

THE DEFENSE *NEVER* RESTS

Vol. 13
Number 3
July 2011



Published by
the Federal Public
Defender's Office for the
Eastern District of Louisiana

BREAKING NEWS: U.S. Sentencing Commission Votes to Apply Fair Sentencing Act of 2010 Retroactively

On June 30, 2011, the United States Sentencing Commission voted unanimously to give retroactive effect to its proposed permanent amendment to the federal sentencing guidelines implementing the FSA's 18:1 crack/powder ratio. Retroactivity of the amendment will become effective on November 1, 2011, the same day that the proposed permanent amendment would take effect, unless Congress acts to disapprove the amendment.

Unfortunately, the Commission's vote to give retroactive application to the proposed amendments to the guidelines does not give retroactive effect to the FSA itself. Many crack offenders will still be required under federal law to serve mandatory 5- or 10-year sentences because of the amount of crack cocaine involved in their offenses.

According to the Commission's June 30 news release, approximately 12,000 offenders may be eligible to seek a sentence reduction. The average sentence reduction for eligible offenders will be approximately 37 months. The average sentence for these offenders, even after reduction, will remain about 10 years. The Bureau of Prisons estimates that retroactivity of the FSA amendment could result in a savings of over \$200 million within the first five years after retroactivity takes effect.

The Commission's news release lists a number of factors that were considered during its deliberations, including the purpose of the amendment implementing the FSA, which lowers the penalties for crack cocaine offenses, the limit on any reduction allowed by the amendment, whether it would be difficult for the courts to apply the reduction, and whether making the amendment retroactive would raise public safety concerns or cause unwarranted sentencing disparity in the federal system. Ultimately, the Commission determined that the statutory purposes of sentencing are best served by retroactive application of the amendment.

According to the news release, after the Commission voted to give retroactive effect to its 2007 crack cocaine amendment, 16,433 motions for a reduced sentence were granted by federal district courts throughout the country. The Commission has conducted a study of the recidivism rate of those offenders who received a reduced sentence as a result of the 2007 amendment as compared to a similarly situated group of federal crack cocaine offenders who served their normal term of imprisonment. It has determined that there is no statistically significant difference in recidivism rates between the two groups of offenders.

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USSC ADOPTS PERMANENT AMENDMENT IMPLEMENTING FSA

In April 2011, the Commission promulgated amendments to the federal sentencing guidelines covering drug trafficking offenses, firearms offenses, and other federal offenses.

In particular, it adopted a permanent amendment implementing the provisions of the Fair Sentencing Act of 2010, legislation that, among other things, reduced the statutory mandatory minimum penalties for crack cocaine trafficking and eliminated the mandatory minimum sentence for simple possession of crack cocaine. The Act also contained directives to the Commission to review and amend the federal sentencing guidelines to account for certain aggravating and mitigating circumstances in drug trafficking cases to better account for offender culpability. In October 2010, the Commission promulgated an emergency, temporary amendment to implement an emergency directive in the Fair Sentencing Act of 2010.

The Commission voted to set the triggering quantities of crack cocaine for the 5- and 10-year mandatory minimum penalties (28 grams and 280 grams, respectively) at base offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months, respectively, for a defendant with little or no criminal history. The new mandatory minimum quantity threshold levels for crack cocaine offenses are consistent with the Commission's 2007 report to Congress, Cocaine and Federal Sentencing Policy, in which the Commission, based on available information, defined crack cocaine offenders who deal in quantities of one ounce (approximately 28 grams) or more in a single transaction as wholesalers. As a result of the Commission's amendments, the federal sentencing guidelines will focus more on offender culpability by placing greater emphasis on factors other than drug quantity.

In other actions the Commission adopted amendments to:

- increase penalties for certain firearms offenses. For example, the Commission voted to provide increased penalties for certain "straw purchasers" of firearms and for offenders who illegally traffic firearms across the United States border.
- implement the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111-148), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203), and the Secure and Responsible Drug Disposal Act of 2010 (Pub. L. No. 111-273). More information regarding these amendments, and other amendments, can be found on the Commission's website at www.ussc.gov.

The Commission submitted its 2010-2011 amendment package to Congress on April 28, 2011. Congress has 180 days to review the amendments submitted by the Commission. The amendments have a designated effective date of November 1, 2011, unless Congress acts affirmatively to modify or disapprove them.

Fifth Circuit Holds that District Courts Must Give Notice and Opportunity to be Heard Before Closing or Sealing Sentencing Proceedings

In *United States v. Cardenas-Guillen v. Hearst Newspapers, LLC* (No. 10-40221), the Fifth Circuit held that the press and public have a First Amendment right of access to sentencing hearings and, therefore, the district court must give notice and an opportunity to be heard before closing or sealing a sentencing proceeding. This can be accomplished by, for example, docketing the motion to seal, or simply by placing a notice on the docket that there is a motion to close "a proceeding" and allowing interested parties to submit briefs or hold a hearing. The court explicitly rejected the government's argument that security concerns justified the district court's decision not to give the press and public any notice or opportunity to be heard prior to closure.

