FEDERAL PUBLIC DEFENDER REPORT

Federal Public Defender
Volume 15, No. 1 Western District of New York February 2009

JUDICIAL DISCRETION IN THE POST-BOOKER ERA

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As every criminal law practitioner in federal court knows, the United States Sentencing Guidelines are advisory. *See Gall v. United States*, 552 U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d 335 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) ("It is now . . . emphatically clear that the Guidelines are guidelines - that is, they are truly advisory"). Under the advisory sentencing guidelines regime, the sentencing court, after correctly calculating the advisory guidelines range and considering all of the sentencing factors set forth under 18 U.S.C. § 3553(a), must impose a sentence that is sufficient, but not greater than necessary, to meet the purposes of sentencing. *See Gall*, 128 S.Ct. at 596-97; 18 U.S.C. § 3553(a). This gives the sentencing court broad discretion when imposing a sentence outside of the advisory guidelines range. *See Cavera*, 550 F.3d at 187 (noting that, after *Booker*, sentencing courts are permitted "to tailor the appropriate punishment to each offense in light of other concerns").

The Second Circuit has handed down several cases explaining the extent of the sentencing judge's discretion when imposing a non-guidelines sentence. Given the sentencing judge's discretion, the Circuit has upheld non-guidelines sentences that have been imposed for various reasons. In one case, the sentencing court gave a non-guidelines sentence based on his "gut feelings" about the defendant. In another case, the sentencing court gave a nonguideline sentence below the guidelines range based on the court's views that the guidelines were overly harsh, and because the defendant had a good character. In a third case, the sentencing court gave a non-guidelines sentence above the guidelines range based on the perceived effect of the offense within the district. Each of these three cases are important not just because they exemplify the type of discretion that a judge has when imposing sentence, but because it also shows the double-edged sword that a defendant must anticipate.

Sentencing under the Advisory Guidelines Regime

There seemed to be some confusion within the federal judiciary as to how sentencing should be handled after the Supreme Court handed down its decision in *Booker*. The Second Circuit provided guidance to the district courts in Connecticut, New York, and Vermont, when it handed down its decision in *United States v. Crosby*, 397 F.3d 103, 111-14 (2d Cir. 2005) (explaining sentencing after *Booker*). The Supreme Court cleared up any confusion that existed throughout the rest of the country when it reiterated the procedure a sentencing

court must follow under an advisory guidelines sentencing regime. *Gall*, 128 S.Ct. at 596-97; *see also Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2468-2469 (2007) (discussing the analysis the sentencing court must undertake before imposing sentence) .

According to the Supreme Court, before imposing sentence the district court must first correctly determine the advisory guidelines range. *Gall*, 128 S.Ct. at 596. Next, the parties must be allowed to present their arguments for "whatever sentence they deem appropriate." *Id*. The sentencing court will then consider the factors set forth in 18 U.S.C. § 3553(a) to determine whether these factors support a sentence requested by the parties. *Id*. This requires the court to "make an individualized assessment based on the facts presented." *Id*. at 597. Further, if the court determines that a sentence outside the guidelines range is warranted, the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id*. After determining the appropriate sentence, the court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id*.

It is the sentencing court's ability to impose a sentence based on § 3553(a)'s sentencing factors that gives the court discretion to go above or below the advisory guidelines range. As long as the court follows the procedure for imposing sentence, and adequately explains its reason for imposing a non-guidelines sentence, the sentence should be upheld on appeal. *See Cavera*, 550 F.3d at 189-90 (discussing the appellate court's role in reviewing sentences after *Booker*); *Crosby*, 397 F.3d at 114-19 (discussing appellate review of sentences after *Booker*). A review of these cases will illustrate the extent of judicial discretion and how to frame an argument in order to protect your client.

A Sentence Based on the Court's Gut Feeling about the Defendant

In *United States v. Jones*, 460 F.3d 191 (2d Cir. 2006), the district court rejected a Rule 11(c)(1)(C) plea that had a stipulated guidelines range of 30-37 months imprisonment, and imposed a 15 months' sentence based on the court's "gut feeling about" the defendant. The court also took into account the defendant's work ethic, his support for his wife and child, the assistance and support he gave to other members of his family, the recent death of the defendant's father, the defendant's attempts at college, his adjustment to state probation, and the fact that the defendant would be on supervised release for three years. *Jones*, 460 F.3d at 194. The Second Circuit panel rejected the government's appeal, noting that the government "fail[ed] to appreciate the enhanced scope of a sentencing judge's discretion in the post-*Booker* world of advisory Guidelines." *Id*. at 195.

