
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

Published by
THE OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF MARYLAND
WEBSITE ADDRESS: WWW.MD-FD.ORG

April 2006

HIGHLIGHTS IN THIS ISSUE

The Fourth Circuit has stated that a sentence falling within a properly calculated Guidelines range is presumptively reasonable under *United States v. Booker* and 18 U.S.C. § 3553(a), while expressly recognizing that a non-Guidelines sentence is not *ipso facto* unreasonable. See *United States v. Green*, at p. 9.

The Fourth Circuit also has ruled that a district court abused its discretion by allowing the government to re-open its case in a drug prosecution in order to admit a written report summarizing a post-arrest interview with the defendant. See *United States v. Nunez*, p. 7.

NOTES FROM THE DEFENDER

Panel Training

Our next Criminal Justice Act (CJA) panel training is scheduled for May 26, 2006 in Courtroom 1A (Ceremonial Courtroom) at the United States District Court in Baltimore. The Agenda includes sessions on working with mental health experts, defending computer crimes, and post-*Booker* sentencing. We will also present The John Adams Award in appreciation of a member of our panel who has made significant contributions to our CJA Panel and the defense of

indigents accused of crimes in the District of Maryland. After the morning program, we will gather at The Wharf Rat for lunch.

Post-Booker Sentencing

We will spend part of our program discussing the fall-out from the Supreme Court's decision in *United States v. Booker*. The Fourth Circuit's response to *Booker* is less than encouraging. Some have suggested that the Circuit – as it has been known to do on occasion – has *de facto* reversed the higher court's decision in *Booker*. Despite the generally disheartening decisions from Richmond, we continue to see an increase in downward departures and variances from our District Court. Virtually, every judge in our district has now used § 3553(a) to give fair and effective sentences that are less than those required by the mandatory guidelines. We look forward to continuing our discussion at the Baltimore training program of how best to help our clients in a post-*Booker* world.

The United States Attorneys' Office response may be the most serious threat to *Booker* and the return of some institutional balance and fundamental humanity to federal sentencing. Assistant

United States Attorneys, particularly in the Greenbelt Office, have started to insist in plea negotiations that the agreement include a provision that the guideline sentence is “reasonable” under § 3553(a).

This is a dangerous practice, that seems even more extreme than DOJ policy. Main Justice requires opposition to variance requests – but does not require Assistants to coerce pleas to prevent judges from hearing the arguments and evidence for a variance. That is a Maryland tactic. When the United States Attorneys’ Office sought 2255 waivers in pleas a few years ago, it at least had the appearance of a principled argument of “finality.” This new tactic is simply a power grab. By insisting that *Booker* does not exist in the District of Maryland, the United States Attorneys’ Office is aggressively seeking to retake sentencing discretion away from United States District Court judges.

I am reminded of Justice Kennedy’s comments in his landmark speech about American sentencing practice to the ABA Convention in 2003. Before concluding that “our resources are misspent, our punishments too severe, our sentences too long,” Justice Kennedy complained about mandatory guidelines and the decline of judicial discretion in sentencing.

There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and

takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

If this negotiation ploy becomes part of the District’s practice, the likely consequences include unnecessary trials (a Greenbelt tradition), more pleas without plea agreements, higher sentences and greater disparity between sentencing outcomes in the District of Maryland and those Districts that still abide by Supreme Court precedent. Many of our clients need to plead guilty. They should plead guilty. As usual, we represent individual clients and it may be in their best interests to enter into a plea even with such a provision. But, this is a practice that has serious potential consequences for justice in the District of Maryland and has to be resisted.

Bill Brennan

CJA Panel Lawyer Bill Brennan was recently awarded the prestigious Heeney Award by the Criminal Justice Section of the Maryland Bar Association. The Heeney Award is given to a member of the Maryland Bar – judge, defense lawyer, or prosecutor – who has made significant contributions to criminal justice in the State of Maryland. Judge J. Frederick Motz, Judge Howard Chasanow, and former Federal Public Defender Fred Warren Bennett, are some of the previous winners of this Award. Bill is a most deserving recipient of this important Award.

