



# Justicia Omnibus

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## Our Mission Statement

The mission of the Federal Defenders of Western North Carolina, Inc. is to provide high quality representation to indigent defendants. In achieving this mission, this program will endeavor to: (1) provide the highest quality of legal representation; (2) advance the effectiveness of the legal system through excellence in legal scholarship and through ongoing education and training of the criminal defense bar and the community; (3) foster and promote high standards and ideals engendered by the Bill of Rights and the Criminal Justice Act; and (4) see that justice is administered on a fair and equal basis.

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## NOTES FROM THE FIRST YEAR

April 1<sup>st</sup> marked my first year anniversary as Executive Director of F.D.W.N.C. It has been a whirlwind year and I am pleased to see the progress of the office and its positive impact on this district. For example, the staff has contributed to lunchtime seminar programs in both Asheville and Charlotte. This month, AFD Peter Adolf will discuss legal arguments and strategies to use at detention hearings. Our website, [ncw.fد.org](http://ncw.fد.org), contains important updates on new 4<sup>th</sup> Circuit cases, C.J.A. forms, draft motions and other information of interest to the criminal defense bar. Please check it often!! Nancy Kimbrough (our C.J.A. Panel Administrator) has done a wonderful job of reviewing and auditing the C.J.A. vouchers to ensure compliance with the federal guidelines and policies. She has led the smooth transition in taking over the court-appointed function.

The attorneys in the office also have assisted C.J.A. counsel with questions, materials and moral support. Please continue to contact us (through phone or email) with questions, issues and concerns. We are all willing to assist and lend support to the C.J.A. panel and other members of the criminal defense bar!

Finally, you will be receiving a copy of the proposed new C.J.A. District Plan and proposed attorney application via email. These documents also are on the website. Kindly review the plan and the application and send me your comments. We must revise our district plan to conform our plan with the national model as well as to make some needed improvements to enhance the representation of indigent defendants in our district. Have a wonderful summer!

*Claire J. Rauscher, Executive Director*

## FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA

### OFFICES:

**Charlotte Office**  
 227 West Fourth Street  
 Suite 300  
 Charlotte, NC 28202  
 Phone: (704) 374-0720  
 Fax: (704) 374-0722  
 Website: <http://ncw.fد.org>

**Asheville Office**  
 Grove Arcade Building  
 One Page Avenue  
 Suite 210  
 Asheville, NC 28801  
 Phone: (828) 232-9992  
 Fax: (828) 232-5575

## CJA PANEL TRAINING

Mark your calendars for the June Brown Bag Series: On June 15 in Charlotte and June 27 in Asheville, Assistant Federal Defender Peter Adolf will present the law and proposed strategies for detention hearings in this District. Sandwiches and refreshments will be provided.

## KIMBROUGH COLUMN

Dear Panel Attorneys:

I wanted to take this opportunity to introduce myself as the new CJA Panel Administrator for the Federal Defenders of Western North Carolina, Inc. I come to this office with fifteen years of experience with the Federal Public Defender's Office for the District of Columbia, and I am very excited to be part of this new office. In Washington, D.C., I was, and still am, a very strong advocate of the CJA Panel Attorneys, and I had the opportunity and privilege to work very closely with many of the judges and their staff, the U.S. District Court personnel, the U.S. Attorney's office, and with my CJA Panel attorneys. I hope that I continue to be a resource and provide the same quality of services here.

As a first step I want to familiarize myself with the District Court and the CJA Panel attor-

neys. Secondly, in order to be sure that the information on the current CJA Panel list is up-to-date, and that the list contains accurate information, we will soon be sending out a questionnaire for you to complete. Our office has been conducting a series of "brown bag" seminars for the CJA Panel attorneys, and we are actively working on additional training tools and resources that will be useful to the CJA Panel attorneys. My door is always open, and I am always available to assist Panel attorneys. Please feel free to call my office at any time for assistance about any CJA-related issue. I also, invite everyone to stop by my office and introduce yourself.

I look forward to speaking or meeting each one of you in the future. Please contact me at the Charlotte office if you have any questions.

*Nancy C. Kimbrough, CJA Panel Administrator*

## THE MEANING OF "TESTIMONIAL" IN CONTEXT OF THE CONFRONTATION CLAUSE

The Supreme Court of the United States is likely to define the meaning of "testimonial" this term. *Crawford v. Washington*, 541 U.S. 36 (2004), prohibits the introduction of testimonial statements in a criminal trial, where the defendant has no opportunity to cross-examine the person who made the statements. Despite admonitions, Justice Scalia declined to define "testimonial" in *Crawford* to settle the question of its meaning because of the ambiguity, the Court granted *certiorari* in *Davis v. Washington*, No. 05-5224 and *Hammon v. Indiana*, No. 05-5705, to settle the question of what evidence is testimonial. These two cases involved domestic battery situations. In *Hammon*, Officer Jason Mooney of the Peru, Indiana, Police Department responded to the Hammons home in response to a domestic disturbance. Upon arrival, he found the alleged victim, Amy, on the front porch. He testified at trial that Amy appeared to be somewhat frightened, and he asked her if there was a problem or if anything was going on. She answered that nothing was the matter and that everything was all right. She permitted Mooney to enter the home where he found the husband/defendant and

evidence of what appeared to have been a struggle. Mooney returned to the porch and again asked Amy what had occurred.

Amy never testified at the trial. However, her statements were admitted through Officer Mooney under the excited utterance exception to the hearsay rule. An affidavit she executed was admitted as a present sense impression. The Indiana Court of Appeals affirmed Hammon's conviction in 809 N.E.2d 945 (Ind. 2004), as did the Indiana Supreme Court in 829 N.E.2d 444 (Ind. 2005). The Indiana Supreme Court refused to find that an excited utterance is necessarily nontestimonial. It did, however, find that the excited utterance by Amy was in fact, nontestimonial. The Court concluded that the test to define "testimonial" was whether or not the statement was one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. *Id.* at 456.