According to the majority opinion, "[a]lthough the sentencing judge is obliged to consider all of the sentencing factors outlined in section 2552(a), the judge is not prohibited from including in that consideration the judge's own sense of what is a fair and just sentence under all the circumstances. That is the historic role of sentencing judge's, and it may continue to be exercised . . . ." *Id*. The majority also rejected the notion that the sentencing court erred by failing to specifically articulate why a 15 months sentence was appropriate, rather than a 14 months or 16 months sentence. *Id*. The panel declined to impose such a requirement, noting that the "[s]election of an appropriate amount of punishment inevitably involves some degree of subjectivity that often cannot be precisely explained." *Id*.

Harsh Guidelines and the Defendant's Character

In *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006), *aff'd*, No. 06-2738-cr(L), 06-3179(XAP), 2008 WL 5155341 (2d Cir. Dec. 9, 2008), the defendant was convicted after a trial of conspiracy, securities fraud, and three counts of filing false reports with the U.S. Securities and Exchange Commission. According to the government, the advisory guidelines called for a life sentence, though the sentence was limited to a maximum sentence of 85 years based on the charges for which the defendant was convicted. *Id*. at 507.[1] According to the government, the defendant had an offense level of 55. *Id*. at 509. The government argued that a sentence in the range of 15 to 30 years imprisonment should be imposed, while the defendant argued that the proper guidelines calculation resulted in a sentencing range of 21 to 27 months imprisonment, and argued for a sentence below this range. *Id*. at 507. The sentencing court

[1] The defendant was acquitted of seven counts of filing a false report with the SEC. 441 F.Supp.2d at 507.

imposed a non-guidelines sentence of 42 months imprisonment. *Id*.

The government's conclusion that the defendant had an offense level of 55, the court explained, was based on "the inordinate emphasis that the Sentencing Guidelines place in fraud cases on the amount of actual or intended financial loss." *Id*. at 509. According to the court, the guidelines' attempt to be objective, with its emphasis on "putatively measurable quantities," can lead to a "multiplier effect [in fraud cases] that may lead to guideline offense levels that are, quite literally, off the chart." *Id*. at 509. This was exacerbated by the fact that loss in a criminal securities fraud cases is the decline in the price of the stock when the fraud is revealed. *Id*. Given that the defendant entered the conspiracy in its latter stages, the court focused on intended loss, which it concluded was between $50 and $100 million, rather than actual loss, which the government argued was no less than $260 million. *Id*. at 509-10. With adjustments, the court determined that the defendant had an offense level of 46. *Id*. at 511. While less than the offense level of 55 recommended by the government, it still resulted in a guidelines recommendation of life imprisonment. *Id*. The statutory maximum for the defendant's sentence was 85 years imprisonment. *Id*. According to the court, even the government balked at the possibility of the defendant being given this sentence. *Id*. at 511-12.

The government's hesitation to request the court to impose a guidelines sentence "exposed . . . the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." *Id*. at 512. The court therefore chose to fashion a sentence that took the guidelines into account, but focused more on the statutory factors set out in 18 U.S.C. § 3553(a). *Id*. In imposing sentence, the court noted that the defendant was not the originator of the fraud, and he did not participate in the conspiracy until its final months. *Id*. at 513. The court also noted that the defendant's history and characteristics were exemplary. *Id*. Over 100 letters were received from persons of all walks of life pointing to the defendant's "good works and deep humanity." *Id*. The court recognized that most of the defendant's acts "were not performed to gain status or enhance his image," and they "were unknown to all but a few people until the time of his sentencing."

Taking into consideration all of § 3553(a)'s sentencing factors, the sentencing court determined that a 42 months sentence was sufficient. *Id*. The government appealed the non-guidelines sentence arguing that the sentencing court failed or refused to recognize the guidelines. *United States v. Adelson*, Nos. 06-2738-cr(L), 06-3179(XAP), 2008 WL 5155341, at *1 (2d Cir. Dec. 9, 2008). The Court of Appeals initially withheld consideration of the government's appeal pending the Supreme Court's decision in *Gall*. *See United States v. Adelson*, 237 Fed.Appx. 713, 714 (2d Cir. 2007). Once the decision in *Gall* was handed down the panel affirmed the sentence, concluding that the "decision to impose a below Guidelines sentence was not a failure or refusal to recognize the Guidelines, but rather a carefully considered reliance on the Section 3553(a) factors." 2008 WL 5155341, at *1.

