THE ZEALOUS

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2013

THE DEFENDER'S MESSAGE

As we celebrate the 50th anniversary of the U.S. Supreme Court's landmark case, *Gideon v. Wainright*, which secured the right to competent representation for all criminal defendants, regardless of the ability to pay, we defenders find ourselves in tough financial times. As you may have heard, CJA payments to panel attorneys will be delayed three weeks at the end of the fiscal year in order to comply with spending cuts under the sequestration budget. Federal Public Defender Offices around the country are facing furloughs and layoffs. In our office, we plan to have 15 days of staff furloughs in fiscal year 2013, with an equal number in 2014.

Despite these economic setbacks, we remain committed to providing quality representation to our clients and have compiled some information in this newsletter in an effort to help you do the same. As always, there is current information for panel attorneys, including an article on how CJA vouchers are processed by Clerk of Court, Julie Richards. In honor of the aforementioned anniversary, we will reexamine *Gideon* in an editorial by our own Steve Gordon. We have also summarized some information on the Sentencing Commission's latest critique of the child pornography guidelines and the Fourth Circuit's evolving jurisprudence on reasonable suspicion in *Terry* stop cases. As, always, I join the editors in hoping that the information you find within this newsletter will be beneficial to you and your practice.

Thomas P. McNamara
Federal Public Defender

INSIDE THIS ISSUE

THE ZEALOUS ADVOCATE

Office of the Federal Public Defender
for the Eastern District of North Carolina
150 Fayetteville Street
Suite 450
Raleigh, NC 27601
Tel: (919) 856-4236
Fax: (919) 856-4477

Thomas P. McNamara, Federal Public Defender
Vidalia Patterson, Editor & Layout, vidalia_patterson@fd.org
Laura S. Wasco, Editor & Layout, laura_wasco@fd.org
Gloria Gould, Design, gloria_gould@fd.org
Donna Stiles, Panel Administrator, donna_stiles@fd.org

PANEL ATTORNEY INFORMATION

Previously Distributed Materials

Numerous materials have been distributed through our panel administrator, Donna Stiles, and panel attorney representative, Joshua Howard, since the last newsletter. These include a number of local and national training opportunities, as well as emails regarding updates to The Guide, Fourth Circuit approval of proposed amendments to the District's CJA Plan, a mileage rate increase, and various articles about budget concerns brought about by Sequestration.

Seminar BOLO

Due to the financial constraints placed on our office by Sequestration, we will not be planning a Fall seminar this year. We look forward to being able to have a seminar in Raleigh during the Spring of 2014. Additional information will be provided as soon as it becomes available. Check the Seminar Information page on our website for announcements about upcoming seminars!

From the Clerk's Office: CJA Voucher Processing

Have you ever wondered what happens after you spend so much time preparing and itemizing your CJA voucher and submit it for payment? When you submit your completed CJA voucher to the Federal Public Defender's Office, Donna Stiles reviews your voucher to determine if it is technically and mathematically correct. She contacts the attorney directly if there are questions about entries or if additional information is needed. The voucher is entered into the CJA payment system and forwarded to Mr. McNamara for his review, at the request of the court, to determine if these charges are fair and reasonable. In some instances, a memorandum, outlining the findings of the review, is prepared and attached to the voucher. The voucher is then forwarded to the presiding judge.

When the voucher is received by the judge's chambers**,** the itemized charges are reviewed for correctness**.** On occasion, the judge may modify the requested amounts. The signed voucher is then forwarded to the Financial Unit in the Clerk's Office for further processing. Some vouchers may require an additional level of review and approval by the chief judge of the Fourth Circuit Court of Appeals.

Once the voucher is received in the Financial Unit, either from the judge's chambers or from the Fourth Circuit, the figures are verified and, if necessary, updated in the CJA payment system. This is a two-step process with the final step being the printing of the check by the Administrative Office of the U.S. Courts in Washington, DC.