In *Washington v. Davis*, 154 Wash.2d 291, 111 P.3d 844, (Wash. 2005), Davis was charged with violating a domestic no-contact order after police responded to a 911 call from Michelle McCottrey. While on the telephone, McCottrey identified Davis as her assailant and told the

operator that Davis had used his fists to beat her and that he had left her residence moments earlier. McCottrey did not testify at Davis' trial. The state submitted the recording of her 911 call as evidence linking Davis to McCottrey's injuries, over Davis' objections. The Washington Supreme Court affirmed, holding that the 911 call in this case was not a testimonial statement under *Crawford*. The Court determined that an emergency 911 call is not of the same nature as an in-custody interrogation by police, so is not the functional equivalent of uncross-examined, in-court testimony. Second, the purpose of a 911 call is generally not to "bear witness." If the purpose of the call was for help or rescue, as in this case, it does not resemble the specific type of out-of-court statement with which *Crawford* is concerned.

The Supreme Court is expected to clarify what the term "testimonial" means in the context of the Confrontation Clause. Counsel is advised to object to hearsay statements on grounds of lack of confrontation in an effort to preserve the issue presented in the above-discussed cases.

*Gary Cook, Panel Attorney*

## GOVERNMENT INITIATIVE MAY BRING COPYRIGHT INFRINGEMENT CASES

A Justice Department initiative that targets and prosecutes non-commercial collecting and trading of copyrighted works is being coordinated out of the Charlotte office of the United States Attorney. The investigation targets individuals known as "Warez groups" and involves FBI agents posing as on-line traders and collectors of copyrighted works. The cases are handled in conjunction with the Justice Department's Computer Crime & Intellectual Property Section in Washington, D.C. It is anticipated that some targets may request CJA appointed counsel for the purpose of negotiating and signing plea and/or cooperation agreements or for trial. The targets are identified

through on-line trading of copyrighted computer software involving an FBI agent or cooperating individual. Their homes are searched and computers, disks and other electronic data are seized. They are not immediately arrested or charged. Instead, they are persuaded to cooperate and work covertly for the FBI assisting with gathering intelligence and evidence against others, primarily focusing on the infringement of high-tech computer software applications. These clients typically have already confessed and have been cooperating with the FBI for more than a year, leaving little for the attorney to do in terms of defending the threatened criminal prosecution.

Based on the cases reviewed by this office, most clients will be from outside the District; between the ages of 18 and 30; educated; and with little or no criminal history. They will likely be computer savvy and have backgrounds in engineering or computer science. Typically, after their ability to cooperate is exhausted, they will be given an opportunity to plead-pre-indictment to a felony offense of copyright infringement and will be offered a motion for substantial assistance to the government. The typical plea agreement offers a base offense level 8 pursuant to U.S.S.G. § 2B5.3 (a). A 2-level adjustment is added for uploading infringed works. U.S.S.G. § 2B5.3 (b) (2). The loss is typically calculated at between \$ 400,000 and \$ 1,000,000, increasing the offense level by 14 points to 24. After deducting acceptance levels, the adjusted offense level is 21. The resulting advisory sentencing range for a defendant with no criminal history is 37-46 months. The hazard of such an agreement is that if the Court follows the stipulated guideline at sentencing, your client could go to jail, even after the filing of a 5K.1 motion. Before signing plea agreements, counsel should evaluate the few limited defenses and specifically scrutinize the loss amount which will normally drive the advisory guidelines into a range with prison exposure.

This office has reviewed sentencing data from a number of cases prosecuted over the past couple of years around the country, and has found that most cases resulted in pleas and probationary sentences. It is unknown, however, what were the terms of those plea agreements. Some organizers of alleged conspiracies received prison sentences ranging from 6 to 48 months. Counsel looking to make § 3553 (a) (6) arguments for probation for their client should contact Assistant Federal Defender Kevin Tate if interested in reviewing the sentencing data.

### WHAT IS COPYRIGHT INFRINGEMENT ?

Criminal Copyright Infringement is the willful infringement of a copyright (a) for purposes of

commercial advantage or private financial gain, or (b) by the reproduction or distribution, during any 180 day period of copyrighted works with a total retail value of more than \$1,000. See 17 U.S.C § 506 (a) (1) & (2). It is also known as the NET Act.

The criminal penalties are set by statute. For a first-time violation where the infringement involves reproducing or distributing at least 10 copies with a total retail value of more than \$2,500, criminal penalties include up to 5 years imprisonment for a violation of (a) (1) or up to 3 years for a violation of (a) (2).

### DEFENSES TO BE CONSIDERED

Copyright infringement cases prosecuted under the NET Act are technical and opaque. Defending an infringement case begins with an analysis of the essential elements that the government must prove. To prevail, the government must prove: (1) a valid copyright exists, (2) it was infringed, (3) the infringement was willful, and (4) either (a) the infringement was for commercial advantage or private financial gain, or (b) the infringed work's value exceeded the statutory thresholds of more than \$1,000 or \$2,500.

The following should be considered in disproving the elements:

- \* Make sure the work is *actually* registered. If not, the government has no case. Is the seized copyrighted
- \* work more than 5 years old ? If so, can the government prove it was downloaded within the last 5 years? If not, move to dismiss since there is a 5-year statute of limitations.
- \* Can the government prove your client was the infringing person or was the work acquired from a third party? The statute disqualifies mere possession as an offense.
- \* The First Sale Doctrine allows redistribution of legitimately acquired copyrighted works (Note that this does not apply to electronic files).

- \* The Fair Use Doctrine allow limited use and reproduction of copyrighted works for *social benefits* (whatever that means).
- \* Client conduct was not willful because he/she incorrectly believed no infringement occurred applying the First Sale and Fair Use doctrines.
- \* The copyrighted work's value is less than the statutory amounts that criminalize the conduct. Must be at least \$2,500 for a felony offense and at least \$1,000 for a misdemeanor. Otherwise there is no crime at all.