Judicial Discretion's Double Edged Sword

Gerard Cavera pled guilty to conspiracy to deal in and to transport firearms in violation of 18 U.S.C. § 922(a)(1)(A). *United States v. Lucania*, 379 F.Supp.2d 288, 290 (E.D.N.Y. 2005). Prior to sentencing, the sentencing court issued a published opinion informing the defendant that it was considering imposing a non guideline sentence. The court determined that the defendant had an advisory guidelines range of twelve to eighteen months imprisonment. *Id*. at 292. The court also informed the 70 years old defendant that it was rejecting his request for a family circumstances departure based on his wife's poor health. *Id*. at 292-93. However, the court indicated that it would take into account the defendant's age due to the inverse relationship between age and recidivism. *Id*. at 297-98.

The main reason the sentencing court gave for its consideration of a non guideline sentence was based on the seriousness of illegally bringing firearms into New York City and the failure of the guidelines to take local factors into consideration. The court explained that the Sentencing Reform Act directed the Sentencing Commission to consider the "community view of the gravity of the offense," but that the Commission never drafted regional guidelines. *Id*. at 294 (quoting 28 U.S.C. § 994(c)(4)). In this vein, the sentencing court noted a previous argument made by then-District Judge Reena Raggi that the Sentencing Guidelines "did not adequately reflect the seriousness of the impact that illegal firearm trafficking has on large metropolitan areas such as exist within the Eastern District of New York." *Id*. at 294-95 (citation omitted). The

court continued, stating that "[i]n states with strict gun control laws, such as New York, a higher percentage of guns used in crimes arrived from out of state." *Id*. at 295 (recognizing also that, in jurisdictions with lenient gun laws, most recovered firearms are purchased within the state). According to the court, the guidelines for illegally transporting firearms represent a national average "that does not reflect objectives variations in the increased risk of death or injury that the creates indifferent parts of the country." *Id*. at 296. As such, based on local factors, the court felt that there was a "greater need to deter this sort of offense" in the Eastern District of New York, and would take these subjective considerations into account when imposing sentence. *Id*.[2]

The defendant was sentenced to 24 months imprisonment and appealed his sentence, arguing that the sentencing court erred by considering the population density of New York City in imposing a non-guidelines sentence. *See United States v. Cavera*, 505 F.3d 216, 219 (2d Cir. 2007), *vacated*, 550 F.3d at 197. The panel that initially heard the argument concluded that the "court's central factual argument–that injury to innocent bystanders is more probable in crowded environments–is sound in theory, its application to New York City is unduly speculative. . . . New York City is simply too large and varied a community to draw meaningful conclusions as to the potential impact of stray bullets that may someday originate from a trafficked firearm." *Id*. at 224. The panel went on to note other Circuit Court's that rejected a sentence based on community specific considerations. *Id*. Shortly after the opinion vacating the judgment was handed down, the Court chose to hear the appeal *en banc*.

The *en banc* Court vacated the panel decision and affirmed the district court's judgment. After discussing the appellate court's role in reviewing a sentence after *Booker* and *Gall*, the Court explained how these considerations applied in *Cavera*. Whether the sentencing court had a "policy disagreement" with the guidelines did "not suffice to render that decision either procedurally or substantively unreasonable." 550 F.3d at 195. The Court acknowledged that, "[i]t is now clear that in appropriate circumstances, district courts may rely on categorical factors to increase or decrease sentences." *Id*. It went on to state that, "[t]here is . . . no special reason to think that reliance on a locality-based categorical factor is–without more–suspect." *Id*. And, the Court agreed with the district court that, "while a district court should not rely on 'subjective considerations such as local mores or feelings about a particular type of crime,' a finding 'that the crime will have a greater or lesser impact given the locality of its commission is appropriately considered in crafting a reasonable sentence post-*Booker*.'" *Id*.

The Court was divided whether the district court's first ground for imposing the non-guideline sentence–"the nonspecific geographical and demographical fact that New York City is a large metropolitan area" and, as such, firearms trafficking there posses a greater risk of harm–was an appropriate basis for imposing a non-guideline sentence. *Id*. at 195. The Court chose not to resolve that dispute because the sentencing court's second ground for imposing the non-guideline sentence–deterrence–provided sufficient justification for increasing the defendant's sentence. *Id*. at 195-96. The sentencing court had reasoned that gun traffickers had been able to make a profit by purchasing firearms out of state and reselling them in northeastern cities. Citing Judge Posner's ECONOMIC ANALYSIS OF THE LAW, the Court noted that, "[w]here the profits to be made from violating a law are higher, the penalty needs to be correspondingly higher to achieve the same amount of deterrence." *Id*. The sentencing court, it was found, did not abuse its discretion by relying on this reasoning. *Id*. In fact, the Court concluded that "the statutory requirement that sentencing courts consider, on a case by case basis, what is necessary for 'deterrence to criminal conduct,' . . . almost inevitably makes judges focus on notions and theories that may be controversial to some." *Id*. (quoting 18 U.S.C. § 3553(a)(2)(B)).