By way of background, the Houston Chronicle had moved to intervene in the criminal prosecution of a drug cartel leader, had requested that certain sealed documents be unsealed, and had also requested that the district court give notice and an opportunity to be heard before closing any future proceedings. The government then moved to close the sentencing hearing for reasons for public safety, and to not give notice to the public that the hearing was taking place. The court granted the government's motion in a sealed order, and the court also sealed the government's motion. The Houston Chronicle was able to find out when the sentencing hearing was scheduled and attempted to gain access to the courtroom with a handwritten motion. However, the court did not rule on that motion, denied access to the reporter and then denied the motion as moot after the closed sentencing proceeding had concluded.



THE NOT QUITE AS FAIR AS IT COULD BE ACT OF 2010¹

The issue of the retroactivity of the "Fair Sentencing Act of 2010" (FSA), which reduced penalties for crack cocaine offenses, has been the source of quite a bit of recent litigation. On February 9, 2011, the Fifth Circuit ruled, in *United States v. Duggins*, 633 F.3d 379 (5th Cir. 2011), that the FSA is NOT retroactive for defendants who were sentenced BEFORE the FSA was signed into law on August 3, 2010. The Fifth Circuit, and indeed nearly every other federal circuit, has ruled that the "Savings Statute" of Title 1 U.S.C. §109 requires the application of the old law in place at the time of the commission of the crime, in the absence of congressional intent either express or implied as to the retroactivity of a new law. Thus, in the Fifth Circuit, the FSA is not retroactive as to any defendant who was sentenced before August 3, 2010. What about defendants who committed their offense before August 3, 2010, but have not been convicted and/or sentenced until AFTER August 3, 2010?

In a surprising decision, on May 31, 2011, the First Circuit upheld a district court's decision to apply the FSA retroactively to a defendant who committed his offense before August 3, 2010, but was sentenced after that date. In *United States v. Douglas*, F.3d ___, 2011 WL 2120163 (C.A.1 (Me.)), the First Circuit looked to congressional intent and determined that Congress would not have ordered the Sentencing Commission to promulgate emergency guideline amendments to implement the FSA if it had not wanted the act to apply to defendants whose cases were still pending conviction or sentence after August 3, 2010. The First Circuit stated that "the imposition of a minimum sentence that Congress has condemned as too harsh makes this an unusual case. It seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums. The purity of the mandatory minimum regime has always been tempered by charging decisions, assistance departures and other interventions: here, at least, it is likely that Congress would wish to apply the new minimums to new sentences."

The First Circuit's *Douglas* decision creates a circuit split with the Seventh Circuit's decision in *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011). The Seventh Circuit found that the FSA did not apply retroactively to defendants who committed their offense before August 3, 2010, but were sentenced later. The Fifth Circuit has not addressed the issue of whether it will allow retroactive application of the FSA to defendants who committed their crime before August 3, 2010, but were or still are awaiting sentence. We do not know whether the Fifth Circuit will follow the First or Seventh Circuit's lead on this issue. Given the circuit split, it is likely that the Government will take a writ of certiorari to the Supreme Court on the *Douglas* decision.

With all the uncertainty at the circuit level, it is little wonder that the district courts are all over the place with trying to decide whether the FSA applies retroactively to pending cases with defendants who committed offenses before the FSA was enacted but had or have not yet been sentenced. Judge Ponsor's ruling, in *United States v. Watts*, ___ F.Supp.2d ___, 2011 WL 1282542 (D.Mass.) from the District of Massachusetts, is truly outstanding and should serve as a model for any defense motion requesting application of the FSA to a currently pending crack case. Given the huge success with the *Douglas* decision in the First Circuit and the resulting circuit split, defense counsel should definitely consider filing a motion for application of the FSA to any crack cases where the defendant committed the offense prior to August 3, 2010, but has not yet been convicted and/or sentenced.

¹Evans, Circuit Judge, *United States v. Anthony Fisher*, 635F.3d336 (7th Cir. 2011).

UPDATE ON JUDICIAL NOMINATIONS

On June 7, 2011, President Obama nominated Susie Morgan to the United States District Court for the Eastern District of Louisiana. Ms. Morgan is a partner in the commercial litigation group at Phelps Dunbar here in New Orleans. Prior to joining Phelps Dunbar in 2005, she worked for 24 years at the Shreveport firm of Wiener, Weiss and Madison. Before that, she served as a law clerk to former Chief Judge of the Fifth Circuit Court of Appeals, Henry A. Politz. No hearing date has been set yet.

The Senate held confirmation hearings on June 8, 2011 for two of President Obama's Louisiana nominees: Stephen Higginson, nominated on May 9, 2011 to the Fifth Circuit Court of Appeals, and Jane Margaret Triche-Milazzo, nominated on March 16, 2011 to the Eastern District of Louisiana. The Senate also held a confirmation hearing on May 4, 2011 for Nannette Jolivet-Brown, nominated on March 3, 2011 to the Eastern District of Louisiana. Her nomination was reported by the Committee to the Senate on May 26, 2011.



ELECTRONIC FILING OF PRE-SENTENCE INVESTIGATION REPORTS

OVERVIEW

- On May 9, 2011, a pilot program commenced in which the U.S. Probation Office is now electronically filing and serving pre-sentence investigation reports through CM/ECF.

If the case is a sealed case or if the re-arraignment is **sealed**, these reports will **NOT** be electronically filed. They will be submitted on paper in a sealed manner to the attorneys and the court.

