FEDERAL PUBLIC DEFENDER REPORT

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PRESENTING A DEFENSE AT TRIAL: THE USE OF REVERSE F.R.E. 404(b) EVIDENCE

By: Mark D. Hosken, Assistant Federal Public Defender[1]

Rule 404(b) of the Federal Rules of Evidence is most commonly utilized by criminal defense attorneys as a shield against "other crimes" evidence offered by the government. Although much less common, F.R.E. 404(b) may be successfully used as a sword to pierce the very foundation of the government's case.

F.R.E. 404(b) generally prohibits the prosecution from offering evidence at trial relating to the defendant's prior crimes, wrongs or acts if the intent of such evidence is merely to suggest that in the instant case, the defendant was acting in conformity with his criminal character. Notwithstanding this general restriction, the government may still offer such evidence if the purpose is to demonstrate motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of a mistake or accident. Indeed, the Second Circuit evaluates the use of F.R.E. 404(b) evidence under an inclusionary approach and routinely allows character type evidence for any purpose other than to demonstrate the defendant's criminal propensity. *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002).

Reverse F.R.E. 404(b) evidence is defense counsel's opportunity to turn the table. Such evidence may be offered by the defendant to exonerate rather than implicate. This permits the defendant to prove another person, such as a government witness, a co-defendant, or a third party, committed the charged crime. Such evidence is relevant, probative and admissible.

Many jurisdictions, including the Second Circuit, have adopted a relaxed standard of admissibility when considering the defensive use of "other crimes" evidence. Reverse

[1] This article was completed with the excellent assistance of Jeffrey L. Ciccone, AFPD.

F.R.E. 404(b) material may be used alone or with other evidence to negate the defendant's guilt of the crime charged. *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984), *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991), *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), *United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989), and *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978).

For example, in *United States v. Aboumoussallem*, the defendant argued he was an innocent pawn, duped into transporting drugs by his cousins. The district court, however, prohibited the introduction of any evidence supporting this theory, finding that it was irrelevant, confusing and prejudicial under F.R.E. 403. The district court also refused the defendant's attempt to offer the evidence under F.R.E. 404(b). The Second Circuit rejected the district court's finding that the proposed testimony was irrelevant or inadmissible per F.R.E. 404(b). According to the Circuit, the proffered evidence satisfied the liberal relevancy standard of the Federal Rules of Evidence as it was intended to make the existence of a consequential fact less probable. The defendant's knowledge was the central issue at trial and the evidence should have been admitted to show the defendant's lack of knowledge. (Though the evidence was not permitted, the Circuit affirmed the conviction finding no abuse of discretion.)

Of particular importance to defense counsel is the Second Circuit's acknowledgment that the standard of admissibility is less restrictive when the defendant seeks to use F.R.E. 404(b) evidence. The Circuit specifically identified that the "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense. . . . [i]n such cases the only issue arising under F.R.E. 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense." 726 F.2d at 911-912.

In *United States v. Stevens*, the Third Circuit examined many of the state and federal cases discussing the use of reverse F.R.E. 404(b) evidence. Unlike "ordinary other crimes evidence, which is used to incriminate criminal defendants, reverse F.R.E. 404(b) evidence is utilized to exonerate defendants." 935 F.2d at 1402. "We agree with the reasoning . . . . that the admissibility of reverse F.R.E. 404(b) evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues. Recasting this standard in terms of the Federal Rules of Evidence, we therefore conclude that a defendant may introduce reverse F.R.E. 404(b) evidence so long as its probative value under F.R.E. 401 is not substantially outweighed by F.R.E. 403 considerations." *Id.* at 1404-1405.

The Third Circuit specifically rejected the government's argument that the defendant must satisfy the same preconditions applicable to the prosecution.

> More specifically, the defendant, in order to introduce other crimes evidence, **need not show** that there has been more than one similar crime, that he has been misidentified as the assailant in a similar crime, or that the other crime was sufficiently similar to be a signature crime. These criteria, although relevant to measuring the probative value of the defendant's proffer, should not be erected as absolute barriers to its admission. Rather, a defendant must demonstrate that the reverse F.R.E. 404(b) evidence has a tendency to negate his guilt, and that it passes the F.R.E. 403 balancing test.