Northeast Ohio Correctional Facility

Our clients continue to struggle at the Northeast Ohio Correctional Center (NOCC). This is the private facility that the Marshals have contracted with to house our clients post-sentencing, while they await designation. NOCC was previously closed after Department of Justice (DOJ) findings that the facility was overcrowded and unsafe. Most of our clients housed there complain that it is worse than MCAC (Supermax). We hear complaints about overcrowding, including clients triple-celled sleeping on plastic “boats.” One of our greatest concerns is that the crowded conditions are going to make it impossible for compliance with separation orders which was one of the security problems found in the DOJ report.

In an informal survey we recently conducted using PACER and the BOP website, we found that many inmates – approximately a quarter – stay in this facility more than two months. A smaller number have been there more than three months.

The reason for these lengthy stays remain a mystery. The Bureau of Prisons regularly reports to the Bench that it designates clients in a matter of days. There has been an electronic “reform” to expedite the delivery of Judgment and Commitment Orders between Probation and BOP. Yet our clients sleep in “boats.”

We have limited leverage to impact upon this issue. I would encourage everyone to remind sentencing judges that Maryland defendants routinely serve many months of their sentences in harsher conditions of confinement than other federal defendants.

Translating a Plea Agreement

We have a growing number of Spanish-speaking clients. It can be very hard for court-appointed lawyers to establish a good relationship with English-speaking clients. Language barriers do not help attorney-client relations.

Judge Jack Weinstein in *United States v. Mosquera*, 816 F. Supp. 168 (E.D.N.Y. 1993) analyzed the issue of which party should bear the costs of translating certain court documents and ordered that the United States Attorney – the proponent of the document – should supply a translation of the plea agreement. Judge Weinstein also suggested that Presentence Reports should be translated and the Probation Office may be required to bear the costs rather than the Criminal Justice Act budget. It is the best practice to provide clients with translations of these documents. Please work with CJA Administrator Donna Shearer and the Court about how best to obtain translations.

RECENT CASE LAW

SUPREME COURT

Substantive Criminal Law

Court Upholds Death Sentence Despite Jury’s Consideration Of Invalid Aggravating Factors

The Supreme Court, in a 5-4 decision, has announced a new test for determining the lawfulness of a death sentence when one or more of the aggravating factors are found invalid after the trial. Under the new test, an invalidated factor will render the death

sentence unconstitutional, by reason of adding an improper element to the aggravation scale in the weighing process, unless one of the other aggravating factors enables the sentencer to give aggravating weight to the same facts and circumstances. Applying this test, the Court found that the jury's consideration of two special circumstances subsequently found to be invalid did not deprive the defendant of an individualized death sentence, when the two remaining special circumstances were sufficient to satisfy *Furman's* narrowing requirement and all the facts and circumstances that had been admissible to prove the two invalid special circumstances were also admissible to prove the two valid special circumstances. *Brown v. Sanders*, 126 S. Ct. 884 (2006).

Sentencing

State May Limit Admissibility Of New Evidence Of Innocence At Capital Sentencing Hearing

The Supreme Court has ruled that the Constitution does not prohibit a state from limiting the innocence-related evidence a defendant may introduce at a capital sentencing hearing to the evidence introduced in the innocence phase of the trial. The Court held that the Eighth Amendment does not provide a right to introduce at sentencing evidence designed to cast "residual doubt" on the defendant's guilt. A state court had ruled the defendant had a constitutional right to introduce at sentencing new alibi evidence which cast doubt on his guilt. *Oregon v. Guzek*, 126 S. Ct. 1226 (2006).

