

News

- 1/23/2007 The Syracuse CJA seminar will be May 10, 2007. Speakers are being chosen and a brochure will go out before the end of February. We are certain to have a speaker on federal sentencing law. Yesterday, the Supreme Court just made it murkier in *Cunningham v. California*. They struck down the California sentencing scheme for reasons that would imply that “presumptive guidelines” are equally suspect. Maybe, by the seminar, the Court will have decided *Claiborne v. U.S.*, No. 06-5618 and *Rita v. U.S.*, No. 06-5754, cases exactly on that point.
- 1/17/2007 I am planning our annual Syracuse CJA seminar for April. We are trying to coordinate the various judges’ schedules to pick the exact day. One topic to be covered is the changes to the laws affecting federal sex offenses. These cases are more complicated to defend and their statutes of limitations have been removed. In the meantime, you should know that if the government (including BOP) can get your client certified as a “sexually dangerous person,” the defendant may be subject to lifetime supervised release or even lifetime civil commitment. 18 U.S.C. §4248. This means you must be more vigilant protecting your clients from unnecessary questions about their past conduct, offers of mental health testing, or counseling, even when it is provided under the pretext of helping them.
- 12/11/2006 We must all be prepared to deal with the Adam Walsh Act, a collection of bad ideas about how to punish those charged or convicted of crimes that are related to child exploitation. The worst of which are new procedures for civil commitments following imprisonment. I am attaching a short paper to give some basic advice, and a decision from WDNY refusing to apply the new bail provisions of the Act.
- 11/20/2006 If you thought that your appointment as CJA counsel meant that you were expected to have a “meaningful attorney-client relationship,” see the most recent opinion issued in *United States v. Darnyl Parker*, 2006 WL 3307620 (2d Cir. 2006). The Circuit denied trial counsel appointment on appeal because he was not on the Circuit’s CJA Panel. In an earlier *Parker*, the Circuit upheld the WDNY’s policy of requiring attorneys to be “fully retained” at their first appearance in court. 439 F.3d 81 (2d Cir. 2006). The irony is that the lawyer, Buffalo’s Mark Mahoney, sits on the Circuit’s committee reviewing whether lawyers may be admitted to the Circuit’s CJA Panel.
- 11/6/2006 On November 1, 2006, we had our annual Albany CLE at the Crowne Plaza Hotel. There was a lively panel discussion with Chief District Judge Norman A. Mordue, Senior District Judge Frederick J. Scullin, Jr., District Judge Lawrence E. Kahn, Magistrate Judge David R. Homer, AUSA Grant Jaquith and USPO Craig Penet. Course materials from speakers Jennifer Coffin, Eric Vos, and Hank Sadowski, have been posted on the website.
- 10/17/2006 Recently, the Second Circuit rejected arguments that district courts were allowed

to consider policy matters such as the lack of “Fast Track” programs in the districts, or the 100/1 crack to powder disparity. Based upon a recent oral argument in the Supreme Court in Cunningham v. California there is hope the Circuit’s repudiation of those arguments may have been premature.