*Kevin A. Tate, Assistant Federal Defender*

## DEFENDING AN ILLEGAL RE-ENTRY CASE

There is a rumor that the U.S. Attorney's Office will be filing more illegal re-entry cases. These cases are typically as difficult to defend as other "status type crimes" such as felon in possession. But there is hope for clients with specific facts. A recent unpublished decision by the Fourth Circuit, *United States v. Cisneros-Garcia*, No. 04-4835 (December 14, 2005) is instructive. Mr. Cisneros, charged with 8 U.S.C. § 1326, challenged, for the first time, the validity of the prior deportation order and asked the court to allow the jury to consider it as an affirmative defense during trial. The court denied the motion, which was renewed at the close of the government's case. Failing to change the court's previous ruling, defense counsel made a Rule 29 motion for reconsideration "due to the ineffectiveness of counsel in failing adequately to assist in [Mr. Cisneros'] defense." The motion was denied. Mr. Cisneros was convicted and received a sentence of 125 months (offense level 24 and criminal category VI). The reason for this lengthy sentence was the 16-level upward adjustment under U.S.S.G. § 2L2.2(b)(1)(A)(I), for having been previously convicted of an aggravated felony. On appeal, Mr. Cisneros argued that the trial court should have granted a judgment of acquittal based on due process violations at his deportation hearing. The court noted that under *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987), a defendant with a prior deportation order has a right to have a review of the validity of the deportation proceeding when it is used to establish an element of a criminal offense. *Mendoza-Lopez* was codified under 8 U.S.C. § 1326(d), which required that 1) an alien exhausted administrative remedies available; 2) the deportation hearing improperly deprived the alien of the opportunity for judicial review; and 3) the entry of the order was fundamentally unfair. Fundamental unfairness requires that the defendant's due process rights were violated by defects in the underlying deportation proceeding and that defendant suffered prejudice as a result of the defects. The prejudice prong is difficult to prove, as the defendant must show that but for the errors claimed, there was a reasonable likelihood that he would not have been deported. *See also, United States v. Wilson*, 316 F. 3d 506 (4<sup>th</sup> Cir. 2003). Although the court determined that Mr. Cisneros waived the issue by failing to file a pretrial motion to dismiss, it nevertheless examined the facts of the underlying deportation and noted that Mr. Cisneros failed to show a violation of due process at the deportation proceeding, as well as prejudice. If you are appointed to an illegal reentry case, it is important to order your client's "A" file from the Bureau of Immigration and Customs Enforcement "BICE" (formerly INS). In many jurisdictions, this file is part of the discovery. If you are not provided a copy, it is easily obtained from BICE; the request should also include a copy of the recording of the deportation hearing. Obtaining the file will usually not require a subpoena. It is rare, however, for the government to have a recording of the hearing; a letter requesting it to BICE is often sufficient. Getting the tape will take time so you may also need to file a motion to continue if operating under an

expedited trial calendar.

The tape will contain numerous hearings in addition to your client's, and the hearing itself is easy to miss because it is so short. You will also need to explore your client's and his family's background to determine if there was a basis for lawful status in the United States. Additionally, the basis for the removal must be investigated to determine if it was legal.

In one case I had in Nevada, my client was removed on the basis of a misdemeanor gun related charge. In reviewing the conviction, it appeared that the offense that he pleaded guilty to was not a deportable offense. I filed a pretrial motion to dismiss and there were several hearings in which the court required the defense to explain the removal process, obtain all court records and provide documentation of

the family's status in the United States. Because my client could have had legal status from his naturalized mother at the time he was deported, the district court found prejudice and dismissed the 1326 charge. The case took many months to resolve, and my client was in custody the entire time. At the minimum, you should request three months to prepare for the filing of the pretrial motion so that you will have time to obtain the necessary documentation. You may also want to ask the court for additional funds to obtain the expert services of an immigration lawyer, who will prove valuable in wading through the immigration documents and deportation procedures. Immigration law requires the same expertise normally found in tax law.

*Fredilyn Sison, Assistant Federal Defender*

## A NEW APPROACH TO INQUIRY INTO STATUS OF COUNSEL HEARINGS

We've all had a difficult client. This is the client who is dissatisfied with your representation for one or for many reasons: other co-defendants are getting better deals than your client; other defendants are receiving their discovery at the jail, so your refusal to give copies obviously means that you are hiding something from the client; you don't see the client enough; you're appointed counsel, so you're just a dump truck and aren't interested in doing anything in the client's case; or, because you're appointed counsel, you really just work for the prosecutor and have conspired with the government to ensure your client's demise. The difficult client, after reciting his litany of complaints about you, tells you that he wants another attorney because his life is on the line and you're obviously not going to help him in any way. What should you do or not do? Are there grounds for you to withdraw as counsel of record? The American Bar Association's Model Rule of Professional Conduct 1.16 addresses an attorney's withdrawal from the representation of a client:

(a) Except as stated in paragraph c, a lawyer

shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
  - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  - (3) The lawyer is discharged.
- (b) Except as stated in paragraph c, a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer's service that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer's services to perpetrate a crime or fraud;

- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (1) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (2) other good cause for withdrawal exists.

An attorney's right to withdraw from representation of a client arises only where there is good cause. In the circumstances in the opening paragraph, there is no ethical reason or mandate for you to move to withdraw from the case, and your client has merely indicated his dissatisfaction with your services -- unless the criticism is such a shock and so upsetting to you that you become incapable of conducting the case effectively. Your client persists with his request for new counsel and he wants you to do something about it. What should you do?

You can ethically suggest to the client that in view of his expressions of dissatisfaction that he might prefer to obtain other counsel. However, you should not contact the court clerk and ask for a hearing. You should tell your client that if he wishes to have the court appoint another attorney to represent him, he needs to write a letter to the court making that request. Once your client prepares the letter, you may provide it to the court on his behalf, by filing it under seal. The court sets a hearing date for inquiry regarding status of counsel. What, if anything, must you do during this hearing?

