc* court split 8-8 on the case last August, effectively affirming the judgment against the DA's office. But the story is not over yet; the Supreme Court granted the DA's petition for certiorari on March 22 and will hear oral arguments in the fall. Its review will be limited to a single issue: does imposing liability for failing to train a prosecutor in a district attorney's office for a single Brady violation contravene rigorous culpability and causation standards? The answer to this question may redefine the contours of prosecutorial immunity and, in any event, will serve to clarify the circumstances under which a DA's office should be held accountable for its attorneys' misconduct.

# Supreme Court Updates

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*Maryland v. Shatzer*, 175 L. Ed. 2d 1045 (February 24, 2010) (Scalia). In 2003, Shatzer was incarcerated in a state prison after a conviction for an unrelated offense. A police detective came to the prison to question Shatzer regarding whether he had sexually abused his son. Shatzer invoked his *Miranda* rights and refused to speak with the detective. Shatzer was released into the general prison population. In 2006, a different detective interrogated Shatzer, who was still incarcerated. During this interview, Shatzer waived his *Miranda* rights and confessed to abusing his son. The trial court refused to suppress his statements reasoning that *Edwards v. Arizona* did not apply. *Edwards* created a presumption that once a suspect invokes his *Miranda* rights, any waiver of that right in subsequent interrogations is involuntary unless there is a "break in custody." The Maryland Court of Appeals reversed, holding that Shatzer's release into the general prison population after the first interview did not constitute a break in custody. The Supreme Court disagreed and held that his release was a break in custody because it allowed him to "return to his accustomed surroundings and daily routine." The Court also held that *Edwards* applies until two weeks after a suspects release from custody.

*Bloate v. United States,* 2010 U.S. LEXIS 2205 (March 8, 2010) (Thomas). The Supreme Court held that, under the Speedy Trial Act (18 U.S.C. § 3161), the time granted to prepare pretrial motions is not automatically excludable from the 70 day time limit under subsection (h)(1). However, such time may be excluded if the district court grants a continuance and makes appropriate findings under subsection (h)(7).

*Florida v. Powell*, 175 L. Ed. 2d 1009 (February 23, 2010) (Ginsburg). Powell was arrested by Tampa police officers. Before questioning him, the officers read him their standard *Miranda* form which states, "You have the right to talk to a lawyer before answering any of our questions" and "you have the right to use any of these rights at any time you want during this interview." Powell waived his rights and admitted he owned a firearm found during a search. He was charged with possession of a firearm by a felon and convicted. The Florida Supreme Court determined his statements should have been suppressed because *Miranda* and the state constitution require that a suspect be clearly informed of the right to have a lawyer present *during* questioning, not merely before questioning. The Supreme Court reversed and held that the language used by the standard form communicated the message mandated by *Miranda*.

*Johnson v. United States*, 2010 U.S. LEXIS 2201 (March 2, 2010) (Scalia). The Supreme Court held that the Florida felony offense of battery by "actually and intentionally touching another person" does not constitute a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) because it does not have as an element the use of physical force against the person of another.

## Cases Pending - October 2009 Term

*United States v. Stevens*, No. 08-769, cert. granted April 20, 2009, argued October 6, 2009. Title 18 U.S.C. § 48 prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. The question presented is whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment.

*Black v. United States*, No. 08-876, cert. granted May 18, 2009, argued on December 8, 2009. The Supreme Court held in *McNally v. United States*, a public corruption case, that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expanded the definition of a "scheme or artifice to defraud" under the mail and wire fraud statutes to encompass schemes that "deprive another of the intangible right of honest services." Presently, the courts of appeals are divided on the application of § 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that § 1346 may be applied in a purely private setting irrespective of whether the defendant's conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government's bid to have the jury return a "special verdict," a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant's Sixth Amendment rights. The issues presented are: (1) whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed and (2) whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

*Weyhrauch v. United States*, No. 08-1196, cert. granted June 29, 2009, argued on December 8, 2009. Whether, to convict a state official for depriving the public of its right to the defendant's honest services through non-disclosure of material

# Supreme Court Updates Continued

information, in violation of the mail fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

*United States v. Comstock*, No. 08-1224, cert. granted June 22, 2009, argued on January 12, 2010. Whether Congress had the constitutional authority to enact 18 U.S.C. § 4248 which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

*Carr v. United States*, No. 08-1301, cert. granted September 30, 2009, argued on February 24, 2010. The Sex Offender Registration and Notification Act ("SORNA") requires persons who are convicted of certain offenses to register with state and federal databases and imposes criminal penalties of up to 10 years of imprisonment on anyone who "is required to register . . . travels in interstate or foreign commerce . . . and knowingly fails to register or update a registration." On February 28, 2007, the Attorney General retroactively applied SORNA's registration requirements to persons who were convicted before the enactment of the requirements. The two questions presented are (1) whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment and (2) whether the Ex Post Facto Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce by predated SORNA's enactment.