Id. at 1405 (emphasis added).

Similarly, in *United States v. Robinson*, the Second Circuit permitted the introduction of evidence consistent with the defendant's theory that aother individual committed the crime. The court reversed the conviction holding that "[i]t was entirely proper for Robinson to disprove the government's contention by proving that the [guilty party] was someone else. If it was, then obviously Robinson was innocent. Evidence . . . was clearly probative of the issue that Robinson sought to prove, namely, that the [guilty party] was someone else." 544 F.2d at 112-113. The defendant may properly defend the charges against him by proving that another individual committed the crime.

In *United States v. Cohen*, the defendants attempted to discredit an essential government witness through the introduction of evidence relating to that witness's prior criminal conduct. Such evidence included the witness's ability to concoct and conduct a fraudulent scheme without the defendants' aid or participation. The Eleventh Circuit reversed and granted a new trial finding the trial court's failure to admit the evidence proffered deprived the defendants from presenting an adequate defense. The panel identified the rationale for permitting the excluded evidence.

> When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent.... In the present case, introduction of the proffered evidence would not have clashed with the policy of keeping scandalous or prejudicial evidence from the jury.

888 F.2d at 777.

In *United States v. Morgan*, the defendant was charged with possessing drugs with the intent to distribute. The majority of the drugs and a substantial amount of cash were found in the basement. The defendant sought to offer evidence that another individual lived in the house and was selling drugs. That evidence was offered through the cross examination of the owner of the house. The defendant had information that the owner's son lived in the house and was selling drugs out of that location. The D.C. Circuit reversed the conviction and ordered a new trial finding that the district court abused its discretion when it excluded the defendant's evidence:

> [t]he government's evidence that appellant possessed (drugs) with intent to distribute was entirely circumstantial. There was no evidence that appellant had actually sold (drugs) at any time. No fingerprints of his were found on any of the items concealed in the basement. And there was evidence that at least one other person. . . was not afraid to enter the basement. Hence, the jury necessarily engaged in speculative inferences to convict. We cannot say with the necessary fair assurance that the jury would have drawn these inferences if it had been informed of sales by a third person living in that house.

581 F.2d at 939.

It should also be noted that the Second Circuit extended the application of F.R.E. 404(b) to include the introduction at trial of evidence of several acts occurring subsequent to the crime in question. Although not favorable to the defendant, in *United States v. Ramirez*, 894 F.2d 565 (2d Cir. 1990), the Circuit permitted similar act evidence if it occurred after the crime at issue: "[r]elevancy cannot be reduced to mere chronology; whether the similar act evidence occurred prior or subsequent to the crime in question is not necessarily determinative to its admissibility." *Id.* at 569. This reasoning should be equally applicable to reverse F.R.E. 404(b) evidence.

I recently had the pleasure of trying a case with AFPD Tracy Hayes. Our client was found in a house where police recovered cocaine base and a firearm. As the police entered the house, another individual jumped out of a window. Our investigation revealed that person had a history of trafficking in narcotics. Specifically, that individual was arrested a month later at another location by the same officers. Police reports completed in connection with the later incident contained oral and written admissions by the individual (the window jumper). Most relevant was his admission that he was cutting up the crack, weighing it, and bagging it into $10, $20, and $40 bags, which he sold to local friends. Tracy and I were successful in convincing the trial court judge to permit the defense to elicit testimony about the window jumper's drug trafficking activities as reverse F.R.E. 404(b) evidence. We were permitted to elicit testimony on cross-examination from those same officers as to the items seized and the identity of the person present on the subsequent occasion.