The typical practice in this District is for the judge to question defense counsel, the client, and the prosecutor about whether or not new counsel should be appointed. Here, the defense

attorney is required to state, on the record, and in the presence of the prosecutor, his or her representation of the client. This practice, which is unethical, must stop.

An attorney has a duty of confidentiality to his client. North Carolina Rule of Professional Conduct 1.6 addresses the confidentiality of information between the attorney and his client, stating that an attorney must not reveal information acquired during the professional relationship with the client unless the client gives informed consent. Therefore, at the beginning of the hearing, when the judge asks you about what you have or haven't done for your client during the course of the representation, you first should tell the court that the hearing must be conducted *in camera* and outside the presence of the prosecutor, because there may be confidential and privileged information provided during the hearing to which the prosecutor is not privy. If the court allows the prosecutor to remain in the courtroom, make your objection for the record. After the court has dismissed the prosecutor from the courtroom, the court again requests you to provide information to the court regarding your representation of the client. You should not give the court any information about your representation of the client. Instead, you should tell the court that your communications with your client are subject to the attorney-client privilege, and that you have nothing to say about the representation of your client. The client is the person who wanted this hearing, and the client is the person who should address the court about why he wants new counsel. Even if the client says awful things about you, and misstates what you have or haven't done in his case, you do not say a thing. After your client has told the court all about your being a worthless and incompetent attorney, should the court again ask you any questions regarding what your client has said, you again may remind the court that your communications with your client are privileged, and you therefore have nothing to say. If the court persists, ask the court to take your cli-

ent's waiver of the privilege on the record.

If your client waives the privilege in open court, you should only disclose information to the extent you reasonably believe is necessary for a response. A simple statement regarding the fact that the client believes there has been an irreparable breakdown in communication and that he has no confidence in you is sufficient. Should the court continue with questions, instead of answering them and demonstrating to the court that your client is difficult, just tell the court that you believe that it would be in the client's best interests if he were provided with new counsel (if that's what you truly believe).

The culture in this District of : (1) allowing de-

fendants to have new counsel every time their views of the representation differ from those of the attorney; (2) having prosecutors remain in the courtroom during the hearings in which the defendant is requesting new counsel; and (3) having defense counsel talk in court at length about the representation of their dissatisfied clients, must stop. It is your ethical duty to represent difficult clients. You are bound by the duty of confidentiality to resist disclosure of privileged communications, in spite of the fact that your client is difficult. Allow the court to determine whether new counsel should be appointed for your client based on your client's *in camera* communications to the court and not your testimony.

*Angela G. Parrott, First Assistant Federal Defender*

## FOURTH CIRCUIT UPDATES

Please note that the cases are listed in chronological order.

*United States v. Morris*, No. 04-7889 (Nov. 7, 2005): Morris appealed the district court's order denying her collateral attack under 28 U.S.C. § 2255. Morris pled guilty in 2002 to conspiracy to distribute, felon in possession of ammunition, and retaliation against an informant. At sentencing, she was given a base offense level "BOL" of 30, a criminal history category of IV, and a sentence of 200 months on the conspiracy count, as well as concurrent 120-month terms for the other two counts. Following the affirmance of her conviction on direct appeal in 2003 and the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), Morris contended that her BOL was increased improperly based on the quantity of drugs, which was found by the judge but neither alleged by the government nor admitted by Morris. The 4th Circuit agreed with the nine other circuit courts of appeals that *Booker* does not apply retroactively to cases on collateral review because under a *Teague* analysis, the rule in *Booker* does not qualify as a "watershed procedural rule" worthy of retroactive applica-

tion. The Court thereby affirmed the district court's denial of collateral relief.

*United States v. Forrest*, No. 04-4665 (Nov. 14, 2005): The Court affirmed Forrest's conviction and 120-month sentence for sexual exploitation of a child (18 U.S.C. 2251 and 2252A). Forrest first contended that the Commerce Clause should not apply to his intrastate, private production and possession of child pornographic photographs. Using the plain error standard, as Forrest's counsel had not raised the constitutional objection at trial, the Court dismissed this argument under the Supreme Court's decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), which rejected a similar challenge under the Controlled Substances Act and held that even where individual conduct has only a *de minimis* effect on interstate commerce, it suffices constitutionally as long as it is part of a class of activities that substantially affects interstate commerce. Additionally, the Court rejected Forrest's argument regarding his sentence under *United States v. Booker*, 125 S. Ct. 738 (2005), and *United States v. Rast*, 293 F.3d 735 (4th Cir. 2002), that the sentence should be vacated and remanded to allow the district

court the discretion either to impose a fine or imprisonment, as the language in 18 U.S.C. § 2251 permits. In *Rast*, the 4th Circuit held that the Guidelines, which at the time were mandatory, prohibited the imposition of a fine rather than a term of imprisonment. Based on this language and *Booker*, Forrest contended that the district court should have the post-*Booker* opportunity to revisit his sentence. Again under a plain error standard, the 4th Circuit rejected Forrest's argument because it could not find an effect on his substantial rights such that the district court would have imposed solely a fine rather than prison time had he been sentenced post-*Booker*. The Court rejected two additional evidentiary arguments and affirmed the decision of the district court.

*United States v. Gilbert*, No. 04-5004 (Nov. 28, 2005): Gilbert appealed his conviction under 18 U.S.C. § 922(g). Before the district court, Gilbert stipulated to the elements of § 922(g), but offered an affirmative defense of "innocent possession," explaining that he simply had found a bundle of guns and a backpack of ammunition and intended to turn them over to either the police or a friend. The district court credited Gilbert's testimony that he had no illicit motive in having the guns, but noted that the Fourth Circuit had not yet recognized such an exception to the statute. The Fourth Circuit refused Gilbert's argument and explained that "possession" under § 922(g) does not require a mens rea of wilfulness but only a mens rea of knowledge, which Gilbert did not dispute. Additionally, the Court distinguished the possibility of a justification defense to a § 922(g) charge, *see United States v. Perrin*, 45 F.3d 869, 873-75 (4th Cir. 1995), from an innocent possession defense. The Court affirmed the conviction.