- 10/4/2006 The brochure and application for our November 1, 2006 CJA Seminar is now available. Please sign up. It is free. I am also posting an excellent outline on search and seizure law, as well as a brief urging the consideration of childhood abuse and trauma at a sentencing hearing.
- 09/29/2006 A brochure is being prepared describing our Wednesday, November 1, 2006 CJA Seminar at the Crowne Plaza Hotel in Albany. As always, this is a day-long free event providing 6.0 hours of CLE, breakfast, lunch, and written materials. The seminar includes a two-hour panel discussion featuring Chief District Judge Norman A. Mordue, Senior District Judge Frederick J. Scullin, Jr., and District Judge Gary L. Sharpe, as well as representatives from the U.S. Attorney and U.S. Probation. Other speakers will be Maine AFD Eric Vos, National Sentencing Resource Counsel Jennifer Coffin, Bureau of Prisons Regional Counsel Hank Sadowski, and SDNY attorney, and former CJA representative, Fred Cohn.
- 09/14/2006 The Federal Bureau of Prisons has a great deal of important information on its website. <http://www.bop.gov> . Some materials also appear on this website. I am providing two links, The first is to BOP’s *State of the Bureau* publication, which provides listings of all its facilities. <http://www.bop.gov/news/PDFs/sob05.pdf> . The second is the recent changes to the BOP’s Program Statement on designation and classification. http://www.bop.gov/policy/progstat/5100_008.pdf .
- 08/25/2006 Last week, the Circuit took away arguments for lower sentences based upon any categorical rejection of the 100:1 crack to powder ratio for cocaine cases. United States v. Castillo, _F.3d_, 2006 WL 2374281 (2d Cir. Aug. 16, 2006). This week, the Circuit did the same thing for the lack of “Fast Track” immigration crime sentencing programs in the Northeast. United States v. Mejia, _F.3d_, 2006 WL 2411384 (2d Cir. Aug. 22, 2006). This does not mean that the drug and immigration guidelines must be followed in lock step. It just means that arguments for lower sentences must be tailored to each defendant and offense, and not based upon categorical inequities of law.
- 08/17/2006 In United States v. Castillo, the Second Circuit joined several other circuits by finding that judges may not categorically reject the 100:1 ratio between powder and crack cocaine under the sentencing guidelines. However, they did say, “[W]e believe that individualized consideration of the defendant’s circumstances pursuant to § 3553(a) can result in a sentence lower than the Guidelines range produced by the ratio...” *See* Footnote 4. For an up-to-date review of sentencing law see the new article by Amy Baron-Evans just posted. Also read Steve Sady’s article on BOP issues. Sady’s blog is excellent.

- 08/09/2006 Next time you are having trouble articulating a reason why the court should impose a sentence lower than recommended by the guidelines, the probation office, or the prosecutor, don't feel bad. Sometimes, it is just a "gut feeling." The Second Circuit says that is o.k., and a judge's gut has as much validity as any other authority. United States v. Jones, 2006 WL 2167171 (2d Cir. August 2, 2006).
- 08/07/2006 The Second Circuit held that the Federal Bureau of Prisons exceeded its authority by promulgating a rule categorically limiting halfway house placement to prisoners with 10 percent or six months remaining on their sentences. Levine v. Apker, 2006 WL 1901020 (2d Cir. July 10, 2006).
- 07/20/2006 I am attaching a letter written on behalf of the federal defenders to the United States Sentencing Commission making recommendations for amending the guidelines to reflect changing priorities in sentencing law. Amy Baron-Evans, a speaker at our April Syracuse CJA seminar, is a principle author. The letter is lengthy, but it is helpful in defining a number of cutting edge issues that should be explored in sentencing memoranda right now.
- 07/12/2006 A recent search by the Clerk's Office of CJA records determined that 53 members of the CJA Panel are not in compliance with the District's requirement that Panel members attend either one (1) locally or national sponsored CJA continuing legal education seminar every two (2) years. *See* NDNY General Order 1, Append. I. The FPD presents two seminars every year. The Spring seminar is in Syracuse. The Fall seminar is in Albany. Attendance has averaged 60 lawyers at each location. Please plan to attend the November 1, 2006 seminar at the Crowne Plaza Hotel in Albany. A brochure will be posted later.
- 07/07/2006 Next month, AFD Dave Secular will be leaving our Syracuse office to become an AFD in the Tampa Office of the Middle District of Florida. Dave has been with us since the office opened in Fall 1999. He has done a fine job and will miss him. I tried to convince him that Lake Onondaga also had a fine beach, but he did not believe me.
- 06/30/2006 The Supreme Court is looking to international law for authority, particularly those conventions and treaties to which the United States is a party. In Hamdan v. Rumsfeld, the Court applied the Geneva Conventions to its determination that the Guantanamo military tribunals are illegal. In Sanchez-Llamas v. Oregon, the Court found that federal courts are bound by the Vienna Convention on Consular Relations, even though it may not be enforced through the exclusionary rule. Our office has recently raised the issue of whether Article 31(1) of the 1951 Convention on Refugees protects aliens with political asylum claims from a preemptive criminal prosecution.
- 06/27/2006 More Supreme Court cases: United States v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006) (Denial of chosen counsel cannot be harmless error); Kansas v. Marsh, 126

S.Ct. 2516 (2006) (Statute may allow death penalty on equal mitigating and aggravating factors); Washington v. Recuenco, 126 S.Ct. 2546 (2006) (Omission of sentencing factor in charge to jury was not structural error); Dixon v. United States, 126 S.Ct. 2437 (2006) (Burden of duress defense belonged to defendant).