Although checks are not issued locally, all vouchers are retained in the Financial Unit in the Clerk's Office. If you ever experience a delay or other problem relating to the payment process, the Clerk's Office is available to assist you. Please address your concerns to the Financial Unit, not the judge's chambers. The Financial Unit will work diligently to get to the bottom of your issue as quickly as possible. If you have any questions, please feel free to contact the Financial Administrator, Sharon Dixon, at (919) 645-1706.

Julie Richards
Clerk, U.S. District Court
Eastern District of North Carolina

To give anything less than your best is to sacrifice the gift.
–Steve Prefontaine, long-distance runner

PRACTICE TIPS

EDITORIAL: 50 Years After Gideon

The Supreme Court held today that the states must supply free lawyers to all poor persons facing serious criminal charges.

So began Anthony Lewis's report, fifty years ago in the *New York Times,* of the ruling in *Gideon v. Wainwright*, a decision Lewis recognized on the day it issued to be "one of the most important ever made by the Supreme Court in the criminal law field." Lewis died this past March 25, one week after *Gideon*'s fiftieth anniversary. His celebrated account of the case, *Gideon's Trumpet*, turns fifty next year. (Finding myself with some unanticipated free time recently, I've been reading it.)

Today, that indigent criminal defendants have a Sixth Amendment right to court-appointed counsel seems obvious, but it wasn't always so. Prior to *Gideon*, a person had a right to a lawyer in any capital case (*Powell v. Alabama*) and in a federal prosecution (*Johnson v. Zerbst*). In state courts, however, the Supreme Court had held in *Betts v. Beatty* that a fair trial did not necessarily require that a defendant have counsel. The Court said in *Betts* that while "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and, while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Justice Hugo Black, who would write the 9-0 *Gideon* decision two decades later, recognized that the real issue in *Betts* was money, and he dissented: "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty." In *Gideon*, Black wrote that "[r]eason and reflection require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

Gideon's anniversary has occasioned further reflections on the role of poverty in the criminal justice system. Google "Gideon's promise unfulfilled," and see how many hits there are. In 1962, Clarence Earl Gideon, as a poor person, ran less of a risk—substantially less—of incarceration than he would run today. And state and federal defender budgets—well, let's not get started on that.

Still, as Attorney General Holder observed in commemorating *Gideon*, the case "stands as a testament to the fact that the structures and mechanisms of our legal system, far from being etched in stone, remain works in progress." Referring to the cert. petition that Gideon wrote in pencil from his jail cell, Holder acknowledged the "powerful example of how–in this great country–even the humblest hands can help to bend the arc of history just a little further toward justice."

The oral argument in *Gideon* is online, and you can listen to it here: http://www.oyez.org/cases/1960-1969/1962/1962_155

Many thanks to AFPD Steve Gordon for sharing his views on this newsworthy topic.

It is never too late to be what you might have been.
–George Elliot

Computer Corner: Email Etiquette

It is important for business or personal use that you follow the basics of email etiquette. The rules that follow will help you avoid mistakes and communicate better via email. Below are tips for email etiquette that everyone needs to be aware of and follow.

Top Email Tips:

-Think of your business email as though it was on your business letterhead, and you'll never go wrong!
-Make sure your e-mail includes a courteous greeting and closing.
-Spell check. Then, proofread your message for what spell check may miss.
-Use proper sentence structure. Capitalize the first word and use appropriate punctuation.
-Refrain from using the **"Reply to All"** feature when responding to a group message. You may end up giving your opinion to those who may not be interested. In most cases, replying to the Sender alone is your best course of action. If everyone on the chain doesn't need to see your response, why fill up their in-boxes?
-Do not type in all caps. It reflects shouting emphasis.
-Stay away from fancy-schmancy fonts – use only the standard fonts found on all computers.
-Be sure the **"Subject:"** field accurately reflects the content of your email.
-Use emoticons sparingly and avoid using shortcuts to real words, jargon, or slang.
-Never open an attachment from someone you don't know.
-Make sure your recipient has the same software as you do before sending attachments, or they may not be able to open your attachment. Use PDF when possible as most people can open these documents.
-Don't "e-mail angry." E-mailing with bad news or expressing anger are major no-no's.
-Respond to messages in a timely fashion.