*United States v. Alerre*, Nos. 04-42-5004 (Nov. 28, 2005): Appellants, three doctors who were convicted of drug distribution, drug conspiracy and money laundering, challenged their convictions on ineffective assistance of counsel and prosecutorial misconduct, insufficiency of the

evidence, and *Booker* grounds. The Court rejected the argument that the defendants' attorneys conflated the civil and criminal standards of liability for drug distribution, noting that the defendants failed to challenge the evidence introduced at trial or the jury instructions and instead simply offered a losing argument that the wrong standard of proof had been used. The court also found that the evidence was sufficient and the instructions proper as to the money laundering count. Finally, as to the sentencing issue, the government conceded that the defendants were sentenced based on quantities neither found by the jury nor admitted by the defendants. The court affirmed the appellants' convictions but vacated and remanded for resentencing.

*United States v. Harvey*, No. 04-4995 (Dec. 8, 2005) (unpublished): Harvey was convicted of conspiracy to distribute and possession with intent to distribute cocaine base, but he testified at trial that he participated in drug sales transactions only at the request of an officer named Williams. In addition to dismissing Harvey's arguments regarding constructive amendment of the indictment and improper admission of 404(b) evidence, the Fourth Circuit found no error in the district court's failure to *sua sponte* instruct the jury on the "public authority" affirmative defense. The Fourth Circuit noted that Harvey's reliance on the defense was not objectively reasonable, as the standard requires, since there was no evidence in the record regarding Officer Williams and any authority that any officer had to engage in covert activity. The Court remanded for resentencing because the district court found Harvey responsible for an amount larger than that alleged in the indictment.

*United States v. Berry*, No. 05-4052 (Dec. 19, 2005) (unpublished): The Fourth Circuit noted that the district court may not have complied with the requirements of 21 U.S.C. § 851(d) in enhancing Berry's sentence based on a prior conviction. However, it found that Berry could not show that he would have done anything

different had the court complied and therefore, there was no effect on his substantial rights. The Court found no *Booker* error and affirmed Berry's conviction and sentence.

*United States v. Williams*, No. 05-4434 (Dec. 19, 2005) (unpublished): Williams entered a conditional guilty plea to possession with intent to distribute, but reserved his right to appeal the district court's denial of his motion to suppress. Reviewing de novo, the Fourth Circuit found no error in the trial court's ruling that Williams lacked standing to challenge the search that unearthed the cocaine in question. In a parking lot, Williams placed a bag in the trunk of the car of a female companion and the two cars then drove off, with her car closely following Williams' car. When police stopped both vehicles, the female companion consented to a search, which yielded the bag containing ten kilograms of cocaine. Williams contended that he had an ownership and possessory interest in a bag that he had placed in the trunk, but the district court and Fourth Circuit found that Williams lacked an expectation of privacy in the area being searched, as he never was a passenger in the car. "Williams' claim of a supervisory role over the transportation of the bag and its contents is insufficient to afford him standing to challenge the search of a vehicle belonging to another and the contents of that vehicle."

*United States v. Nunez*, Nos. 04-4484 and 04-4504 (Dec. 21, 2005): Appellants, a husband and wife, challenged their convictions for conspiracy to possess with intent to distribute, possession, attempted possession and distribution under 21 U.S.C. § 841 and § 846, and 18 U.S.C. § 2. The DEA conducted an extensive investigation into the activities of Jenny and Carlos Nunez and their colleagues, including an interview of Jenny Nunez by an English-speaking agent (Toomey) and a Spanish-speaking agent (Negrón) who translated for Jenny and Toomey. Toomey then prepared a report of the interview (Report), which Report summarized the interview, provided a point-

by-point account and assessment of the charges, and implicated both Jenny and Carlos Nunez. In response to motions, the trial court initially ruled that a redacted Report would suffice to protect Carlos's Sixth Amendment rights. Subsequently, the Supreme Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), regarding the introduction of out-of-court testimonial statements. The Nunezes then moved to bar Agent Toomey from introducing the Report since it was not a first-hand account of Jenny's statements. The trial court agreed, reversed its earlier ruling, and allowed only Agent Negrón to testify as a fact witness, in which he referred to the Report but did not sponsor its admission. However, following deliberations, the jury sent a note stating they were unable to find the Report. Urged by the court, the government then moved to reopen the evidence and introduce the Report, and the Report then was submitted to the jury, over objections and motions for mistrial by the Nunezes. The jury convicted the Nunezes, and the trial court denied their motions for a new trial based on the improper reopening of the evidence and admission of the Report.

On appeal, the Fourth Circuit held that the convictions should be vacated and a new trial ordered. While a district court's decision to reopen evidence is within its discretion, the district court's discretion should be guided by several factors, including whether 1) the government has a reasonable explanation for its failure to present the evidence, 2) the evidence was relevant or admissible, and 3) reopening the case infused the evidence with undue importance, prejudiced the other party, or precluded the other party from addressing the evidence. *See United States v. Abbas*, 74 F.3d 506, 510-11 (4th Cir. 1996). The Court first concluded that the government lacked a reasonable explanation for its failure to submit the Report in its case-in-chief. On the second and third prongs, the Court determined that the Report was not properly admissible since the agents who would have introduced it were

not available for cross-examination by the Nunezes and the Nunezes were prejudiced by the inability to respond to the evidence. While the Fourth Circuit found that the trial court abused its discretion, it did not rule on the issue of whether the trial court erred by suggesting to the government that it reopen the evidence. The Court vacated the convictions and remanded for a new trial.