If a case is appealed, these reports will continue to be transmitted on paper in a sealed envelope to the Court of Appeals. At some point in the near future, we anticipate the 5th Circuit will begin accepting these documents electronically, as well.

- The Probation Office will designate personnel to e-file these reports. The designated probation officers will be set up as court users in CM/ECF with limited docketing privileges.
- When a report is filed, a docket entry will appear on a public docket sheet with the docket text reflecting that the pre-sentence report is either a 'draft' or 'final', the defendant's name, and that the document will have restricted access.
- The NEF of the docket entry will be sent only to the government and applicable defense attorneys as determined by Probation. If an attorney is not a CM/ECF user, Probation must serve the report on them by conventional means.
- The Probation officer will then grant electronic access to view the document only to the government and applicable defense attorneys via an electronic "padlock" similar to the way court transcripts are handled now. This padlock also has a 'history' feature displaying the user who grants access, to whom access is given, and the date this occurred. The Probation officers have been cautioned to verify that only those attorneys representing the government and the defendant to be sentenced get access to the report.
- Each judge should designate a group of those staff members, if any, who will have access to the 'Final' pre-sentence investigation report and associated attachments.
- As the Clerk's office docketing staff will not generally have access to the documents, these docket entries will not be QCed.



FILING PROCEDURES

- The **Draft Pre-Sentence Investigation Report** is e-filed by Probation and includes instructions to attorneys to file objections or sentencing memoranda directly to the Probation Office and not e-filed in CM/ECF. Probation will monitor the deadline for objections as they currently do. Though it will appear on the docket activity report, the Judge and staff will not have access to view the draft report. Only the government and applicable defense attorneys, as determined by Probation, will have access.
- Objections to pre-sentence investigation report** are to be filed by attorneys directly with the Probation Office and not e-filed in CM/ECF.
- Sentencing Memoranda** shall continue to be delivered by attorneys directly to the judge. These will not be e-filed in CM/ECF.
- The **Final (and any Revised Final) Pre-Sentence Investigation Report (including worksheet)** is e-filed by Probation with the following attachments: (1) sentencing recommendation, (2) any addendum, and (3) any letters. The docket entry will appear on a docket activity report. The case manager or other designated chamber's staff will notify the judge of the filing. Only Probation and those staff members designated by the judge will have access to view the final report AND its attachments. The government and applicable defense attorneys will have access to the report but not the attachments.

OBJECTIONS TO PSIs, REQUESTS FOR DEPARTURES, SENTENCING MEMORANDA: Deadlines and other Practical Details

OBJECTIONS TO PSIs	<p><u>See</u> Fed. R. Crim. P. 32(f): Objecting to the Report. (1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. (2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer. (3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.</p> <p><u>See also</u> E.D.L.A. L. Crim. R. 32.1(B): Within 14 days [after disclosure of PSI], counsel shall communicate in writing to the probation officer and each other any objections they may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report.</p> <p><u>Filing Recommendation:</u> Objections to PSIs should be submitted directly to U.S. Probation Officer (no electronic submissions).</p>
REQUESTS FOR DEPARTURES	<p><u>See</u> E.D.L.A. L. Crim. R. 32.1.1: Any motion or letter requesting a departure from the Sentencing Guidelines must be delivered to the sentencing judge's chambers by no later than 4:30 p.m. on the third working day prior to the date of the sentencing hearing (i.e., if the sentencing hearing is set for Wednesday, the request must be delivered by 4:30 p.m. on Friday; if the sentencing hearing is set for Thursday, it must be delivered by 4:30 p.m. on Monday). Any motions or letters requesting a departure from the Sentencing Guidelines not timely submitted shall be deemed waived unless good cause is shown.</p> <p><u>Filing Recommendation:</u> Requests for departures generally may be filed electronically following proper ECF filing procedure.</p>
OTHER SENTENCING MOTIONS OR DOCUMENTS	<p><u>See</u> E.D.L.A. L. Crim. R. 32.1.2: All submissions, other than those referred to in LCrR32.1.1E, must be filed no later than five working days before sentencing and all responses must be filed no later than three working days before sentencing.</p> <p><u>Filing Recommendation:</u> Other sentencing motions and documents should be hand-delivered to the district court. Please request inclusion in record orally at sentencing.</p>

Reminders:

- As of May 1, 2011, the U.S. Probation Office is conducting PSI interviews remotely (videoconferencing) for clients housed at certain prisons. Interviews are not recorded or monitored. Defense counsel will be offered the option of participating in the PSI interview remotely from the U.S. Probation Office in lieu of travelling to the facility and will be allowed to speak with the client privately if needed. The U.S. Probation Office will get the necessary authorizations to release information after the rearraignments and before the clients are returned to their facilities.
- Five Eastern District of Louisiana judges (Judges Barbier, Africk, Fallon, Vance, and Lemelle) are currently participating in a pilot program requiring the U.S. Probation Office to file PSIs electronically. They are delivered to attorneys through CM/ECF.

JUDICIARY SPLIT ON NEED FOR RULE 16 CHANGES

This article originally appeared in the May 2011 issue of The Third Branch and is used with permission.