Habeas Corpus

Court Vacates Habeas Relief For Death Row Inmate

The Supreme Court has vacated a judgment granting habeas relief to a death-sentenced prisoner on the ground that the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of state law in concluding that the theory of transferred intent could not support an aggravated murder conviction. The Court also ruled that the Sixth Circuit erred in adjudicating the prisoner's ineffective assistance of counsel claim by relying on evidence that was not properly presented to the state post-conviction courts without first determining whether the prisoner was at fault for this omission and whether he met the criteria for a federal evidentiary hearing. *Bradshaw v. Richey*, 126 S. Ct. 602 (2005).

Unreasonable Delay Results In Untimely Petition

The Supreme Court has ruled that a California prisoner unreasonably delayed filing a habeas petition when he waited three years and one month after a state intermediate court denied his request to file a new petition with the California Supreme Court, and thus his state petition was not "pending" during that period so as to toll the one-year limitations period under federal habeas law. The Court found that the summary denial of the petition by the California Supreme Court was not conclusive evidence the petition was timely filed under state law. *Evans v. Chavis*, 126 S. Ct. 846 (2006).

Supreme Court Reverses Grant Of Habeas Relief By Ninth Circuit

The Supreme Court has unanimously decided that the Ninth Circuit improperly substituted its evaluation of the record for that of a California trial court in granting habeas relief based on a challenge under *Batson v. Kentucky*. The California court had accepted the prosecutor's race-neutral reasons for striking an African-American from the jury panel, and the Supreme Court ruled the Ninth Circuit had erred in finding otherwise. *Rice v. Collins*, 126 S. Ct. 969 (2006).

Certiorari Granted

Constitutionality Of Arizona's Insanity Statute

The Supreme Court will consider the constitutionality of Arizona's insanity law, which provides that a person "may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Previously, Arizona's insanity law had followed the M'Naghten insanity test, providing that a person is not responsible for criminal conduct if at the time of such conduct the person was suffering from a mental disease or defect "as not to know the nature and quality of the act, or if such person did not know that what he was doing was wrong." The petitioner argues that by eliminating the "nature and quality of the act" aspect of M'Naghten, after previously eliminating all common law defenses, including diminished capacity, Arizona violated a defendant's right to present a complete version of the facts and to put forth a complete defense. *Clark v. Arizona*, 126 S. Ct. 797 (Dec. 5, 2005).

Police's Authority To Enter Home Without Warrant To Stop Fight

The Supreme Court will address the circumstances under which the emergency aid doctrine or the exigent circumstances doctrine permits police to enter a home without a warrant to stop a physical altercation within. *Brigham City v. Stuart*, 126 S. Ct. 979 (Jan. 6, 2006).

Waiver And Harmless Error Under Speedy Trial Act

The Supreme Court has granted certiorari in a case that presents two issues under the Speedy Trial Act, 18 U.S.C. § 3161-74: (1) whether the requirements of the Act can be waived only in the limited circumstances mentioned by the statute; and (2) whether a violation of the Act's 70-day time limit is subject to harmless error analysis. *Zedner v. United States*, 126 S. Ct. 978 (Jan. 6, 2006).

Denial Of Defendant's Qualified Right To Counsel Of Choice

The Supreme Court will decide whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction. The Eighth Circuit held that denial of counsel of choice was a structural error mandating reversal. *United States v. Gonzalez-Lopez*, 126 S. Ct. 979 (Jan. 6, 2006).

Burden Of Persuasion With Respect To Duress Defense

The Supreme Court will decide whether the burden of persuasion with respect to a duress defense should be on the government, to prove beyond a reasonable doubt that the defendant was

not under duress, or on the defendant, to prove duress by a preponderance of the evidence. *Dixon v. United States*, 126 S. Ct. 1139 (Jan. 13, 2006).

Supreme Court To Consider Death Row Inmate's Challenge To Florida's Lethal Injection Method

The Supreme Court will decide whether a civil rights complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his death sentence to pursue a challenge to the chemicals utilized for carrying out his execution, must be recharacterized as a habeas corpus petition under 28 U.S.C. § 2254. The inmate argues that a challenge to a particular protocol the state plans to use during the execution process constitutes a cognizable claim under § 1983 and need not be treated as a habeas petition. *Hill v. Crosby*, 126 S. Ct. 1189 (Jan. 25, 2006).