*United States v. El Shami*, No. 04-4662 (Dec. 27, 2005): After being arraigned for illegal re-entry after deportation charges in November 2004, El Shami moved to dismiss on the basis that his failure to receive proper notice in his 1993 deportation proceedings made the deportation order invalid under 8 U.S.C. § 1326(d). The district court denied the motion, finding that even if he had not received notice, El Shami could not show actual prejudice. The Fourth Circuit disagreed and found that El Shami met all three requirements for a collateral attack under § 1326(d): 1) exhaustion of administrative remedies; 2) improper deprivation of opportunity for judicial review; and 3) fundamental unfairness of the entry of the deportation order. The Fourth Circuit vacated the conviction on the unlawful entry count and remanded for re-sentencing.

*United States v. Belyea*, No. 04-4415 (Dec. 28, 2005) (unpublished): Belyea appealed his conviction for possession of a firearm by an illegal drug user on the grounds that the district court erred in excluding expert testimony on false confessions and in denying his motion for a new trial based on newly discovered evidence. The Fourth Circuit remanded on both issues, finding that it was error to exclude expert testimony on false confessions on the district court's stated basis that "jurors know that people lie" and error to deny the new trial in light of the testimony of five witnesses that another man had committed the crime. On the expert testimony issue, the Fourth Circuit found that the district court failed to make a particularized analysis as required by *Daubert*, particularly in light of the counter-intuitive concept of

false confessions. The district court erred in stating that the new evidence was neither material nor likely to result in an acquittal because the new evidence went directly to the issue of whether Belyea ever actually or constructively possessed the firearm.

*United States v. Cardwell*, Nos. 03-4585 and 03-4835 (Dec. 30, 2005): The Court found no error in the district court's denial of motions to suppress and sever, but vacated the appellants' sentences for various murder-for-hire offenses. As to the joinder of a gun count and the murder-for-hire counts, while the Fourth Circuit disagreed with the government's argument that a temporal relationship between charges suffices to meet the "logical relationship" test under Rule 8(a), the Court found that joinder was proper based on all of the facts presented. The Court also found a) no error in the district court's refusal to sever the gun count from the murder-for-hire counts, b) a valid waiver of *Miranda* rights regarding statements that Hinson, the co-defendant, made in custody, and c) sufficient evidence to sustain Cardwell's convictions. However, the Court did find plain error in the district court's use of facts not found by the jury for a four-level enhancement and remanded for re-sentencing.

*United States v. Rodriguez*, No. 04-4609 (Jan. 3, 2006): In calculating the sentence range for Rodriguez's conviction for unlawful entry, the district court considered a 2002 conviction on two Virginia state counts of aggravated sexual battery to be a prior conviction of a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii). In Rodriguez's plea, he admitted being removed after a conviction for an "aggravated felony" but objected to the PSR's suggested enhancement for a "crime of violence." Because the sentencing court applied the 16-level enhancement for the crime of violence rather than the 8-level enhancement for the aggravated felony, which Rodriguez admitted, the Fourth Circuit held that error required the vacation of the sentence.

*United States v. Meadows*, No. 03-4864 (Jan. 3, 2006) (unpublished): Meadows appealed his sentence for one count of possession with the intent to distribute cocaine base on the basis that his North Carolina conviction for possession with intent to deliver did not qualify as a felony offense under *Blakely* because, without aggravating factors, the maximum allowable sentence he could have received under state sentencing guidelines did not exceed twelve months. The Fourth Circuit held, however, that the statutory maximum for the offense did exceed twelve months. In response to Meadows's argument that the district court erred in treating the federal sentencing guidelines as mandatory in meting out his sentence, the Fourth Circuit found that, while the court had "made comments suggesting that it considered itself constrained by the then-mandatory guidelines range," these comments were "equivocal" and accordingly did not provide a basis for remand.

*United States v. Perez-Mendez*, No. 04-4151 (Jan. 3, 2006) (unpublished): Perez-Mendez pled guilty to conspiracy to distribute and possession with intent to distribute heroin and cocaine. On appeal, he contended that the district court abused its discretion when it refused to allow him to withdraw his guilty plea based on the fact that the government "impliedly promised" him an opportunity to provide assistance and potentially merit a motion for downward departure. However, the agreement did not require the government to do so, and the government refused to do so after it said Perez-Mendez provided false information to the court and the presentence investigator. The district court then used this apparent false information to enhance Perez-Mendez's sentence by two points for obstruction of justice. The Fourth Circuit held this enhancement to be error and remanded for resentencing, but it rejected Perez-Mendez's argument that the court also erred when it denied him acceptance of responsibility based on this same provision of false information.

*United States v. Lamkin*, No. 04-4249 (Jan. 4, 2006) (unpublished): After pleading guilty to one count of being a felon in possession, Lamkin challenged his sentence on the basis that the district court erred when it determined, without his admission or a finding by the jury, that he met the statutory requirements for Armed Career Criminal Act (ACCA) enhancement. The Fourth Circuit held that the ACCA enhancement does not constitute error under the Sixth Amendment where the facts necessary to qualify for the enhancement "inhere in the fact of conviction." The Court also dismissed Lamkin's argument that the district court erred when it found that his prior convictions had occurred on different occasions rather than as a series of crimes on a single occasion. The Court affirmed Lamkin's conviction and sentence.

*United States v. Phillips*, Nos. 05-4323 and 05-4324 (Jan. 5, 2006) (unpublished): The Court affirmed Phillips' and co-defendant Ziegler's convictions and sentences for one count of aiding in the distribution of cocaine base and conspiracy to distribute. In addition to a *Blakely/Booker* claim, Phillips argued that the district court erred in failing to grant him a one-level reduction for being a minor participant. The Fourth Circuit noted, though, that counsel did not formally move for a reduction pursuant to U.S.S.G. § 3B1.2 but rather simply asserted at sentencing that Phillips was the "most minor participant."