Do federal prosecutors and defense attorneys understand their pretrial obligations to disclose exculpatory and impeachment information? The question is at the heart of a recent survey of federal judges asking if Federal Rule of Criminal Procedure 16 should be amended. As it turns out, federal judges are split on the issue.

Rule 16 governs discovery and inspection of evidence in the 86,000 federal criminal cases filed annually in federal courts. It also imposes on the government “a continuing duty to disclose additional evidence or materials subject to discovery under the rule, if the government discovers such information prior to or during the trial.” Thirty-eight districts have a local rule or standing order that codifies the government’s obligations to disclose exculpatory and/or impeachment material, and/or provides timing requirements for the disclosure of the material.

“Whether and how to address criminal discovery through Rule 16 has been on the agenda of the Committee for over 40 years,” said Judge Richard C. Tallman (9th Cir.), the chair of the Judicial Conference Advisory Committee on Criminal Rules. “Federal cases tend to be more complicated than state cases, generating more evidence, more data, and more electronic records. That poses problems for prosecutors and especially for defense attorneys who need to know about the evidence relevant to guilt or innocence and how to organize it all for trial. We wanted to see if there was something we should do to amend Rule 16 to make the exchange of information quicker and more efficient to insure fairness to the defendant, while also respecting the privacy and security of witnesses.”

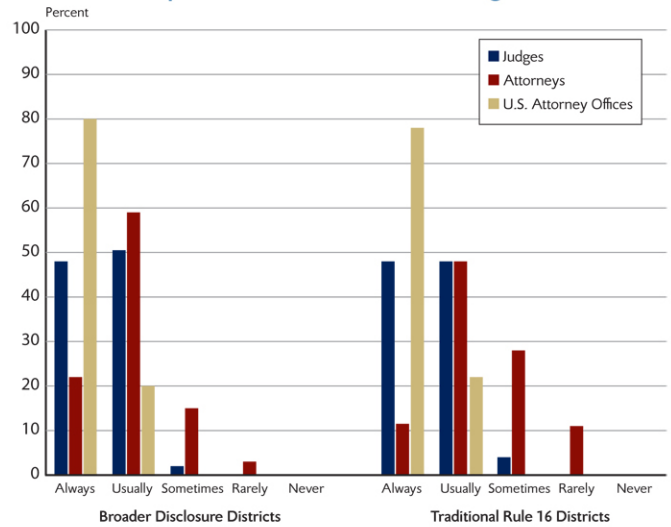
In June 2010, at the request of the Advisory Committee on Criminal Rules, the Federal Judicial Center conducted the largest survey in the Center’s history, a national survey of all federal district and magistrate judges, U.S. attorneys’ offices, and federal defenders, and a sample of defense attorneys in criminal cases that terminated in calendar year 2009. Of the 1,505 district judges who received a survey, 644 or 43 percent completed the online survey.

As part of the survey, judges were asked about their courts’ local rules and policies requiring disclosure by prosecution and defense; whether or not federal prosecutors followed a consistent policy or approach with regard to pretrial discovery and disclosure obligations; the number of cases in which judges felt disclosure of exculpatory information resulted in threats or harm to a prosecution witness; and how often prosecutors and defense attorneys may have violated their disclosure obligations.

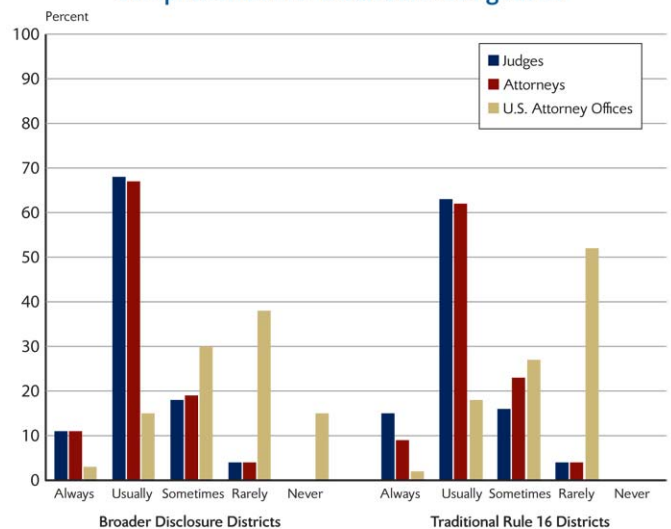
When asked, “Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information*,” the 644 judges split evenly on the question. However, greater support for amending Rule 16 was found among judges in districts with local rules and/or orders that require broader disclosure of these materials than required by Rule 16.

The overwhelming majority of judges—94 percent—thought that federal prosecutors usually or always understand their disclosure obligations. Only 78 percent of judges thought the same of defense attorneys. And 88 percent of judges felt federal prosecutors usually or always follow a consistent approach to disclosure. Sixty percent of the judges reported having no cases during the past five years in which they concluded a federal prosecutor or defense attorney had failed to comply with

Perceptions Regarding Federal Prosecutors’ Comprehension of Disclosure Obligations



Perceptions Regarding Defense Attorneys’ Comprehension of Disclosure Obligations



Broader Disclosure Districts: Of the ninety-four federal districts, thirty-eight districts have local rules and/or standing orders that impose requirements beyond those of Rule 16 for disclosure of exculpatory and impeachment material, in essence requiring “broader disclosure” than Rule 16 provides.

disclosure obligations. Overall, judges reported high levels of satisfaction over the compliance by federal prosecutors and defense attorneys with their disclosure obligations.