*United States v. Marcus*, No. 08-1341, cert. granted October 13, 2009, argued on February 24, 2010. Whether the court of appeals departed from the Supreme Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain error review of an asserted Ex Post Facto Clause violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

*Skilling v. United States*, No. 08-1394, cert. granted October 13, 2009, argued on March 1, 2010. First, whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests and, if not, whether § 1346 is unconstitutionally vague. Second, when a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

*Berguis v. Smith*, No. 08-1402, cert. granted September 30, 2009, argued on January 20, 2010. Whether the Sixth circuit erred in concluding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren v. Missouri* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which the Supreme Court has never applied and which four other circuits have specifically rejected.

*Berghuis v. Thompkins*, No. 08-1470, cert. granted September 30, 2009, argued on March 1, 2010. First, whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them. Second, whether the Sixth Circuit failed to afford the state court the deference it was entitled to under 28 U.S.C. § 2254(d) when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins's guilt allowed the state court to reasonably reject the claim.

*McDonald v. Chicago*, No. 08-1521, cert. granted on September 30, 2009, argued on March 2, 2010. Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

*United States v. O'Brien*, No. 08-1569, cert. granted on September 30, 2009, argued on February 23, 2010. Title 18 U.S.C. § 924(c)(1) provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (using or carrying a firearm during and in relation to an underlying offense or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30 year minimum when the firearm is a machine gun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

*Graham v. Florida*, No. 08-7412, cert. granted on May 4, 2009, argued on November 9, 2009. Whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

# Supreme Court Updates Continued

*Sullivan v. Florida*, No. 08-7621, cert. granted on May 4, 2009, argued on November 9, 2009. First, does imposition of a life-without-parole sentence on a 13 year old for a non-homicide violate the prohibition of cruel and unusual punishment under the Eighth and Fourteenth Amendments where the rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children? Second, given the extreme rarity of a life imprisonment without parole sentence imposed on a 13 year old child for a non-homicide and the unavailability of substantive review in any other federal court, should the Supreme Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

*Carachuri-Rosendo v. Holder,* No. 09-60, cert. granted on December 14, 2009, to be argued on March 31, 2010. Under the Immigration and Nationality Act, a lawful permanent resident who has been convicted of an aggravated felony is ineligible to seek cancellation of removal under 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law misdemeanor) has been convicted of an aggravated felony on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

*Magwood v. Culliver*, No. 09-158, cert. granted on November 16, 2009, to be argued on March 24, 2010. First, when a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a second or successive claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds? Second, did the petitioner's attorney provide ineffective assistance of counsel warranting federal habeas relief by failing to raise an argument at petitioner's resentencing proceedings that would have made clear that petitioner was constitutionally ineligible for the death penalty?

*Renico v. Lett*, No. 09-338, cert. granted on November 30, 2009, to be argued on March 29, 2010. Whether the Sixth Circuit in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the state trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

*Dolan v. United States*, No. 09-367, cert. granted on January 8, 2010, to be argued on April 20, 2010. Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5), which states, "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order."

*Barber v. Thomas*, No. 09-5201, cert. granted on November 30, 2009, to be argued on March 30, 2010. The federal good time credit ("GTC") statute provides for credits "up to 54 days at the end of each year of the prisoner's term of imprisonment." Throughout federal sentencing statutes, and elsewhere in the same sentence, "term of imprisonment" means the sentence imposed. However, the Bureau of Prisons ("BOP") interprets "term of imprisonment" as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The first question presented is does "term of imprisonment" in § 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentencing imposed? The second question presented is if "term of imprisonment" in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

*Holland v. Florida*, No. 09-5327, cert. granted October 13, 2009, argued on March 1, 2010. Whether gross negligence by collateral counsel, which directly resulted in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond gross negligence must be established before an extraordinary circumstance can be found that would warrant equitable tolling.

*Dillon v. United States*, No. 09-6338, cert. granted December 7, 2009, to be argued on March 30, 2010. First, whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582. Second, whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

# Recommended Training Programs for Panel Attorneys

LAW AND TECHNOLOGY WORKSHOP

***JULY 22 - 24, 2010 - MIAMI, FLORIDA***

Contact: Karen_W_Holsendorff@ao.uscourts.gov

The Law and Technology Workshop focuses on the use of modern technology to improve the persuasiveness of courtroom presentations. This workshop is an intensive program where participants will learn to use Trial Director and PowerPoint products to sharpen their courtroom skills. Attendees will enhance their direct-examination, cross-examination, and opening/closing argument abilities with detailed application and use of these litigation tools. Today, many federal courtrooms are “wired” to accommodate the latest computer programs, and this technology has proven to be an effective and persuasive addition to lawyers’ arsenals. Participation in the Law and Technology Workshop is particularly valuable for federal criminal defense attorneys.