Some How To's on To, Cc, Bcc,:

-Include addresses in the **"To:"** field for those from whom you would like a response.
-The **"Cc:"** field means, "this is for your information, and you are not expected to take action."
-Use the **"Bcc:"** field for large groups of recipients. Do not advertise people's email addresses. This will also help you avoid misusing the **"Reply to All"** feature.
-And finally... *Type unto others as you would have them type unto you!*

Many thanks to Computer Systems Administrator, Gloria Gould, for contributing these helpful tips.

When Suspicion is Unreasonable

In 2011, The Court of Appeals for the Fourth Circuit addressed the Government's interpretation of isolated facts as suspicious activity as it relates to Terry stops in four separate opinions. *See United States v. Foster*, 634 F.3d 243 (4th Cir. 2011); *United States v. Powell*, 666 F.3d 180 (4th Cir. 2011); *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States v. DiGiovanni*, 650 F.3d 498 (4th Cir 2011). Since then, the Fourth Circuit has continued to articulate a stricter nexus of facts when it comes to satisfying the reasonable suspicion requirement for *Terry* stops.

In *United States v. Jones*, 678 F.3d 293 (4th Cir. 2012), two police officers in a marked patrol cruiser closely followed a car from a public road into a private apartment complex. During this time, the officers observed no traffic violations. The only suspicious activity articulated was the car's presence in a high crime neighborhood with out-of-state tags.

These isolated facts led the officers to believe that the car's occupants, four African American men, were involved in drug trafficking. Jones, the driver, eventually parked his car at the apartment complex and exited the car along with the other occupants. The officers parked the patrol cruiser so to prevent Jones' car from leaving. The officers asked Jones and another passenger to lift their shirts to show that they had no weapons. Officers proceeded to pat down Jones and the other passenger for weapons. None were found. It was not until after the pat-down and search for weapons that law enforcement asked for Jones' identification. The officers then discovered that Jones was driving with a revoked license. Jones was handcuffed, and a search incident to arrest was conducted. Officers found a handgun in Jones' crotch area as well as a small bag of marijuana.

The Court concluded that law enforcement officers detained Mr. Jones before there was any justification for doing so. *Id.* at 306. The Court rejected the government's argument that the encounter was consensual and found that no reasonable suspicion existed. Based on the facts, the police cruiser's obstructing the driveway, the continued show of authority, and multiple requests to search the car's occupants, Jones and the car's occupants did not feel free to decline the officers' requests or to terminate the encounter. *Id.* at 303. "Any one of these facts on its own might very well be insufficient to transform a consensual encounter into a detention or seizure, but all of these facts viewed together crystallize into a Fourth Amendment violation." *Id.* at 305.

In *United States v. Black*, 707 F.3d 531 (4th Cir. 2013), the Court again addressed the issue. In *Black*, police officers during their patrol observed a car parked at the pump of a gas station. During a three minute observation, officers saw that the driver did not leave the car, pump gas, or enter the convenience store. One of the officers characterized this behavior as unusual and indicative of drug transactions. Officers ran the car's tags and found no outstanding traffic violations, yet began to follow the car to a nearby parking lot. The driver parked and exited the car, joining four other men who were standing in a circle in the parking lot. Officers identified one of the men in the circle as someone who had prior felony drug arrests. The officers approached the group. One man in the group signaled to officers with his hands indicating that he had a firearm in a holster on his hip, in plain view, which is legal in North Carolina. Officers seized the firearm, and all of the men in the group were frisked. Black voluntarily offered his identification card to one of the officers. When Black attempted to leave, he was told that he was not free to leave and to remain seated. One of the officers grabbed Black's arm. Black ran away and was chased by the officers. A firearm was found on Black, and he was subsequently charged with possession of a firearm by a convicted felon.