The Department of Justice, while opposing any proposed amendment to Rule 16, has implemented nationwide training initiatives to increase awareness among prosecutors of their discovery obligations in criminal cases. The training was recently extended to 26,000 federal agents, and in 2010 a policy memo from then-Deputy Attorney General David Ogden provided detailed guidance to all federal prosecutors on pretrial disclosure procedures.

Overall, Tallman's committee has been impressed with the steps the DOJ has taken and will take to ensure that prosecutors assess and meet their disclosure obligations. Revisions to the *U.S. Attorney's Manual* have clarified the disclosure of material and exculpatory evidence, and a DOJ working group has been tasked with review of the department's policies and practices regarding criminal discovery issues. The position of the National Coordinator for Criminal Discovery Initiatives has been created and the advisory committee heard from the person appointed to that position. In addition, each U.S. attorney's office has been directed to develop a local discovery policy consistent with the law and local rules and practices.

"The committee has decided against recommending a change in Rule 16 at this time," says Tallman. "The survey shows there is a lack of consensus in the federal Judiciary as to whether an amendment is necessary." He adds that the committee is not abandoning efforts to make improvements in this area, but is recommending alternatives that could be implemented more quickly and effectively through the FJC: better training of judges in managing criminal discovery pretrial, changes to the District Judge's Benchbook to include discovery checklists to aid in case management, and publication of a "Best Practices Guide for Criminal Discovery." "No rule can effectively prevent intentional misconduct by prosecutors who knowingly withhold exculpatory information," Tallman said. "But the committee was not convinced that the problem is so severe as to warrant a rule change when existing Supreme Court authority on a prosecutor's disclosure obligations is clear and for which substantial sanctions are available for non-compliance."

**Material tending to impeach the character or testimony of the prosecution witness in a criminal trial.*

COST OF INCARCERATION AND SUPERVISION

This article originally appeared in the May 2011 issue of The Third Branch and is used with permission.

The chart below reflects the fiscal year 2010 cost of supervision by probation and pretrial services officers as compared to the cost of incarceration and pretrial detention. The cost of supervision is calculated using the current work measurement formula, probation/pretrial services officer salary costs, law enforcement account obligations, and miscellaneous operating expenses.

The Bureau of Prisons provided the figures for the cost of imprisonment and Community Corrections Center placement. Pretrial detention costs were provided by the Department of Justice's Office of Federal Detention Trustee and includes the cost of detained pretrial defendants that are housed in contract facilities.

	Imprisonment in Bureau of Prisons Facility	Community Correction Centers	Supervision by Probation Officers	Supervision by Pre-trial Services	Pretrial Detention
Daily	\$ 77.49	\$ 70.79	\$ 0.79	\$ 6.62	\$ 70.56
Monthly	\$ 2,357.01	\$ 2,153.22	\$ 328.20	\$ 201.30	\$ 2,146.22
Annually	\$ 28,284.16	\$ 25,838.63	\$ 3,938.35	\$ 2,415.64	\$ 25,754.68

Pursuant to U.S.S. G. § 5E1.2(d)(7) and 18 U.S.C. § 3572(a)(6), the court shall, when determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, consider the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence. We intend to ask that probation officers begin to reference the updated costs in their presentence reports.

RECENT SUPREME COURT DEVELOPMENTS

Fourth Amendment

Davis v. United States, 09-11328 (June 16, 2011). At issue was whether to apply the exclusionary rule when the police conducted a vehicle search in compliance with binding precedent interpreting *New York v. Belton*, but that precedent was later overruled in *Arizona v. Gant* while the defendant's appeal was pending. Because the suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, the Court held that searches conducted in reasonable reliance on binding appellate precedent were not subject to the exclusionary rule.

Kentucky v. King, 09-1272 (May 16, 2011). At issue in this Fourth Amendment case was whether the exigent circumstances exception to the warrant requirement applies when police officers, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Court held that the exigent circumstances rule applies and "warrantless entry to prevent destruction of evidence is reasonable and thus allowed" as long as "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."

Fifth Amendment

J. D. B. v. North Carolina, 09-11121 (June 16, 2011). The Court held that the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*, as it is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. The Court thus remanded to the state courts to address whether the thirteen-year-old petitioner was in custody when he was interrogated, taking into account all of the relevant circumstances of the interrogation, including his age at the time.

Confrontation Clause

Bullcoming v. New Mexico, 09-10876 (June 23, 2011). Petitioner was arrested on DWI charges and the principal evidence against him was a forensic laboratory report certifying that his blood alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification and, instead, called another analyst who was familiar with the laboratory's testing procedures but had neither participated in nor observed the test on petitioner's blood sample. The Court held that surrogate testimony of that order was impermissible under the Confrontation Clause where the accused's right was to be confronted with the analyst who made the certification, unless that analyst was unavailable at trial and the accused had an opportunity, pretrial, to cross-examine him.