Constitutionality Of California's Determinate Sentencing Law In Light Of *Blakely*

The Supreme Court will decide whether, under *Blakely v. Washington*, California's determinate sentencing law is invalid because it allows a defendant's sentence to be increased based on aggravating facts not found by the jury or admitted by the defendant. *Cunningham v. California*, 126 S. Ct. 1329 (Feb. 21, 2006).

FOURTH CIRCUIT

Substantive Criminal Law

Fourth Circuit Upholds Application Of Federal Child Pornography Statutes To Wholly Intrastate Activity

Federal law prohibits both the sexual exploitation of a minor for the purpose of producing child pornography (18 U.S.C. § 2251(a)), and the possession of child pornography containing images transported in interstate commerce (18 U.S.C. § 2252A). The Fourth Circuit has rejected a defendant's Commerce Clause challenge to the application of these statutes to his wholly intrastate production and possession of child pornography, ruling that Congress had a rational basis for concluding that the local production and possession of child pornography substantially affected interstate commerce, despite the de minimis character of individual instances arising under the statutes. *United States v. Forrest*, 429 F.3d 73 (4th Cir. 2005).

No "Innocent Possession" Defense To Felon-In-Possession Charge

The Fourth Circuit has ruled that the statute prohibiting a felon from possessing a firearm, 18 U.S.C. § 922(g), is not amenable to an "innocent possession" defense. In other words, there is no exception to the statute when a felon has no illicit motive and attempts to quickly rid himself of the gun. Even if the statute was amenable to such a defense, the defendant's account that he found weapons under debris and was in the process of taking them to the police station to collect a reward when he was caught did not establish the defense, the court ruled, in that his possession of the

weapons was needlessly prolonged and his actions provided no objective evidence of his claimed innocent motive. *United States v. Gilbert*, 430 F.3d 215 (4th Cir. 2005).

District Court Abused Its Discretion
By Allowing Government To Re-
Open Case

The Fourth Circuit has found that a district court abused its discretion by permitting the government to re-open its case in a drug prosecution, after the jury had begun deliberations, to present a written, unredacted report summarizing the defendant's interview after her arrest. The court emphasized that the defendants were not afforded the opportunity to cross-examine the officer who wrote the report or the officer who translated the defendant's interview after the report was admitted; the government provided no reasonable explanation for its failure to timely seek introduction of the report as substantive evidence during the trial; and the timing of the belated admission infused the report with distorted importance. *United States v. Nunez*, 432 F.3d 573 (4th Cir. 2005).

District Court Plainly Erred In
Medicating Defendant For
Sentencing Hearing

The Fourth Circuit has ruled that, while a district court plainly erred by medicating the defendant against his will for the sole purpose of rendering him competent for sentencing, the plain error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Baldovinos*, 434 F.3d 233 (4th Cir. 2006).

Court Vacates Defendant's
Conviction For Illegal Reentry
Based On Lack Of Notice
Regarding Deportation Hearing

A defendant argued on appeal that his conviction for unlawful reentry by a deported alien should be vacated because he satisfied the three requirements for a collateral attack of the prior deportation order. The Fourth Circuit agreed, finding that the prior deportation order was flawed under 18 U.S.C. § 1326(d). The court found that the failure to notify the defendant in writing of the deportation hearing deprived him of the ability to exercise his due process rights, and that the defendant was prejudiced by the lack of notice because there was a reasonable probability he would have received relief from deportation but for the defect. *United States v. El Shami*, 434 F.3d 659 (4th Cir. 2006).

Constitutional Criminal Procedure

Defendant Validly Waived *Miranda*
Rights

The Fourth Circuit has ruled that a defendant voluntarily and knowingly waived his *Miranda* rights, where police officers read him those rights, he indicated that he understood them, he never invoked his rights, and, less than two hours after he received the warnings, an officer asked the defendant a question and he responded. *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005).