Conclusions

There are several lessons to be learned from *Jones*, *Adelson*, and *Cavera*. The first, and most important, is that under the advisory guidelines regime judicial discretion is almost unlimited. The defendant in *Jones* received a non-guidelines sentence based on the sentencing judge's gut feeling about the defendant. In *Adelson* and *Cavera*, just as in *Kimbrough v. United States*, 552 U.S. ___, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), the sentencing courts

[2] The sentencing court also noted a similar conviction in New York State court would result in a more severe sentence than mandated under the guidelines. 379 F.Supp.2d at 296.

expressed problems they had with the guidelines. In *Adelson*, the court thought the "inordinate emphasis" the guidelines placed on financial loss in fraud cases led to an "absurd" result–a guidelines range that called for life imprisonment of a first time non-violent offender. Judge Larimer recently expressed similar concerns from the bench when sentencing white collar criminal defendants. *See United States v. Nicolo*, Docket No. 05-CR-6161. The sentencing court in *Cavera* expressed its concern that the sentencing guidelines do not reflect the real dangers of the offense on the community. While the Sentencing Commission may have developed the guidelines based on an analysis of national experience and empirical study, *see Kimbrough*, 128 S.Ct. 574, sentences are being imposed based on the sentencing judge's own analysis and experience.

The second lesson can be summarized with the warning that was printed on ancient maps: *Cave*! *Hic Dragones* (Beware, here be dragons!). The discretion afforded to the sentencing judge can benefit your clients, but it can also harm them. *Cavera* best exemplifies this where the sentencing court imposed a sentence above the guidelines range in order to deter others from bringing firearms into New York City. Defense counsel in the Western District need to be concerned over a judge's intent to impose a harsher sentence in order to promote general deterrence based on local criminal activity. We have already seen the U.S. Attorney's Office initiate programs, such as project exile, in an attempt to target certain types of criminal behavior. If the court can be convinced of the merits of these programs, there is nothing to stop the government from trying to use this discretion to increase sentences above the guidelines range.

The final lesson is really more of a reminder, than a lesson. That is, defense counsel needs to put forth the best argument on behalf of their client. For example, defense counsel in *Adelson* submitted nearly 100 letters on behalf of their client to attest to his character. This exhibit to counsel's sentencing memorandum encompassed approximately 140 pages. As the court's reference to them at sentencing attests, these letters were persuasive.

* * *

We're Moving . . .

Effective **April 6, 2009** we are moving to the South Tower of Olympic Towers. Our new address will be:

300 Pearl Street
Suite 200
Buffalo, New York 14202

Our phone number remains the same.

Panel Members: Do We Have Your Postal and E-mail Address?

If you are on the CJA Panel, please make sure that we have your correct **postal and e-mail address**. This will allow us to communicate with you more efficiently on matters of case appointment and district policy. We have had several mailings returned recently as undeliverable, so please provide us with any change of address. If we receive a mailing back as undeliverable, we will regretfully remove you from our mailing list - so please advise us of any changes to avoid interruption of mailings.

Moreover, we share your e-mail address with your national CJA representative (currently Jim Harrington), so that he can reach you on matters especially important to CJA Panel members. You can be sure that we do not have your correct e-mail address if you have not received e-mail from us or Jim Harrington in the recent past.

To report your correct postal and/or e-mail address to us, just call or e-mail Carol Steinbruckner in our Buffalo office (phone (716) 551-3341; carol_steinbruckner@fd.org) or Lisa Raetz in our Rochester office (phone (585) 263-6201; lisa_raetz@fd.org). Thanks for your cooperation.

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NEW FEDERAL COURTHOUSE UPDATE

Michael J. Roemer
Clerk of the Court
United States District Court for the
Western District of New York

The construction of the new federal courthouse on Niagara Square in Buffalo continues on a pace to be completed by the Summer of 2010, as scheduled. Approximately ten floors of steel have been erected so far and five floors of the precast concrete panels have been hoisted into place. Much of the overhead mechanical systems, fireproofing and masonry work has been completed on the lower floors.