Although the threshold for admission of reverse F.R.E. 404(b) evidence is more relaxed than that required for direct F.R.E. 404(b) evidence, defense counsel is well-advised to prepare an explanation in case the court should inquire. A simple statement may suffice. Such as:

> Your Honor, the evidence will show the government's witness, Mr. Smith, was in the apartment before the search warrant was executed. The government contends the defendant solely possessed the contraband seized from the apartment where he was present. The defendant offers evidence of Mr. Smith's drug activities one month later when he was arrested by the police. The defendant was not present when Mr. Smith was in possession of similar contraband on that occasion. Such reverse F.R.E. 404(b) evidence will show Mr. Smith had a motive and an opportunity to possess the contraband at issue in this case.

Frequently, defense counsel objects to the government's introduction of "other crimes" evidence. Notwithstanding such arguments, the trial judge generally permits the prosecutor to offer evidence relating to the defendant's prior activities, or "other crimes." Many trial defenses have been compromised and destroyed by the government's successful use of F.R.E. 404(b) evidence. There is no reason that the government should be the sole proponent of "other crimes" evidence.

Counsel should consider the availability and use of reverse F.R.E. 404(b) evidence when constructing the theory of the defense. Evidence that will exonerate the defendant or negate his guilt is relevant and probative. It is also admissible evidence pursuant to F.R.E. 404(b).

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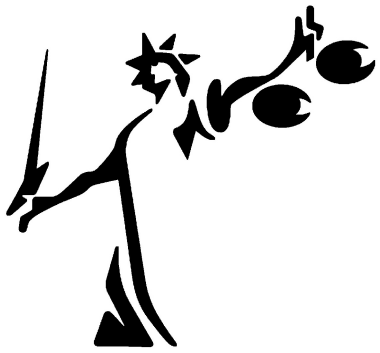

FEDERAL CRIMINAL DEFENSE PRACTICE
FALL 2009 SEMINAR

Friday, December 4, 2009
8:30 a.m. - 3:15 p.m.
Genesee Community College
Batavia, New York

We have lined up three excellent guest speakers for our Fall Seminar with a focus on trial techniques:

Terence F. MacCarthy

Defender Emeritus of the Federal Defender Program,
United States District Court for the Northern District of Illinois

A celebrated lecturer with numerous awards to his name, Mr. MacCarthy has been praised by the National Association of Criminal Defense Lawyers as "the father of the criminal defense opening statement [who] has developed a cross-examination system taught and effectively used throughout the country." Mr. MacCarthy attended St. Joseph's College and DePaul Law School before clerking for then-Chief Judge William J. Campbell of the United States District Court for the Northern District of Illinois. He practiced thereafter for several years as an Illinois Special Assistant Attorney General and served for forty-two years as Executive Director for the Federal Defender Program in Chicago, Illinois. Mr. MacCarthy, who chaired the Criminal Justice Section of the American Bar Association and served on its Council for over twenty years, has lectured in all 50 states and over a dozen foreign countries. In August 2007, he published his long-awaited book "MacCarthy on Cross-Examination."

Topic: Cross-Examination

Anthony J. Natale

Supervising Assistant Federal Public Defender,
Southern District of Florida

A graduate of Foreign Service of Georgetown University and the Antioch School of Law, Mr. Natale practiced law privately for over twenty years concentrating on criminal defense and civil litigation in both state and federal courts. As a member of the National Criminal Defense College faculty since 1982, he has lectured extensively on trial techniques in the United States and abroad. His lectures feature a strong emphasis on audience participation. He presently serves as the training coordinator for the Federal Defender Office and the CJA panel lawyers for the Southern District of Florida.

Topic: Opening and Closing Statements

Frank J. Clark

Former District Attorney for Erie County

Mr. Clark served as the Erie County District Attorney from 1997 to 2009. Prior to being elected to that office, Mr. Clark acted for five years as Chief of the Organized Criminal Drug Task Force for the United States Attorney's Office for the Western District of New York and for seven years as the Chief of the Violent Felony Bureau in the Erie County District Attorney's Office. He later assumed the role of First Deputy District Attorney. Mr. Clark, who served in the United States Marine Corps from 1968 to 1971, is a decorated veteran of the Vietnam conflict. He holds a degree in Classical Languages from Niagara University and a Juris Doctor degree from SUNY Buffalo School of Law.