*United States v. Johnson*, No. 05-4378 (April 7, 2006): Artez Johnson pleaded guilty to aiding and abetting in the distribution of more than five grams of cocaine base and a quantity of cocaine, and possession with the intent to distribute more than five grams of cocaine base. The PSR, in calculating the offense level, totaled the amount of cocaine from all the charges, and not just the charge of conviction, pursuant to U.S.S.G. § 3D1.2. The district court sentenced him to 97 months, at the low end of the applicable advisory sentencing range. The Fourth Circuit found that guide-

line sentences were presumptively reasonable: first, because of the legislative and administrative process by which they were created; second, because the guidelines incorporate the § 3553(a) factors; and third, because sentences are based on individualized fact-finding resulting from a process that permits defendants to raise objections.

*United States v. Milam*, Nos. 04-4224 and 04-4225 (April 6, 2006), *amended* April 12, 2006: Brothers Jason and Lee Milam were charged in a seven-count indictment with trafficking in cocaine and ecstasy. Each pleaded guilty to Count 6, which charged them with aiding and abetting each other in distributing an unspecified quantity of ecstasy, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. During the plea colloquy, the brothers admitted to selling 51 ecstasy pills for \$20 each to a confidential informant. The PSR found that the amounts of cocaine and ecstasy attributable to the brothers was equivalent to 157.7 kilo-

grams of marijuana. The PSR based its conclusion on the brothers' statements, as well as independent sources. At sentencing, Lee Milam objected to the amounts attributable to him, contending that he should be sentenced only on the basis of the 51 ecstasy pills. The district court overruled in part Lee's objections and found the applicable drug amount was 87 kilograms of marijuana. Jason Milam objected to the acceptance of responsibility because of his positive urine analysis while on pretrial supervision. The Fourth Circuit vacated and remanded the cases for resentencing. The Court held that the facts stated in a PSR cannot, at sentencing, "be deemed to be admissions by the defendant sufficient to bypass the Sixth Amendment right to a jury trial" as stated in *Booker*, even though the defendant did not object to the facts.

*Lesley Whitcomb, Assistant Federal Defender for the District of Maryland*

## REPRESENTING THE NON-CITIZEN DEFENDANT IN FEDERAL COURT

The complexity of immigration law leaves many attorneys feeling like immigration matters are better left handled by experienced immigration attorneys. And indeed in many instances the belief is justified. However, although disclosure to a client concerning potential immigration consequences of a guilty plea is not required in federal court, defense counsel has at the minimum a responsibility of informing the non-citizen client that the guilty plea *could have* an effect on their citizenship or residency status in the future.

This article is part one of a three-part series. This first article discusses attorney liability, if any, for not disclosing immigration consequences to a defendant who pleads guilty to certain offenses in federal court. In the coming months the discussion will focus on removal (formerly deportation) based on certain convictions. Criminal defense attorneys represent a fair amount of non-citizen clients in federal

court. Some attorneys find themselves defending against ineffective assistance of counsel claims for failing to inform a client concerning potential immigration consequences of a guilty plea. However, the Fourth Circuit has held that an attorney's mere failure to inform a client regarding removal does not amount to ineffective assistance of counsel. Moreover, the Court held that requiring defense counsel to inform a client concerning collateral consequences of a plea, such as removal, placed an unreasonable burden on defense counsel. see *United States v. Yearwood*, 863 F.2d 6, 7-8 (4<sup>th</sup> Cir. 1988). Ten years later, the Fourth Circuit in *United States v. Jeter*, No. 97-7459, (Aug. 11, 1998), made the same finding and held that ineffective assistance of counsel claims would not stand because failing to advise a client regarding the collateral consequences of a plea does not render counsel's assistance ineffective. More recently, in *United States v. Burton*, 26

Fed.Appx. 351, 351 (4<sup>th</sup> Cir. 2002), the Court affirmed the holding in *Yearwood*.

Chances are that your client who is here unlawfully today may in the future want to return to the country legally. A quick reminder to

the client concerning potential immigration consequences may save your client unexpected grief in the future.

*Cecilia Oseguera, Assistant Federal Defender*

## VISITING OUR CLIENTS

Below are the jails detained defendants are being housed by the U.S. Marshals. Addresses and contact information are provided.

### BUNCOMBE COUNTY JAIL

20 Davidson Drive  
Asheville, NC 28801

(828) 250-4550

**Contact:** Captain Banks or Captain Matayabas

**Attorney Visitation:** 9:00 am-11:30 am; 12:30 pm-4:00 pm

**Family Visitation:** Tuesday and Thursday- Inmates sign up for visitation in a log book

### BURKE-CATAWBA DISTRICT CONFINEMENT CENTER

148 Government Drive  
Morganton, NC 28655

(828) 438-5435

**Contact:** Michael Metcalf

**Attorney Visitation:** Anytime until 9:00 pm (Preferably

not between 12:00 pm-1:00 pm)

**Family Visitation:** Males- Saturday, Alphabetically; Females- Sunday, Alphabetically

### GASTON COUNTY JAIL

425 N Marietta Street  
Gastonia, NC 28053

(704) 869-6869

**Contact:** Officer Johnson

**Attorney Visitation:** 9:00 am-11:30 am; 12:30 pm-11:30 pm

**Family Visitation:** 6:30 pm-9:45 pm, Alphabetically by day

### IREDELL COUNTY JAIL

221 East Water Street

Statesville, NC 28677 (704) 878-3131

**Contact:** Captain Mike Valentine

**Attorney Visitation:** 8:30 am-11:00 am; 1:00 pm-4:00 pm; 6:30 pm-10:00 pm ; Weekends 8:30 am-11:30 am; 6:30 pm-10:00 pm (Weekends will be crowded due to family visitation)