The new elliptically-shaped courthouse will ultimately be 12 stories high (factoring in the high courtroom ceilings, it will actually be equivalent to an 18-story building), with a 238-feet high elevator tower that will equal the height of the Statler Building and be topped with a glowing lantern. The precast skin will be covered by a fritted veil of transparent glass planes that will be projected in front of the precast panels. The 265,000 gross square foot structure was designed by world-renown architect William Pederson of the architectural firm Kohn Pederson Fox of New York, and will contain five courtrooms and six chambers for district judges, four magistrate judge courtrooms and chambers, a Court of Appeals chamber, a large jury assembly room, a grand jury room and a satellite library, along with necessary facilities for preparatory space for the U.S. Attorney and Federal Public Defender. The new courthouse will also house the Court Clerk's Office, the U.S. Probation Office, and the U.S. Marshals Service.

The building will feature a work by artist Robert Mangold, who was raised in Buffalo. Mangold's piece will consist of large-scale translucent colored glass panels which will be located in the entry pavilion adjacent to the courtyard. In addition, the U.S. Constitution and Bill of Rights will be etched into the glass walls of the pavilion.

The weather conditions over the months of December and January in Buffalo have presented the contractor, Mascaro Construction, which hails from Pittsburgh, with a particularly difficult challenge. At one point, winds reached over 70 mph on the site. At a recent progress meeting, the construction manager told those in attendance that although Mascaro has constructed buildings all over the country, it has never encountered weather conditions like those it has encountered here in Buffalo. He then showed the attendees a 13-ton-rated safety cable that was snapped by the force of the wind on the site.

The new courthouse will also be "green." The Leadership in Energy and Environmental Design (LEED) Green Building Rating System, associated with the U.S. Green Building Council, is a third-party certification program and the nationally accepted benchmark for the design, construction and operation of high performance green buildings. It is currently anticipated that the courthouse will achieve at least a LEED-Silver rating, but rest assured, we are going for the Gold. If we achieve a Gold rating, the new courthouse will be the first GSA building in this region to do so.

ADVOCATING FOR A SENTENCE BELOW THE MANDATORY MINIMUM AFTER RICHARDSON

Hillary K. Green
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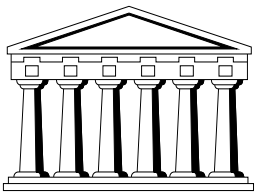
In United States v. Richardson, 521 F.3d 149 (Mar. 20, 2008), the Second Circuit held that in mandatory minimum cases a departure may be predicated only on the defendant's substantial assistance to the government and no other mitigating considerations. In Richardson, the Court of Appeals reversed and remanded defendant's case for sentencing where the district court: (1) determined that the statutory minimum sentence did not apply because of her substantial assistance in accordance with 18 U.S.C. § 3553(e); and (2) departed well below the statutory minimum sentence of 240 months to 464 days of time served based on "all the circumstances" of the case. Id. at 156. These circumstances included the defendant's character as a "responsible, hardworking, capable and generous person with an excellent employment record and the benefit of a close family and network of friends . . . ." Id. at 153.

In reversing the district court's decision, the Court of Appeals pointed out the distinction between U.S.S.G. § 5K1.1 departure motions and 18 U.S.C. § 3553(e) motions for a reduction below the mandatory minimum sentence. "A motion under § 5K1.1 authorizes the sentencing court to depart below *the applicable Guidelines range* in determining the advisory sentence, and a § 3553(e) motion permits the court to sentence below *a statutory minimum*." Id. at 158 (emphasis added). Where, as in Richardson, a defendant's minimum sentence is mandated by statute, his or her substantial assistance to the government is the singular ground for departing below that minimum using the factors enumerated in U.S.S.G. § 5K1.1 as a guide to determine the permissible extent of that departure under 18 U.S.C. § 3553(e). Id. at 159.

The Richardson Court's holding impacts federal criminal defense practice in two important areas: negotiating plea agreements and pursuing resentencing based on amendments to the guidelines. In the plea context, Richardson renders meaningless a defendant's reserved right to raise 18 U.S.C. § 3553(a) factors at sentencing or to advocate for a non-guidelines sentence where he or she is subject to a statutory minimum. As Richardson makes clear, a court is only authorized to impose a sentence below a statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense" consistent with the sentencing guidelines. 18 U.S.C. § 3553(e).

In advocating for a below guidelines sentence in a mandatory minimum case, a defense attorney should attempt to frame any mitigating circumstances as supporting a departure for "substantial assistance" wherever possible. For example, a defense attorney could argue that the defendant has unique family circumstances that make his cooperation more risky or that the defendant has made extraordinary efforts at rehabilitation despite his continued, government-endorsed immersion in a drug culture to accomplish cooperation. Unless a defendant's nature, circumstances, and characteristics support a greater departure under 18 U.S.C. § 3553(e), they will likely be ignored in Richardson's wake.