Speedy Trial Act

United States v. Tinklenberg, 09-1498 (May 26, 2011). The Court held that the Speedy Trial Act contains no requirements that the filing of a pretrial motion actually caused, or was expected to cause, delay of a trial. Rather, 18 U.S.C. § 3161(h)(1)(D) stops the Speedy Trial clock from running automatically upon the filing of a pretrial motion irrespective of whether the motion had any impact on when the trial began.

Armed Career Criminal Act

Sykes v. United States, 09-11311 (June 9, 2011). The Court held that felony vehicle flight, as proscribed by Indiana law, was a violent felony for purposes of the Armed Career Criminal Act, 18 U.S.C. 924(e). It noted that felony vehicle flight presented a serious potential risk of physical injury to another, was not a strict-liability, negligence, or recklessness crime, and was, as a categorical matter, similar in risk to the crimes listed in the residual clause.

McNeill v. United States, 10-5258 (June 6, 2011). The Court held that for purposes of determining whether a conviction for a prior state drug offense is a "serious drug offense" under the Armed Career Criminal Act, (i.e., the "maximum term of imprisonment" for that offense is ten years or more), the "maximum term of imprisonment" is the maximum sentence applicable to the offense at the time of the conviction. Thus, the district court properly applied an ACCA sentencing enhancement even though the defendant's state drug crimes no longer carried a "maximum term of imprisonment of ten years or more."

Other Sentencing Issues

Freeman v. United States, 09-10245 (June 23, 2011). At issue in this case was whether defendants who enter into plea agreements recommending a particular sentence under Rule 11(c)(1)(C) can be eligible for relief under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) allows defendants sentenced based on a sentencing range that has subsequently been lowered by the Sentencing Commission to move for a reduced sentence. The Court held that the text and purpose of the statute, Rule 11(c)(1)(C), and the governing Guidelines policy statements compelled the conclusion that the district court had authority to entertain section 3582(c)(2) motions when sentences were imposed in light of the Guidelines, even if the defendant entered into an Rule 11(c)(1)(C) agreement.

Tapia v. United States, 10-5400 (June 13, 2011). The Supreme Court held that the Sentencing Reform Act, 18 U.S.C. §

3582(a), precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation. Thus, a sentencing court could not increase the length of a defendant's sentence to ensure that she would qualify for and complete the BOP's Residential Drug Abuse Program.

DePierre v. United States, 09-1533 (June 9, 2011). Petitioner was convicted for distribution of 50 grams or more of cocaine base under 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii), and sentenced to the 120 months prison term mandated by the statute. At issue was whether the term "cocaine base" as used in the statute referred generally to cocaine in its chemically basic form or exclusively to what was colloquially known as "crack cocaine." The Court held that "cocaine base," as used in section 841(b)(1), meant not just "crack cocaine," but cocaine in its chemically basic form.

FIFTH CIRCUIT UPDATES

United States v. Potts, No. 10-10257 (5th Cir. June 15, 2011): During a vehicle stop, defendant's car was searched and a weapon was found. Defendant was asked if it belonged to him and he didn't respond. Defendant was then arrested. At trial, the arresting officer testified about defendant's silence, and defendant objected on the ground that it violated defendant's Fifth Amendment rights. The court didn't rule on the objection but instead suggested that the jury could be instructed that defendant had no obligation to answer the question. Defendant agreed to the suggestion, the judge instructed the jury, and defendant's attorneys didn't make any further objections. Defendant was convicted. On appeal, defendant raised the Fifth Amendment issue, but the court held that by accepting the jury instruction, defendant waived the objection and therefore failed to preserve it for appeal. Thus, the court reviewed the claim under the plain error standard, and found that any alleged error was unclear because the Fifth Circuit has yet to address conclusively whether use of pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment.

Martinez v. Caldwell, No. 10-30318 (June 15, 2011): As a matter of first impression, the court held that a pre-trial detainee's habeas petition is covered by section 2241, not section 2254, and therefore 2254(d) deference does not apply. Instead, such petitions are to be reviewed *de novo*.

United States v. Portillo-Munoz, No. 11-10086 (5th Cir. June 13, 2011): Defendant argued that his 922(g) conviction for being an illegal alien in possession of a firearm, based on his possession of a firearm to allegedly protect chickens at a ranch where he worked from coyotes, violated the Second Amendment. The court rejected that argument, holding as a matter of first impression that the protections of the Second Amendment do not apply to illegal aliens.

United States v. Olguin, No. 09-10916 (5th Cir. June 7, 2011): Defendant, convicted of conspiracy to distribute and possess controlled substances, challenged the district court's asset forfeiture judgment which found each defendant jointly and severally liable for \$2 million. The court rejected defendant's arguments that 21 U.S.C. 853 did not allow a personal money judgment, that each defendant should not be held jointly and severally liable for the full proceeds of the conspiracy, and that the district court erred in determining the forfeiture amount based on the gross, and not the net, proceeds of the conspiracy.