Topic: Direct Examination

RESTITUTION IN CHILD PORNOGRAPHY CASES

By: Jay S. Ovsiovitch, Research & Writing Attorney, and Robert G. Smith, Assistant Federal Public Defender

Aside from "white collar" and tax cases, restitution is only given superficial attention in federal cases. Restitution is included in the plea agreement and may be challenged in the PSR. However, restitution is seldom litigated separately from the offense itself. This "superficial" practice may change in child pornography cases. On February 24, 2009, the Hartford Courant ran a headline entitled, "New Tactic to Fight Child Porn." *See* Edmund H. Mahony, *New Tactic to Fight Child Porn, Restitution by Users*, HARTFORD COURANT, Feb. 24, 2009, at A1. According to the report, United States District Judge Warren W. Eginton ordered a defendant who used his computer to trade images of child pornography to pay approximately $200,000.00 in restitution to a girl whose image the defendant had obtained. *Id*.[2] James R. Marsh, the attorney for the girl whose image was possessed by the defendant, predicted that this "ruling is unlikely to cause a spike in claims for restitution." *Id*. This is because, he explained, "only a small number of victims have been identified, many are still children, and because some victims are not aware of their legal rights." *Id.*

Despite Mr. Marsh's predictions that there will not be a spike in claims for restitution, such a spike has been observed. Restitution requests have been made in approximately thirty judicial districts. Notification comes in the form of a letter from attorney Marsh, or some other attorney for the alleged victim, indicating that he is seeking restitution, and by the filing of a governmental memorandum regarding restitution. In some cases the government has requested that a victim impact statement and request for restitution be filed under seal. *See United States v. Malta*, No. 09-CR-6018L, Protective Order (June 18, 2009). Attorneys in the Western District of New York and around the country have received notification that attorney Marsh, and other counsel, are seeking restitution against defendants who possessed or received an image of their client(s).

Defense counsel in the Western District of New York have objected to the restitution demands. In Rochester, both Judge Larimer and Judge Siragusa rejected these demands in cases where the defendant was convicted of possessing and/or receiving child pornography. The issue is still pending before Chief Judge Arcara and Judge Skretny in Buffalo. Given the increased number of requests for restitution seen in the Western District of New York, this article will examine the claims for restitution made by the Marsh Law Firm and identify a series of objections that were successfully used to oppose the restitution claim.

Restitution, in Theory

The purpose of "restitution" is to "restor[e] someone to a position he [or she] occupied before a particular event." *See Hughey v. United States*, 495 U.S. 411, 416 (1990). Thus, the focus "is on the victim's loss and upon making victims whole.'" *United States v. Battista*, No. 08-3750-cr, ___ F.3d. ___, 2009 WL 2392886, at *3 (2d Cir. Aug. 6, 2009) (quoting *United States v. Coriaty*, 300 F.3d 244, 253 (2d Cir. 2002)). Federal Courts have no inherent power to order restitution; restitution may only be ordered to the extent authorized by statute. *See United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006).

[2] It should be noted that the District Court never issued a restitution order in the case. *See United States v. Hesketh*, 08-CR-165 (D.Ct.) (docket sheet).

"The burden [of] demonstrating the amount of loss sustained by a victim as a result of an offense shall be on the attorney for the government." *See* 18 U.S.C. § 3664(e). The procedures to be followed in determining whether restitution should be ordered is set forth in the Mandatory Victims Restitution Act [hereinafter MVRA], 18 U.S.C. § 3663A, and the Victim and Witness Protection Act of 1982 [hereinafter VWPA], 18 U.S.C. § 3663. The authority to order restitution to victims of sexual exploitation is set forth under 18 U.S.C. § 2259 (mandating restitution to any victim of the commission of a crime under Chapter 110 of Title 18).