Defendant Not In Custody When
Questioned In Investigator's Office

According to the Fourth Circuit, a defendant was not in custody for *Miranda* purposes while being questioned in the

office of the state bureau of investigation, even though the defendant, a police officer who voluntarily came to the office, was asked to check his weapon in his car and was separated from his chief who had accompanied him. The court emphasized that the defendant was specifically told he was not under arrest, he was offered refreshments and was allowed to leave the office to use the restroom, the office door was left partially open at times, and there was no forceful restraint. *United States v. Uzenski*, 434 F.3d 690 (4th Cir. 2006).

Search Warrants In Drug Cases Can Be Served Day Or Night

The Fourth Circuit has ruled that, when a search warrant involves a federal drug crime, the warrant can be served day or night under 21 U.S.C. § 879, so long as the warrant itself is supported by probable cause. *United States v. Rizzi*, 434 F.3d 669 (4th Cir. 2006).

Evidence

Introduction Of Relevant Civil Standard-Of-Care Evidence Did Not Improperly Alter Standard Of Proof

Evidence that defendant-physicians violated a civil standard of care in prescribing pain medications was relevant in a prosecution for illegally distributing controlled substances, the Fourth Circuit has ruled, because it tended to show that the physicians were not acting as healers in prescribing schedule II substances but as sellers of wares. The court further ruled that introduction of such evidence did not alter the standard of proof to the lesser standard for civil liability because the trial judge properly instructed the jury on the criminal standard of proof and

spelled out the differences between the criminal and civil standards. *United States v. Alerre*, 430 F.3d 681 (4th Cir. 2005).

Sentencing

Enhancement Applies When Defendant Fails To Appear For Sentencing

The Fourth Circuit has ruled that the sentence enhancement for committing a crime while on release applies to the crime of failing to appear at sentencing. *United States v. Fitzgerald*, 435 F.3d 484 (4th Cir. 2006).

Error In Treating Guidelines As Mandatory Was Not Harmless

The Fourth Circuit has found that a defendant was prejudiced by the district court's erroneous treatment of the Sentencing Guidelines as mandatory, and thus the error was not harmless, where the district court offered no indication of whether it might have imposed a lower sentence under an advisory regime. The *Booker* error had been preserved below. *United States v. Rodriguez*, 433 F.3d 411 (4th Cir. 2006).

District Court Improperly Considered State-Federal Sentencing Disparity

The Fourth Circuit vacated a sentence and remanded for further consideration after finding that the district court either failed to consider or considered improperly the need to avoid unwarranted sentencing disparity among federal defendants, based on the court's consideration of the sentence the defendant would have received in state court. Two concurring judges noted that

under *Booker* a district court may take account of state sentencing practices in certain cases. *United States v. Clark*, 434 F.3d 684 (4th Cir. 2006).

Sentencing Guidelines Presumptively Reasonable In Post-Booker World, Although Non-Guidelines Sentence Is Not Presumptively Unreasonable

The Fourth Circuit has ruled that a sentence imposed within a properly calculated Guidelines range is “presumptively reasonable” under *Booker* and 18 U.S.C. § 3553(a). The court further held that, while a sentence falling outside of the properly calculated Guidelines range is not *ipso facto* unreasonable, if that sentence is based on an error in construing or applying the Guidelines, it will be found unreasonable. The court then vacated the defendant’s sentence, finding that the district court had failed to properly apply the career offender provision, without reaching the issue of whether the sentence imposed was reasonable under § 3553(a). *United States v. Green*, 436 F.3d 449 (4th Cir. 2006).

District Court Acted Properly In Deciding To Impose Non-Guidelines Sentence, Although Extent Of Variance Was Unreasonable

A defendant’s sentencing range was 360-life under the career offender provision of the Guidelines. Under *Booker* and 18 U.S.C. § 3553(a), the district judge imposed a sentence of 10 years imprisonment. On appeal, the Fourth Circuit vacated that sentence. The court found that the district judge had acted reasonably in deciding to impose a variance (i.e., a non-Guidelines

sentence), but that the extent of the variance was unreasonable. The court then remanded the case for imposition of a sentence of no less than 20 years imprisonment. In other words, the court held that as much as a 10-year reduction from the career offender sentence was reasonable under *Booker*. *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006).