United States v. Harper, No. 10-30643 (5th Cir. June 6, 2011): The court vacated defendant's sentence because the government breached the plea agreement by using statements that defendant had made during a pre-plea debriefing to argue for a higher sentence. The plea agreement had granted defendant "use immunity for all prospective statements to law enforcement agents and testimony given as a result of this agreement." In his debriefing, defendant revealed that his relevant offense conduct involved 18 kilograms of crack cocaine, which was then incorporated into his Presentence Investigation Report by the U.S. Probation Office. The government supported the PSR's findings. At sentencing, the district court adopted the PSR and utilized the 18 kilograms in determining defendant's base offense level under the sentencing guidelines. On appeal, the court, relying upon section 1B1.8 of the guidelines as well as caselaw, held that the government breached defendant's plea agreement by advocating for a higher guideline sentencing range, and vacated and remanded for resentencing before a difference judge.

United States v. Flores-Vasquez, No. 10-40312 (5th Cir. May 23, 2011): The court held that mere fact that illegal entry defendant's prior state conviction was based on an *Alford* plea did not preclude the sentencing court, in determining whether that conviction was a "crime of violence" and whether defendant was subject to a 16-level sentence enhancement under the sentencing guidelines, from relying upon the proffer of facts which was independently confirmed by defendant at plea hearing and in his plea agreement as being a "true and accurate" description of his offense.

United States v. Garcia-Rodriguez, No. 09-20406 (5th Cir. May 2, 2011): This case concerns a defendant who was convicted of illegal re-entry, served his sentence, was transferred to ICE and deported. Then he returned to the U.S., was arrested and his supervised release was revoked. The Fifth Circuit held that the defendant's term of imprisonment ended and his term of supervised release commenced on the day he was transferred from BOP custody to ICE administrative detention for purposes of triggering the tolling period for revocation of supervised release.

NATIONAL LITIGATION SUPPORT

The National Litigation Support Team (NLST) recently announced the launch of their blog which can be found at <http://nlsblog.org>.

The purpose of the blog is to share information regarding new and existing litigation support technology tailored to the interests of federal public defender staff and court-appointed Criminal Justice Act (CJA) panel attorneys. Besides facilitating communication, it is intended to highlight how people are taking advantage of different types of litigation support software programs and services, to share interesting articles and case law, as well as making available short, step-by-step guides and videos on how to use common applications (some which you may already have). The forum is envisioned to be a resource, a quick help guide, and an enjoyable read. Guest bloggers will hopefully add perspective, give feedback and ask questions.

There will be weekly posts to answer questions and address comments. The National Litigation Support Team can still be reached by phone or email:

Sean can be reached at (510) 637-1950 or sean_broderick@fd.org

Kelly can be reached at (510) 637-1952 or kelly_scribner@fd.org

If you have questions that you think others might have, please let them know. The idea is that the questions and answers will be posted to the blog so that all can benefit. In a world where social media has taken communication to a whole different level, this blog will allow easy access to useful information and a place to share ideas. The blog will be hosted on a public site and available to all who are interested.

Don't hesitate to use the site or to contact the National Litigation Support Team with questions, thoughts or if you would like to be a guest blogger on <http://nlsblog.org>. Blogging is about community building so the more active the site, the more helpful it will be to the entire defender community. And if you need Lamont, you know where to find him.

CJA GUIDELINE FOR THE PURCHASE OF COMPUTER HARDWARE, SOFTWARE OR LITIGATION SUPPORT SERVICES

On February 24, 2011, the Judicial Conference of the United States approved a modification to Section 320.70.40 of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, Guide to Judiciary Policy (Guide). Formerly known as CJA Guideline 3.16, it addresses the process by which CJA panel counsel request funding from the court for the purchase of litigation support software, hardware or services. These changes will streamline the procurement process for CJA panel attorneys while ensuring that government property is tracked and more effectively redistributed at the conclusion of a case.

In order to provide an adequate defense to CJA-eligible defendants, Guideline 320.70.40 allows CJA panel counsel to obtain litigation support software, hardware or services that are not typically available in a law office. If a procurement will exceed certain financial thresholds (\$800 for hardware or software; \$10,000 for the combined cost of computer systems, litigation support products, services, personnel, or experts), CJA panel attorneys must consult with, and obtain a recommendation from, the National Litigation Support Administrator (NLSA) in the Office of Defender Services (ODS) regarding the technological and budgetary soundness of the request before any purchase is approved. This consultation should take place as early in the case as reasonably possible. Pursuant to the modified guideline, CJA panel attorneys may pay for the product or service and obtain reimbursement by use of a CJA form 21 or 31 (for capital representations), or arrange for the vendor to directly bill the court through a CJA 21 or 31 form.

To allow for proper tracking of property, CJA panel counsel are required to provide documentation to the NLSA after they purchase hardware or software. The documents that need to be submitted are (1) a copy of the completed CJA 21 or 31 form, (2) the purchase order from the vendor, and (3) any receiving documents such as a copy of the packing slip or an invoice. Upon completion of the case, since any product purchased with CJA funds is the property of the United States, counsel must contact the National Litigation Support Team about how to delete case-related materials and where to send the hardware or software for future use.

If you have any questions regarding the modifications to Guideline 320.70.40 and how it affects the acquisition of litigation support hardware, software or services, please contact either Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org.

RECOMMENDED TRAINING PROGRAMS FOR CJA PANEL ATTORNEYS

LAW AND TECHNOLOGY WORKSHOP SERIES: ELECTRONIC COURTROOM PRESENTATION

JULY 21 - 23, 2011 - PROVIDENCE, RHODE ISLAND

Contact: Shemiah_Schuler@ao.uscourts.gov

The Law and Technology Electronic Courtroom Presentation 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 TrialDirector 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.

MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR

AUGUST 18 - 20, 2011 - SEATTLE, WASHINGTON

Contact: Jenna_Shepard@ao.uscourts.gov

The Multi-Track Federal Criminal Defense Seminar (Multi-Track) is designed to offer in-depth instruction in a variety of substantive criminal topic areas. Many practitioners may feel there are just certain areas of defense they need to "beef" up on. Multi-Track allows attendees to select specific areas, or tracks, and to really delve into specific areas of defense. This year's tracks will be in the areas of:

1. Immigration with an emphasis on the implications of *Padilla* (Thursday & Friday)
2. Sentencing in a post-Booker world (Thursday & Friday)
3. Experts, forensics & science (Thursday & Friday)
4. Computer crimes & the handling of electronic discovery (Thursday & Friday)
5. Drugs, Guns and Money - Major Federal Felonies (Saturday Only)

Tracks 1-4 will be presented on Thursday and Friday in a manner which will allow participants the opportunity to attend 2 complete tracks of the 4 offered. On Saturday the seminar will include sessions addressing topics of general interest from the areas of drugs, guns and fraud which are central to criminal defense practitioners. All days will include both plenary sessions as well as the opportunity to attend small group breakouts covering a variety of substantive criminal defense issues.

SIXTEENTH ANNUAL NATIONAL FEDERAL HABEAS CORPUS SEMINAR

AUGUST 18 - 21, 2011 - CHARLOTTE, NORTH CAROLINA

Contact: Lauren_Billups@ao.uscourts.gov

This nationally-recognized program, the only one of its kind, focuses on representation in capital habeas cases in toto. Habeas experts discuss issue identification, investigation, factual and legal development and presentation of claims, the use of mitigation and mental health experts, and substantive and procedural habeas corpus jurisprudence. The program will also have sessions addressing the impact of recent and currently pending Supreme Court decisions on capital post-conviction practice as well as sessions addressing new developments in the other courts and new legislative initiatives.

THE HABEAS INSTITUTE

SEPTEMBER 15-18, 2011 - KANSAS CITY, MISSOURI

Contact: Lauren_Billups@ao.uscourts.gov

The Habeas Institute is an intensive learning by doing seminar designed to teach the skills necessary to prepare and conduct a post-conviction hearing in a capital case. This program is offered to federal defenders, CJA panel attorneys, and other attorneys who either represent or are interested in representing a death-sentenced inmate in post-conviction proceedings. A National Institute for Trial Advocacy (NITA) case file containing materials from the state court record in a capital case, together with evidence and information discovered after conviction, provides the program's backdrop. Participants will brainstorm issues, interview and prepare witnesses, determine how to present proof, and conduct direct and cross-examinations of witnesses. This program will complement existing continuing legal education programs and ensure that the profession provides competent post-conviction representation in capital cases.



MESSAGE BOARD

- Our office routinely moots our cases before Fifth Circuit arguments. Recently appellate panel attorneys have requested that our office moot their cases as well. If there is sufficient participation by the appellate panel attorneys, we will seek CLE credit from the State Bar for this specialized exercise which will include review of briefs, participation in moot, observation of actual appellate argument at the Fifth Circuit and the discussion which will follow.
 - If you have a CJA appointed case and anticipate that your costs will approach \$30,000, you **must** submit a full budget. Further, if you foresee your case proceeding to trial, notify Barbara Daigle or Heather Davis at least 30 days before the scheduled trial date. If a budget is not submitted and your costs exceed \$30,000, reimbursement for all compensation and expenses cannot be guaranteed. CJA Form 28A is the *Attorney Services Detailed Budget Worksheet for Non-capital Representations*. It is available on our website at www.federaldefender.net.
 - In the past we have been able to accommodate individual preferences in preparing vouchers for submission to the court, but due to the number and complexity of the vouchers we will no longer be able to continue this practice. As you know, the vouchers should reflect time expended with a description of the work undertaken in tenths of hours and entered into the appropriate categories as they appear on the CJA 20 voucher. In addition, billing .10/hr. separately for each routine ECF received in a case (i.e. minute entries for each co-defendants' appearance in court) is not appropriate and will generally not be allowed. Obviously, if the ECF is of specific relevance to your client's case (i.e. plea/factual basis of co-defendant), it is an appropriate charge and the entry on the voucher should describe the nature of the notice as justification for time expended receiving, reading, and taking the necessary action. Note that calendaring is not a billable expense. For the benefit of our new panel members and even some of our seasoned attorneys, if you have questions contact either Heather or Barbara.
 - **St. John the Baptist Parish Prison** has new and improved visitation hours. Attorneys can now visit clients Monday through Thursday from 8 a.m. to 6 p.m.
 - The **United States Attorney's Office** has moved. Their new location is 650 Poydras Street, Suite 1600, New Orleans, LA 70130.
 - Congratulations to CJA panel member John H. Musser, IV, who was recently sworn in as the President-Elect of the Louisiana State Bar Association.
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FEDERAL PUBLIC DEFENDER'S OFFICE

Hale Boggs Federal Building
500 Poydras Street
Suite 318
New Orleans, LA 70130

www.federaldefender.net