- 06/26/2006 In United States v. Rattoballi, 2006 WL 16999460 (2d Cir. June 21, 2006), the Second Circuit has again attempted to explain the legacy of *Booker/Fanfan*. Although, not presumptive, the guidelines still leave large footprints upon sentencing law. First, when sentencing, judges are not to rely on attributes that are common to all defendants, especially when they conflict with guideline policy statements. Second, each sentence must be supported by a compelling statement of reasons. Therefore, lawyers should make sure that judges are provided such compelling reasons, so that favorable non-guideline sentences are not later reversed on appeal.
- 06/21/2006 On April 25, 2006 we held a 6.0 hour CLE seminar in Syracuse. We now have a professionally recorded and edited set (3 DVDs) of that presentation. The seminar brochure (see "Training"), lists the topics and speakers. Contact the Albany office to inquire about obtaining a set for free. Two more important Supreme Court cases were decided. In Samson v. California, 126 S.Ct. 2193 (2006), the Court held parolees, probationers, or supervised releases are subject to suspicionless searches. In Davis v. Washington, 126 S.Ct. 2266 (2006), the Court ruled that while cries for help are not testimonial statements within the meaning of the Sixth Amendment, accusations of previous misconduct are.
- 06/15/2006 There are more Supreme Court decisions this week. First, there is no suppression of evidence for a violation of the Fourth Amendment's "Knock and Announce" rule. Hudson v. Michigan, 126 S.Ct. 2159 (2006). However, lethal injection may be challenged by a writ of habeas corpus, Hill v. McDonough, 126 S.Ct. 2096 (2006), and DNA evidence may be used to prove "actual innocence." House v. Bell, 126 S.Ct. 2064 (2006).
- 06/12/2006 The following are Supreme Court cases on criminal law and procedure still pending this term: 04-1170 - Kansas v. Marsh (constitutionality of Kansas death penalty statute); 04-1360 - Hudson v. Michigan (remedy for violation of knock-and-announce rule); 04-8990 - House v. Bell (scope of right to present new evidence of innocence); 04-9728 - Samson v. California (authority to search parolee without a warrant or suspicion); 04-10566 - Sanchez-Llamas v. Oregon (state court duty to arrested foreign nationals for access to consulate); 05-83 - Washington v. Recuenco (harmless error analysis for sentence enhancement); 05-352 - U.S. v. Gonzalez-Lopez (remedy for denial of counsel of choice); 05-416 - Woodford v. Ngo (scope of exhaustion requirement for writs); 05-5224 and 05-5705 - David v. Washington and Hammon v. Indiana (excluding evidence of excited utterances under *Crawford*); 05-5966 - Clark v. Arizona (right to make an

insanity defense to disprove intent); 05-7053 - Dixon v. U.S. (burden of proof on defense for duress or coercion); 05-8794 - Hill v. McDonough (challenge to lethal injection).