With respect to amended guidelines, such as the retroactive crack reductions, a defendant will not be eligible for resentencing under 18 U.S.C. § 3582(c)(2) if he or she was otherwise subject to a statutory minimum. As the Second Circuit recently held in United States v. Williams, 551 F.3d 182 (Jan. 7, 2009), "[o]nce the mandatory minimum applied, [the defendant]'s sentence was no longer based on the sentencing range that has subsequently been lowered by the Sentencing Commission." Id. at 185. The Williams Court's decision was explicitly based on Richardson's mandate that a district court may not depart from a mandatory minimum sentence based on anything other than substantial assistance.



Announcing...

The Federal Public Defender's Office is pleased to announce several new additions to the office in the past eight months:

Hillary K. Green has joined the Buffalo Office as a Research & Writing Attorney. Hillary is a graduate of the University of Buffalo Law School. She served as a Confidential Law Clerk to Chief District Judge Richard J. Arcara, District Judge William M. Skretny, Magistrate Judge H. Kenneth Schroeder, Jr. and Magistrate Judge Victor E. Bianchini. She was most recently employed as an Associate Attorney for Rupp, Baase, Pfalzfgraf, Cunningham & Coppola LLC in Buffalo, New York.

Tracy Hayes has joined the Buffalo office as an Assistant Federal Defender. Tracy earned his JD at the University of Wisconsin School of Law and an LLM from the Georgetown University Law Center, where he was an E. Barrett Prettyman Fellow. He comes to us from the Rhode Island Public Defender's Office.

Brian P. Comerford has joined our Buffalo office as an Assistant Federal Defender. Brian is a graduate of Notre Dame Law School. He previously served as a Confidential Law Clerk to District Judge William M. Skretny and as an Appellate Court Attorney for the New York State Supreme Court, Appellate Division, Fourth Department.

Jeffrey L. Ciccone has joined the Rochester Office as An Assistant Federal Defender. Jeff earned his JD at the University of Pennsylvania Law School. He previously served as a Confidential Law Clerk to the Honorable Marian W. Payson, United States Magistrate Judge, and former United States Magistrate Judge William G. Bauer.

We congratulate all the hires on their new positions and wish them much happiness and success!

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TWO NEW APPELLATE PROCEDURES IN THE SECOND CIRCUIT

1. **Effective January 15, 2009, the Second Circuit adopted new procedures for setting deadlines for filing briefs in all criminal appeals.**

The Court will set and "so order" as the filing dates for appellant's and appellee's briefs the respective dates proposed by counsel. Unless the case involves a voluminous transcript, the appellant must select a date within 120 days of receipt of the complete transcript, and the appellee must select a date within 120 days of receipt of the appellant's brief. If counsel requests more than 120 days, the Court may reduce the time for filing the brief. **The so-ordered filing dates are firm.** A subsequent motion for extension of time to file a brief will be denied absent a most extraordinary circumstance, such as serious personal illness or death in counsel's immediate family. Appellant's reply brief must be filed in compliance with FRAP 31.

The automatic 30-day extension is eliminated for all purposes.

Specifically the new procedure operates as follows:

Appeals in Which No Scheduling Order Has Issued. Upon docketing an appeal, the Clerk's Office will issue a docketing notice. Appellant retains the obligation to order the transcript in accordance with FRAP 10(b)(1) and the Plan to Expedite Criminal Appeals. In addition, appellant must now notify the Clerk's Office if the complete transcript is not received within 30 days of the transcript order. Appellant must include in this notice documentation of the efforts made to obtain the transcript. Appellant is further required to update the Court in 14-day intervals until the complete transcript is received. During this time the Clerk's Office will undertake to facilitate delivery of the transcript.

Within 14 days of receipt of the complete transcript, appellant must notify the Court and all counsel in writing of the date by which the brief will be filed (the "scheduling notification"). Within 14 days of receipt of appellant's brief, or the last appellant's brief in a multi-defendant

appeal, the appellee must notify the Court and all counsel in writing of the date by which its brief will be filed. Unless the case involves a voluminous transcript, the appellant must select a date within 120 days of receipt of the transcript, and the appellee must select a date within 120 days of receipt of the last appellant's brief.

An extension of time to submit the scheduling notification will be denied, absent a most extraordinary circumstance. In the event that a party fails to timely file the scheduling notification, the Court will set a 30-day filing date for the defaulting party's brief.