**Family Visitation:** Work Release Males- Sunday 12:45 pm-1:45 pm; All other Males (A-L) Saturday 2:00 pm-4:00 pm, (M-Z) Sunday 2:00 pm-4:00 pm; Females in Main, Saturday 12:45 pm-1:45 pm; Females in Annex, Monday-Friday anytime until 9:00 pm

### MCDOWELL COUNTY DETENTION FACILITY

593 Spaulding Avenue  
Marion, NC 28752

(828) 652-4000

**Contact:** Lieutenant Huskins or Captain Cook

**Attorney Visitation:** 6:00 am-8:00 am; 12:00 pm-1:00 pm; 5:00 pm-8:00 pm

**Family Visitation:** Anytime Saturday and Sunday

York, SC 28745

(803) 628-3080

Fax: (803) 628-3084

**Contact:** Chief Ralph Misle

**Attorney Visitation:** Weekdays from 8-11:30 am & 1-5:30 pm; Need 24 hrs notice for a contact visit

**MECKLENBURG COUNTY JAIL – CENTRAL**

Physical Address

801 E. 4<sup>th</sup> Street  
Charlotte, NC 28202

Inmate Mailing Address

Name of Inmate  
PID Number  
P.O. Box 34429  
Charlotte, NC 28234-4429

(704) 336-2543

Contact Visit Fax (704) 432-1836

**Contact:** Captain McCoy (704) 432-0396

**Attorney Visitation:**

Seven days/week: 7:45 am – 11:30 am; 1:00 pm – 4:30 pm; 5:30 pm – 6:30 pm; 7:45 pm – 11:00 pm

**Family Visitation:** Weekdays Only: 8-11 am & 1-4pm & 8-11pm; Inmates in Mecklenburg County Jails are allowed one thirty-minute visit per week. Two adults or one adult and two children may visit at any one time. Adults must be 16 years of age or older and must provide proper identification such as: valid driver’s license, passport, DMV Special ID, or Military ID.

**MECKLENBURG COUNTY JAIL – NORTH**

Physical Address

5235 Spector Drive  
Charlotte, NC 28269

Inmate Mailing Address

Name of Inmate

PID Number  
P.O. Box 34429  
Charlotte, NC 28234-4429

(704) 336-8504

**Contact:** Major Charles Johnson  
(704) 432-2759

**Attorney Visitation:** (Need license and bar card) Seven days/week: 7:45 am – 11:30 am; 1:00 pm – 4:30 pm 5:30 pm – 6:30 pm; 7:45 pm – 11:00 pm

**Family Visitation:** Weekdays Only: 8-11 am & 1-4pm & 8-10 pm. Inmates in Mecklenburg County Jails are allowed one thirty-minute visit per week. Two adults or one adult and two children may visit at any one time. Adults must be 16 years of age or older and must provide proper identification such as: valid driver’s license, passport, DMV Special ID, or Military ID.

**RUTHERFORD DETENTION CENTER**

198 N. Washington St.  
Rutherfordton, NC 28139

(828) 287-6160 (Main) to contact inmates  
Fax (828) 287-6476

Contact: Jail Supervisor (828) 287-6245;

Juvenile Services (828) 287-6464

**Attorney Visitation:** Daily, anytime of the day.

**Family Visitation:** Need a valid license from any state or any state ID card for visitation. Floors 1 & 3 : Last Name A-L : Saturday, 8:30 am to 10:30 am; Floors 1 & 3 : Last Name M-Z : Saturday, 1:00 pm to 3:00 pm; Floors 2 & 4 : Last Name A-L : Sunday, 8:30 am to 10:30 am; Floors 2 & 4 : Last Name M-Z : Sunday, 1:00 pm to 3:00 pm; Female Visitation : 7:30 pm to 9:30 pm Saturday; Trustee Visitation : 7:30 pm to 9:30 pm Sunday.

**SWAIN COUNTY JAIL**Physical Address

8 Everette Street

Bryson City, NC 28713

Inmate Mailing AddressInmate #

P.O. Box 1398

Bryson City, NC 28713

(828) 488-4844

Fax (828) 488-2385

**Attorney Visitation:** Call the main number and tell them who you are visiting and when; need an ID and a bar card.

**Family Visitation:** No ID necessary, but better to bring one. State Inmates – Saturday 8-

12 &amp; 1-6; Federal Inmates – Sunday 8-12 &amp; 1-6

**YORK COUNTY DETENTION CENTER**Physical Address

1675 York Hwy

York, SC 29745

Mailing Address

Inmate Name

1675-3A York Highway 5

**Family Visitation:** Have to know what Block they are in (Letter) they have certain days and times

Only allowed 1 hour per week of visitation from family/friends; Need a State ID or license

*Lisa Ottens, Case Manager and Panel Assistant & Danielle Gelder, Branch Manager*

**ARE FINGERPRINT IDENTIFICATIONS INFALLIBLE?**

Prior to the FBI's IAFIS (Integrated Automated Fingerprint Identification System), it could take several weeks for fingerprint comparisons to be made because it involved hand searching through file cabinets of inked fingerprint cards. Since IAFIS, the system can bring up possible matches in as little as seconds. Originally, the prints entered into the system were from inked cards. As technology has advanced, entries on the system include images from digital photos. This should raise a new area of concern for defense teams. As with any digital image, police technicians can digitally enhance and "clean up" fingerprint images to make comparison easier. The FBI has no way of monitoring these clean ups to determine whether or not the print is still an accurate representation of the original. Now that 80 percent of the prints submitted to the FBI are digital prints, defense teams need to question their handling and validity.

Who handled the print?

Some questions to ask and points to clarify.

Was the print that was used for comparison an inked print, or digital print image?

Is the digital print the "original capture"?

Did anyone in the process manipulate, enhance, or clean up the image?

If the print was enhanced, make the person who enhanced it detail their training to do so, explain exactly what they did, verify their expertise to do so, and show that it did not alter the outcome of the comparison.

*Paulette Kasieta, Investigator*