Statutory Procedure for Imposing Restitution

The procedure for issuing an order of restitution, pursuant to 18 U.S.C. § 2259 or 18 U.S.C. § 3663A, is governed by 18 U.S.C. § 3664. Under this procedure, the Probation Department is required:

> to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim . . . and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

18 U.S.C. § 3664(a). The government also plays a role:

> Upon request of the probation officer, but not later than thirty days prior to the date initially set for sentencing, the attorney for the government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of amounts subject to restitution.

Id. § 3664(d)(1). The Probation Department is allowed additional time to ascertain the amount of an identified victim's losses:

> if the victim's losses are not ascertainable by the date that is ten days prior to sentencing, the attorney for the government or probation officer shall so inform the court, and the court shall set a date for final determination of the victim's losses, not to exceed 90 days after sentencing.

Id. § 3664(d)(5). The burden of establishing the amount of loss is on the attorney for the government. *Id*. § 3664(e); *see also United States v. Graham*, 73 F.3d 352, 356 (3rd Cir. 1995) (noting that the government has the burden of demonstrating by a preponderance of the evidence the amount of the loss sustained by the victim).

Challenges to Requests for Restitution

In one case in which the Federal Public Defender's Office has been involved, the government has filed a "Memorandum Regarding Restitution." *See United States v. Tutty*, No. 09-CR-6030, Govt's Mem. Re. Restitution (filed May 22, 2009). The memorandum addressed the restitution demand from attorney Marsh, indicating that the government received a request for restitution on behalf of a person who was depicted in the "Misty series" of child pornography that was found on the defendant's computer. According to the government's filing,

> the victim states that images of the abuse she suffered have been received, possessed, and distributed by innumerable collectors of child pornography, to include [the] defendant [ ]. The victim now seeks compensation for the effects that this criminal behavior has had on her life in the form of restitution from [the] defendant [ ], pursuant to the Mandatory Restitution for Sex Crimes section of the Violence Against Women's Act of 1994. *See* 18 U.S.C. §2259.

In filing its memorandum, the government states that it "takes no position as to the restitution request, [and files its] memorandum . . . for the purpose of providing a framework for evaluation of the victim's submission for mandatory restitution." *Id*. The government's filing provides an overview of the law, but fails to provide any information that would aid the Court in determining whether restitution was warranted in this case. *See id*.

Mr. Tutty's counsel argued against the restitution request by asserting fact-specific objections and then general objections. The first specific objection was that the government procedurally defaulted under its obligations under 18 U.S.C. § 3664. Furthermore, neither the government nor the Marsh Law Firm established any loss by the alleged victim. No evidence was presented that the individual in any of the images possessed or received by Mr. Tutty were those of the Marsh Law Firm's client, nor was there any evidence that the losses suffered by the victim were a proximate result of Mr. Tutty's offense.

Mr. Tutty's counsel also cited some general objections, including a line of cases that included *United States v. Lancy*, 189 F.3d 954 (9th Cir. 1999), *United States v. Doe*, 488 F.3d 1154 (9th Cir. 2007), *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999), *United States v. Julian*, 242 F.3d 1254 (10th Cir. 2001), and *United States v. Dancer*, 270 F.3d 451 (7th Cir. 2001). Counsel pointed out that no Court has awarded restitution to a person whose image was only viewed or possessed when the defendant had not physically abused the child. *See also United States v. Pearson*, 570 F.3d 480 (2d Cir. 2009) (per curiam) (holding that a restitution order pursuant to 18 U.S.C. § 2259 may provide for estimated future medical expenses in a case where the defendant videotaped and photographed two minors). This is true even in the case out of the District of Connecticut. Contrary to the Marsh Law Firm's assertions, and as reported in the Hartford Courant, the District Court in Hesketh has not issued a final order directing the defendant to pay restitution. *See United States v. Hesketh*, 08-CR-165 (D.Ct.) (docket sheet).