Appeals in Which a Scheduling Order Has Issued. A party seeking an extension of time to file a brief in a case in which a scheduling order has issued but the transcript has not yet been received should follow the procedure set forth supra. A party seeking an extension where a scheduling order has issued and the complete transcript or appellant's brief has been received must include in the motion papers all prior extensions granted in the case and state a proposed date for filing the brief. If more than 120 days has already lapsed from the receipt of the complete transcript or appellant's brief, counsel is advised to propose a minimal extension. Absent a most extraordinary circumstance, the extension granted upon this motion will be the last. The elimination of the automatic 30-day extension applies to these cases.

2. The Local Rules of the United States Court of Appeals for the Second Circuit are hereby amended, effective January 20, 2009, by the amendment of Interim Local Rule 25 and adoption of Interim Local Rule 25.2, as set forth below

Interim Local Rule 25.1 Filing and Service

(a) Documents in Digital Format.

1. Document Defined. For the purposes of this rule, document includes every paper submitted to the court, including forms, letters, motions, petitions and briefs but not appendices (which are governed by the requirements set forth in Local Rule 25.2).

2. Submission Requirement. Every document filed by a party represented by counsel must be submitted in a Portable Document Format (PDF), in addition to the required number of paper copies, unless counsel certifies that submission of the paper as a PDF document would constitute extreme hardship. A party not represented by counsel is encouraged, but not required, to submit a PDF version of every document, in addition to filing the required number of paper copies.

* * * * *

Interim Local Rule 25.2 Appendix on CD-ROM

A party represented by counsel must submit every appendix on a CD-ROM, and serve a CDROM version on all opposing counsel, in addition to filing the required number of paper copies, unless counsel certifies that submitting a CD-ROM version of the appendix would constitute extreme hardship. A party not represented by counsel is encouraged, but not required, to submit and serve a CD-ROM version of the appendix, in addition to filing the required number of paper copies.

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FEDERAL CRIMINAL DEFENSE PRACTICE SPRING 2009 SEMINAR

Friday, May 1, 2009
8:30 a.m. - 3:00 p.m.
Genesee Community College
Batavia, New York

Plans are underway for our Spring Seminar. Save the date on your calendar and look for our seminar mailing later this month!

DOES PEER-TO-PEER FILE SHARING WARRANT A 5-LEVEL ENHANCEMENT UNDER U.S.S.G. § 2G2.2(b)(3)(B) FOR DISTRIBUTION IN EXCHANGE FOR A THING OF VALUE?

MaryBeth Covert
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Do not be fooled into agreeing that U.S.S.G. § 2G2.2(b)(3)(B)'s 5-level enhancement applies to the mere use of Limewire or some other peer-to-peer file sharing program. Section 2G2.2(b)(3)(B) provides for this substantial enhancement where distribution was for "receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain."

In some cases, the Government and Probation have been arguing that a defendant's use of a peer-to-peer software program, such as Limewire, warrants the 5-level enhancement simply because the defendant knows that other users were able to download those files from the defendant's computer to their own. District Judge David G. Larimer recently refused to apply the enhancement on that theory alone in United States v. Mahaney, 08-CR-6197.

Cases interpreting § 2G2.2(b)(3) have stated that the "five-level enhancement applies when a defendant distributes child pornography in anticipation of, or while reasonably believing in the possibility of, the receipt of a thing of value." United States v. Maneri, 353 F.3d 165, 169 (2d Cir. 2003). Maneri clearly held that any transaction, whether there may be a specific agreement between parties or not, may suffice for application of the enhancement where there is evidence of the expectation of receipt or the receipt of a thing of value. Id. at 170. Maneri involved emailed images, not peer-to-peer network sharing.

Peer-to-peer file sharing programs generally store the downloaded images into a "shared or sharing" directory. Under most circumstances, people who engage in file sharing on the Internet both provide (upload) files for others to download to their computers and receive (download) to their own computer files made available by others.

The file-sharing program LimeWire has been described as a

> popular peer-to-peer file sharing program that permits computer users to distribute and receive photographs, videos, and music over the internet. Once a user installs LimeWire's file sharing software and designates files as being available for sharing, other distant LimeWire users can access and download those files. Although it is capable of being used for legitimate purposes, LimeWire also permits large-scale dissemination of child pornography.

United States v. Sloan, CR 06-00468JMS, 2007 WL 1521434 (D. Haw. May 22, 2007); see also United States v. Todd, 100 Fed. Appx. 248, 250 (5th Cir. 2004) (acknowledging that "the Limewire program's specific purpose is to share files, and the user is warned twice during the installation of the program that any file he downloads will be shared by default").