- 06/05/2006 According to the Supreme Court in U.S. v. Zedner, 126 S.Ct. 1976 (2006) all trials must now be speedy. Thanks to AFPD Ed Zas in SDNY.
- 05/31/2006 A string of unanimous Supreme Court opinions has ended. In Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), a 5-4 decision, the Court limited the free speech rights of public employees. As a result, do not expect prosecutors to complain about misconduct by law enforcement. They could lose their jobs.
- 05/26/2006 Prison is not cheap. The Administrative Office of the United States Courts released statistics showing that it cost \$23,431.92 per year to house someone in federal prison in fiscal year 2005. Pretrial detention was no bargain either at \$22,665.23, for each defendant annually. In-state college tuition, room and board, is still less expensive.
- 05/22/2006 In the Chief Justice Roberts era everyone on the Supreme Court agrees. Unfortunately, today they agreed on weakening the Fourth Amendment. In Brigham City v. Stuart (9-0) [Brigham City v. Stuart, 126 S.Ct. 1943 (2006)], the Court added a new wrinkle to the “knock and announce rule.” Now, if the police think somebody inside is in danger, they can just “announce.” Maybe the Court will now approve the so-called “Alabama Search Warrant.” That is when an officer knocks on the front door announcing, “Police!” and an officer in back of the house responds, “Come in!”
- 05/15/2006 The Sentencing Commission announced its proposed 2006 amendments. There are many changes including guidelines for steroids and terrorism. This is bad news for bodybuilders attacking the United States. For more common Northern New York cases, there are increases in immigration and firearms cases. There is a two-level increase for smuggling a minor unaccompanied by a parent or grandparent. Upward departures are recommended when smuggling is for subversive activity, drug trafficking, other serious criminal behavior. False document cases will be increased for their use to evade immigration laws. Stolen firearms with obliterated serial numbers will now get a four-level bump. Firearms trafficking will be a separate specific offense characteristic. The definition of obstruction of justice has been broadened. One positive note: compassionate release from BOP is now appropriate for any extraordinary and compelling reason for sentence reduction.
- 05/03/2006 Bad news and good news. The bad news is that probation officers may use

polygraphs as tools to monitor whether defendants on supervised release or probation are abiding by conditions of release. United States v. Johnson, 2006 WL 1148514 (2d Cir. May 1, 2006) was an appeal from a case before Judge McAvoy. The good news is that a federal employee may leave an obscenity-laced voice-mail for her employer without worrying about a conviction for assault. Colleen Cassidy won that appeal in United States v. Temple, 2006 WL 1148703 (2d Cir. May 1, 2006) arising from a conviction in the Southern District.

- 04/13/2006 Yesterday, the Supreme Court adopted a rule allowing unpublished appellate opinions to be cited by attorneys. The rule will go into effect on December 1, 2006, unless Congress acts to prevent it. This is particularly significant in the Second Circuit where the local rule currently prohibits citation to unpublished opinions. Ninth Circuit Judge Alex Kozinski stated in protest, "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway."
- 04/11/2006 AFD Tim Crooks of Houston, Texas recently got certiorari granted on the issue of whether simple possession of a controlled substance is an aggravated felony for purposes of enhancing immigration offenses. Toledo-Flores v. United States, 2006 WL 842994 (U.S. April 3, 2006). Ed Zas, Barry Leiwant, and Sean Hecker recently filed a brief in a case that will determine when a defendant effectively waives Speedy Trial time limits, and whether violating those limits may be harmless error. See United States v. Zedner, 2006 WL 422140, cert. granted 126 S.Ct. 978 (2006).
- 04/10/2006 A Panel of the Eleventh Circuit has struck down the statute criminalizing promotion of child pornography. In United States v. Michael Williams, 2006 WL 871200 (11th Cir. 2006) the court found 18 U.S.C. § 2252A(a)(3)(B), is invalid on its face.
- 04/10/2006 The Administrative Office of the United States Courts has issued new regulations [Volume 7, *Guide to Judiciary Policies and Procedures*] providing due process to attorneys who face voucher reductions by judges. The Northern District previously established such a procedure in its Local Rules last year.
- 4/07/2006 In an important new case, the Second Circuit held that the federal sentencing guidelines are not presumptively reasonable and that a judge may consider a defendant's cooperation, without a government motion, as long as the sentence does not violate a statutory minimum requirement. In United States v. Fernandez, 2006 WL 851670 (2d Cir. April 3, 2006) the panel took a position different than most other circuits by holding the guidelines are simply one consideration under 18

U.S.C. § 3553, and the mere fact that a sentence is calculated within the appropriate guideline range does not necessarily make it reasonable within the meaning of *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

04/06/2006 Federal Public Defenders regularly provide advice and counsel to the United States Sentencing Commission on pending amendments. Recently, a letter on proposed increases to firearms guidelines was sent.

04/05/2006 The first news is the opening of this website. Previously, I sent lawyers newsletters and updates by e-mail. The problem was that attachments were often stripped by service providers and addresses were subject to change. I constantly got multiple error messages and could not tell whether the addressees ever received the materials or not. A regularly updated website saves us work and provides lawyers with a reliable place to find current legal resources.