Sentence Reductions In Crack Cases Must Be Based On Individualized Reasons

The Fourth Circuit has ruled that a district court may not reduce a sentence merely because it disagrees with the fact that federal drug offenses involving crack cocaine are punished at a rate 100 times more severe than are offenses involving the powder form of the drug. In the instant case, the district court had based its sentence reduction, not on the individual facts and circumstances of the offense and the offender, but instead on a general disagreement with the public policy underlying the 100:1 ratio. While finding this impermissible, the Fourth Circuit nonetheless emphasized that “[o]f course, it does not follow that *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range. We certainly envision instances in which some of the § 3553(a) factors will warrant a variance from the advisory sentencing range in crack cocaine offenses. However, a sentencing court must identify the *individual* aspects of the *defendant’s* case that fit within the factors listed in 18 U.S.C. § 3553(a) and, in reliance on those findings, impose a non-Guideline sentence that is reasonable.”

In a concurring opinion, Judge Michael discussed reports issued by the Sentencing Commission over the last

several years in which the Commission has consistently recommended that the 100:1 ratio be reduced. Judge Michael stated that, while the Commission's reports alone cannot justify a sentence outside the advisory range, "the reports can be used to support a below-guidelines sentence that takes into account the several case-specific factors in § 3553(a). . . ." *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006).

Statement Obtained In Violation Of Miranda May Be Considered By Sentencing Court

A district judge may, at sentencing, consider a defendant's statements that were obtained in violation of *Miranda v. Arizona*, provided the statements are otherwise voluntary. *United States v. Nichols*, 438 F.3d 437 (4th Cir. 2006).

Habeas Corpus

Fourth Circuit Rejects Death Row Inmate's Claim Of Ineffective Assistance Of Counsel

The Fourth Circuit has affirmed the denial of habeas relief to a defendant convicted of capital murder and sentenced to death, finding that he was not deprived of the effective assistance of counsel because one of his public defenders was pursuing an employment discrimination lawsuit against his other public defender, when both counsel stated that the lawsuit had no effect of their ability to represent the defendant, the potential conflict was disclosed to the defendant prior to trial, and the defendant expressly consented to the dual representation. *Vinson v. True*, 436 F.3d 412 (4th Cir. 2006).

Prosecutor Did Not Violate Brady In Capital Case

The Fourth Circuit has affirmed a death sentence after finding that the prosecutor did not withhold material exculpatory evidence in violation of *Brady v. Maryland*. The court found that the prosecutor's disclosure that one of its grand jury witnesses perjured herself was sufficient to satisfy *Brady*, because, while the prosecutor only informed the defense that part of the witness' testimony was false, he provided the defense with the witness' subsequent statement to the police and informed the defense that the witness would not be called at trial. The court also found that the prosecutor's failure to disclose handwritten notes about the sighting of the perpetrator while the defendant was at work, and the prosecutor's failure to disclose that there was a pre-existing relationship between the government's key witness and the grand jury witness who perjured herself, was not material, since, in light of the evidence, there was no reasonable probability the outcome of the trial would have been different had there been disclosure. *Vinson v. True*, 436 F.3d 412 (4th Cir. 2006).

Death Sentence Affirmed Even Though Juror Recited From Bible During Sentencing Deliberations

The Fourth Circuit has affirmed the denial of habeas relief to a death row inmate, deferring to the state court's ruling that a juror's recitation of a Biblical passage during sentencing deliberations did not violate the Sixth Amendment. *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006).

DEFENSE NEWS

is published by the

Office of the Federal Public Defender

for the District of Maryland
100 S. Charles Street, Tower II
Suite 1100
Baltimore, Maryland 21201-2705
(410) 962-3962
Fax (410) 962-0872