The Fourth Circuit found that Black was illegally seized, as the seizure was not supported by reasonable suspicion. "Here, the totality of the factors outlined by the district court-an individual's presence at a gas station; prior arrest history of another individual; lawful possession and display of a firearm by another; Black's submission of his ID showing an out of district address to Officer Zastrow, all of which occurred in a high crime area at night-fails to support the conclusion that Officer Zastrow had reasonable suspicion to detain Black." *Id.* at 539. The Court criticized the government's use of separate, unrelated facts to establish reasonable suspicion: "...we encounter yet another situation where the Government attempts to meet its *Terry* burden by patching together a set of innocent, suspicion free facts, which cannot rationally be relied on to establish reasonable suspicion." *Id.* Judge Gregory, writing on behalf of the Court, acknowledged the effect that the erosion of Fourth Amendment protections would have on residents of high crime neighborhoods. "In our present society, the demographics of those who

reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion." *Id.* at 542.

In these cases, the Fourth Circuit acknowledged that law enforcement officers need discretion to perform their duties. However, the Court demonstrated its commitment to upholding Fourth Amendment protections by emphasizing the requirement of showing specific, articulable facts to meet the reasonable suspicion standard; isolated, unrelated, ordinary facts are not enough. Practitioners are advised to look for continued development in this area, examine these cases in depth, and become acquainted with the language articulated by the Fourth Circuit as it pertains to Fourth Amendment protections.

Many thanks to Nikia Williams for contributing these helpful tips. Nikia is a third year law student at the North Carolina Central University School of Law and was an extern in the FPD office during the Spring of 2013.

U.S. Sentencing Commission Releases Report Criticizing Child Pornography Guidelines

On February 27, 2013, the United States Sentencing Commission released a comprehensive report on sentencing policy in federal child pornography cases. The report focuses on non-production offenses. Prompted in part by claims that the current sentencing guidelines are outmoded, it examines sentencing data, typical offender behavior, and recidivism rates. Judge Patti B. Saris, chair of the Sentencing Commission, summarized the findings: "[T]he existing penalty structure is in need of revision. Child pornography offenders engage in a variety of behaviors reflecting different degrees of culpability and sexual dangerousness that are not currently accounted for in the guidelines."

The sentencing data presented in the report reveals symptoms of guideline dysfunction. Despite rising guideline ranges* and rising average sentences, the number of below guideline sentences are increasing. In 2010, non-government sponsored downward departures and variances occurred in 44.3% of cases. Courts granting below-guideline sentences appear to be rejecting guideline amendments that ratchet up the penalty level for non-production offenses. Some participants in the criminal justice system, including courts, believe that the guideline ranges are simply too severe.

As might be expected, deviations from the guidelines cause sentencing disparities. No common factor explains sentencing variances and downward departures. Instead, geographical differences are the strongest factor indicating whether a defendant will benefit from a reduced sentence stemming from charging practices, plea bargaining, or judicial sentencing discretion.

Sentencing disparities are aggravated by the statutory classification of non-production offenses. There are four primary non-production offenses: possession, receipt, transportation, and distribution. The statutory mandatory minimum and the base offense level is higher for individuals charged with receipt, transportation, and distribution than for individuals charged with possession. However, there is significant overlap between offenses. Over 90% of defendants convicted of possession committed a more serious child pornography offense, such as receipt of child pornography. Charging decisions lead to significant sentencing disparities. Consider an offender who both possesses and receives child pornography. For those convicted of possession, the average

sentence is 52 months; for those convicted of receipt, the average sentence imposed is 78 months.

The report emphasizes one reason for the below-guideline sentences: the failure of sentencing enhancements. Four of the six enhancements for non-production offenses apply in the typical case. Sentencing enhancements like these, that apply to all offenders, no longer distinguish between defendants with different levels of culpability.

Simply put, the guidelines have failed to keep pace with technological changes. With the ubiquity of the Internet, the typical offender can amass a larger collection of child pornography and can easily, sometimes inadvertently, disseminate child pornography through peer-to-peer file sharing. When nearly two-thirds of all child pornography offenders distributing pornography to others and over 95% of offenders using a computer, the current enhancements focused on collection behavior produce high guideline ranges for the majority of offenders.