SENTENCING ADVOCACY WORKSHOP

***JULY 29 - 31, 2010 - SAN FRANCISCO, CALIFORNIA***

Contact: LaShawn_Parker@ao.uscourts.gov

The Sentencing Advocacy Workshop focuses on an often neglected, yet extremely important, area of practice. Since approximately 95% of federal criminal cases proceed to the sentencing phase, participation in the Sentencing Advocacy Workshop should not be missed. The program presents a comprehensive approach to sentencing advocacy. Participants will learn a process for the development of a persuasive, fact-based sentencing theory and the advocacy skills necessary to advance that theory in writing and during sentencing hearings. Among other subjects, presentations and demonstrations will address changes in federal sentencing law, judging at sentencing, use of a mitigation specialist, storytelling and persuasive writing. The workshop consists of plenary sessions and small group breakout sessions. In the small group breakout sessions, participants will use a case of their own to brainstorm facts, develop a theory and theme, tell a story, and persuasively write a portion of their downward departure motion or sentencing memo.

18th ANNUAL JUDGE ALVIN B. RUBIN SYMPOSIUM

***MAY 13, 2010 - NEW ORLEANS, LOUISIANA***

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The New Orleans Chapter of the FBA will host its 18th Annual Judge Alvin B. Rubin Symposium on Ethics and Professionalism on Thursday, May 13 from 2:00 p.m. through 4:00 p.m. in the Ceremonial Courtroom (5th Floor) at the United States District Court for the Eastern District of Louisiana, 500 Poydras Street, New Orleans, Louisiana. This symposium is held each year as a living memorial to the late Judge Rubin’s contributions to federal jurisprudence and legal scholarship. Anthony M. DiLeo, S. Gene Fendler, Professor David Orentlicher, and Andrew G. Schultz, all of whom served as law clerks to Judge Rubin, will participate in a panel discussion on Judge Rubin’s lifelong contributions to the fields of ethics and professionalism in the law. The Honorable Helen G. Berrigan will moderate the discussion. Seminar attendees will receive continuing legal education credit in both ethics and professionalism. The FBA has graciously offered a reduced rate of $15 for Eastern District of Louisiana CJA panel attorneys.

## Financial Assistance for Trial Advocacy Training

The Training Branch is offering financial assistance to eligible CJA Panel Attorneys who would like to enroll in one of the following criminal defense trial advocacy programs:

- National Criminal Defense College - Trial Practice Institute - *Macon, GA - June 13-26, 2010 and July 18-31, 2010*
- Western Trial Advocacy Institute - *Laramie, Wyoming - June 5-10, 2010*
- National Defender Training Project’s Public Defender Trial Advocacy Program - *Dayton, Ohio, June 4-9, 2010*

To apply for financial assistance, please complete the *Financial Assistance Request Form* and fax it to the attention of Bob Burke at (202) 502-2911. The form can be downloaded at
http://www.fd.org/pdf_lib/Financial%20Assistance%20Application%20trial%20ad.pdf)

**Please submit your request two weeks in advance of the registration deadline for the program you wish to attend.** If you would like to apply for financial assistance to attend a trial advocacy program offered by an organization other than one of those listed above, please submit a detailed description of the program along with your application. The Training Branch will approve only those programs that meet certain educational standards. If you have any questions regarding the application process or the status of your application, please contact Bob Burke at 202-502-3030.

# MESSAGE BOARD

- **CJA Case Budgets**

  As cases become more complex and require more time, the vouchers increase proportionately. In order to improve the likelihood of success in obtaining the Fifth Circuit's authorization of these excess vouchers, it has become necessary to prepare budgets in certain cases. In the past, budgets have not been required in non-capital cases. However, in the last few newsletters we have noted that in complex and/or extended cases, panel attorneys must submit budgets. The budgeting process, while new, is not that difficult. It generally follows the normal case development by segregating or compartmentalizing the time and expense anticipated to complete the case.

  CJA Form 28A is the Attorney Services Detailed Budget Worksheet for Non-capital Representations. It is available on our website at federaldefender.net The form breaks down the categories of work into specific tasks and makes the process less onerous. The budget follows this format: 1. Discovery retrieval, organization and review; 2. Trial; 3. Motions and hearings; 4. Witness interviews and other investigations; 5. Client consultation; 6. Expert witness consultation; 7. Other meetings and consultations; 8. Case budget preparation time; 9. Travel costs; and 10. Other miscellaneous costs and expenses.

  If you anticipate that your costs in one of these complex cases will approach $30,000, you must submit a full budget. This will improve the likelihood of your receiving reimbursement for all of the time expended.

- According to Rule 4(b)(1)(A) of the Rules of Appellate Procedure, a notice of appeal in a criminal case is to be timely filed with the Clerk of the District Court within fourteen days "after the entry of the judgment or order appealed from." Unlike the former 10-day period, the new 14-day period to appeal DOES include weekends and holidays.


## FEDERAL PUBLIC DEFENDER'S OFFICE

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