Whether the use of LimeWire to download files of child pornography constitutes distribution for the receipt, or expectation of receipt, of a thing of value is an open question in the Second Circuit.

Probation has argued that this file sharing, the upload and download process is distribution for receipt of something of value or at least has the element of "an expectation of receipt, receipt of something of value" or at least has the element of "an expectation of receipt of a thing of value" as defined in USSG §2G2.2(b)(3)(B) (in this case more child pornography). Since a forensic examination is likely to confirm that the defendant's downloaded images were stored in a shared directory and thus, available to Limewire users for download, they argue the 5 level increase applies.

The analysis by Probation and the Government ignores the definitions of relevant terms used in the guidelines. Specifically, the distribution needs to be "for the receipt, or expectation of receipt, of a thing of value." U.S.S.G. § 2G2.2(b)(3)(B). Application Note 1 of the guideline defines this term as follows:

> any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value. . . . For

> example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

The simple use of a peer-to-peer file sharing program does not present any "transaction" or "bartering." See United States v. Geiner, 498 F.3d 1104 (10th Cir. 2007) (holding that something other than simply installing and running the file-sharing program must be present before the court can apply § 2G2.2(b)(3)(B)).

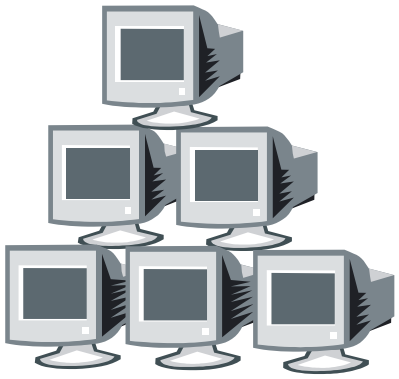
The mere fact that the files were available to other Limewire users does not necessarily mean that a defendant expected others to send him files in exchange, as in a "transaction" between two users. Use of peer-to-peer file sharing does not mean that a defendant's computer necessarily sent files to others. While peer-to-peer Internet programs permit files to be stored on and served by the personal computer of the users, the computer does not necessarily distribute files. Limewire allows a user to connect to a network with no centralized server. On newer versions, the program automatically saves completed downloads to the shared directory. No special request is necessary and it is only upon "customizing" the program that files are not shared. Peer-to-peer programs like Limewire will then search for files from the computer with the most power (called "supernodes" or "ultrapeers") and go directly to that subscriber's computer to retrieve files, bypassing other users which may have the same file. Thus, a user's computer could have been by-passed altogether as a source for files, yet be able to pull files from other computers to his. Such a situation would not involve a *quid pro quo*, bartering, or transacting for something of value.

Three cases are often cited as authority for the application of the 5-level enhancement, but none of the cases arise out of the Second Circuit Court of Appeals and therefore provide no direct precedential value in this district. The three are United States v. Griffin, 482 F.3d 1008 (8th Cir. 2007); United States v. Sewell, 513 F. 3d 820 (8th Cir. 2008); and United States v. Geiner, 498 U.S. 1104 (10th Cir. 2007).

Of the three, only Griffin held that the mere use of peer-to-peer file-sharing warrants the 5-level enhancement. In Sewell, 513 F. 3d 820 (8th Cir. 2008), the Eighth Circuit did not even address the question of the appropriateness of the 5-level enhancement. See Griffin, 482 F.3d at 1012, fn. 4 ("Sewell also involved child pornography downloaded from Kazaa, but was an interlocutory appeal of an evidentiary ruling. *Whether file-sharing constituted distribution for a thing of value under §2G2.2(b)(2)(B) was not before the court*.").

Lastly, Geiner, 498 F.3d 1104, actually held that something other than simply installing and running the file-sharing program must be present before the court can apply § 2G2.2(b)(3)(B). There the Tenth Circuit made clear that the enhancement only applied because the applicable peer-to-peer file-sharing program, called Bearshare, permitted *faster download speeds* for users who permitted others to obtain files from him. Id. at 1106. "After hearing from both parties, the District Court decided that the enhancement applied to Mr. Geiner's case because he made files containing child pornography available to the public *in return for the ability to obtain child pornography at a faster speed*." Id. at 1107 (emphasis added).

No such similar "benefit" is offered to users of Limewire or other peer-to-peer programs. In short, don't agree to the 5-level enhancement simply because your client used Limewire or a similar file sharing program.



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FEDERAL PUBLIC DEFENDER REPORT

is published by the

Federal Public Defender's Office
Western District of New York

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