To solve these problems, the report recommends 1) overhauling sentencing enhancements in light of technological changes and 2) equalizing sentencing practices for receipt and possession cases. An executive summary accompanying the full 468-page report outlines the details. It is this summary that was used to prepare this article.

Because the report advises a complete revision of U.S.S.G. § 2G2.2 (the guideline for non-production offenses), it concentrates on proposing a new system of enhancements organized around three categories: the nature of the child pornography collection, the degree of the offender's involvement in a community of child pornography offenders, and the offender's history of engaging in sexually abusive behavior. Enhancements for the nature of the child pornography collection should account for the size of the collection as well as the manner in which the images were collected, organized, and secured.

The proposed amendments shift attention away from collecting behavior; for example, the report strongly opposes the current enhancement for computer use. However, the proposed enhancements confirm that higher sentences are appropriate for offenders with a history of sexual abuse or a history of involvement in online communities that validate the exploitation of children and help others evade detection by law enforcement. For this reason, the report will be most helpful to attorneys representing unsophisticated offenders.

In its response to the report, the Department of Justice agreed that the current sentencing enhancements are flawed and suggested new enhancements similar those in the Sentencing Commission report. Given the agreement, defense attorneys can craft a strong argument for downward variances counteracting current enhancements.

The report also provides a foundation for defense attorneys to challenge the higher penalties for receipt offenders. As the report explains, technological changes vitiate the original reason for distinguishing receipt and possession. The offense categories were created at a time when commercial child pornography dominated the landscape. Criminalizing receipt facilitated the conviction of distributors who were difficult to catch in the act of distribution. Now, it is as easy to prove distribution as receipt; there is no law enforcement justification for the higher receipt penalties.

Finally, practitioners may find the report useful because it provides data countermining the claim that child pornography offenders are particularly prone to recidivate. The report is optimistic about new treatment options that may reduce the risk of further sexual abuse by those with clinical sexual disorders. Practitioners are advised to review of copy of the report, which can be found at this link:

http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Executive_Summary.pdf .

* Between 2004 and 2011, the average guideline minimum more than doubled (from 50.1 months to 117.5 months).

Many thanks to Allison Jaros for contributing these helpful tips. Allison is a third year law student at the Duke University School of Law and was an extern in the FPD office during the Spring of 2013.

LEGAL UPDATES

4th Circuit Update

For the latest Fourth Circuit update, please visit our website at http://nce.fd.org/ and go to "Publications." For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check http://circuit4.blogspot.com. To receive daily published Fourth Circuit opinions, register at http://pacer.ca4.uscourts.gov/opinions/opinion.htm.

Supreme Court Update

For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com.

If you have suggestions for news articles, or topics that you would like to see covered in a future edition of The Zealous Advocate, please contact the ZA Editors. Thanks!

LOCAL NEWS

FPD Office News

We bid a fond farewell and best wishes to:

Gale M. Adams, who was sworn in on Friday January 4, 2013 as a Cumberland County Superior Court Judge.

Gale Adams, shown here with three of her children, Precious, Joshua, and Leah, during her January 4, 2013 investiture. Photo Courtesy of The Fayetteville Observer.

Dean Ross who, after 30 years of service in the Federal government, retired on April 30, 2013 and will be moving with his family to Nebraska this summer.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys: in Raleigh: Russell David Babb, Laurie B. Biggs, Bo Caudill, Matthew Charles Faucette, Elizabeth Dean Hopkins, Robert Bruce Josey Jr., William H. Kroll and Mark A. Perry; Cary: Joshua "Gabe" Talton; Greenville: Lindsay Levine and Charles Marion Vincent; and Wilmington: Patrick Melton Mincey.

The following are new regular panel attorneys: in Raleigh: Michael F. Easley, Jr., Edd K. Roberts, Stephen Ervin Webb II, Alex Ryan Williams, Rhonda Graham Young, and Carol Ann Zanoni; Oriental: Jason Alan Brenner; Durham: EJ Hurst II; Warrenton: Robert Thomas May Jr., and Susan Morrice Thompson; Wilson: Jason R. Page; Chapel Hill: Lynne Louise Reid; and Kinston: Jacob Warner.