The District Court accepted defense counsel's averments and declined to order the payment of restitution. The Court agreed with defense counsel's general objections. However, the fact-specific objections drew the most favorable comments from the Court. The Court was critical of the government for not making a request for restitution or complying with the procedural requirements of 18 U.S.C. § 3664. The Court also noted that there was no proof that Mr. Tutty possessed or received images of the alleged victim of his offense. Related to this was the Court's concern that the government failed to establish any loss proximately caused by Mr. Tutty's offense. The Court acknowledged that no other court has ordered an individual convicted of possessing or receiving child pornography, but who had not created the images, to pay restitution to the victim.

Conclusion

Several lessons have been learned by the Federal Public Defender's Office in addressing restitution claims in child

pornography cases. First, determine whether the government has taken a position on restitution, and fulfilled its burden under 18 U.S.C. § 3664 for determining whether there was any loses by the alleged victim. Second, determine whether your client actually viewed the "victim" who is seeking restitution. Often, there are hundreds, if not thousands, of images on a computer hard drive. Yet, only a small number of images may actually form the basis for the restitution request. Defense counsel may want to require the government to identify which images are the subject of the restitution request.

Also, did the client only come into possession of the images, or was the client involved in creating the images? This was an important consideration by both Judge Larimer and Judge Siragusa when denying the restitution requests. Finally, if you are faced with a client who is being ordered to pay restitution in a child pornography case and are unsure of how to proceed, contact the Federal Public Defender's Office. The Federal Public Defender's Office is monitoring the claims that are being raised around the country, and is in contact with attorneys who are addressing the issue. With the resources that are available, we can assist you in this matter.

* * *

Reminder, our Buffalo office is now:

300 Pearl Street
Suite 200
Buffalo, NY 14202

Our phone number remains the same

SENTENCING COMMISSION SUBMITS PROPOSED GUIDELINE AMENDMENTS TO CONGRESS

On May 1, 2009, Sentencing Commission submitted its proposed guideline amendments to Congress. Assuming Congressional approval, the amendments will take effect on November 1, 2009.

The amendments include a change in the definition of "victim" in §2B1.1 to include certain persons who suffer non-pecuniary harm; an increase to the base offense level cap in hydrocodone cases; creation of a new guideline in response to the Drug Trafficking Vessel Interdiction Act of 2008, which criminalizes the operation of certain submersibles or semi-submersibles; a change in the definition of "counterfeiting" so that bleached notes are included within it; creation of a new enhancement at §2L1.1 where a defendant is a leader or organizer and commits a harboring offense in furtherance of prostitution; and clarification that the undue influence enhancement at §2A3.2 and §2G1.3 applies to attempted conduct, but does not apply where the only "minor" involved is an undercover officer. The first change is worthy of some detailed discussion.

Changes to the Identity Theft Guidelines

This multi-part amendment responds to the directive in section 209 of the Identity Theft Enforcement and Restitution Act of 2008, Title II of Pub. L. 110–326 (the "Act"), and addresses other related issues arising from case law. Section 209(a) of the Act directed the Commission to review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, United States Code, and any other relevant

provisions of law, in order to reflect the intent of Congress that such penalties be *increased* in comparison to those currently provided by such guidelines and policy statements.

The Act further required the Commission, in determining the appropriate sentence for the above-referenced offenses, to consider the extent to which the guidelines and policy statements adequately account for 13 factors listed in section 209(b) of the Act.

In response to the congressional directive, the amendment increases penalties provided by the applicable guidelines and policy statements by adding a new enhancement and a new upward departure provision. In addition, the amendment expands both the definition of "victim" and the factors to be considered in the calculation of loss; each of these expansions may, in an appropriate case, increase penalties in comparison to those provided prior to the amendment.

First, the amendment adds a new two-level enhancement in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

The new enhancement, which addresses offenses involving personal information, is at subsection (b)(15).[3] The new enhancement for offenses involving personal information applies if: (A) the defendant was convicted of an offense under 18 U.S.C. § 1030 and the offense involved an intent to obtain personal information; or (B) the offense involved the unauthorized public dissemination of personal information. The "(A)" prong of the new personal information enhancement had been a prong of the existing computer crime enhancement, but the tiered structure of that enhancement was such that if a computer crime involved both an intent to obtain personal information and another harm (such as an intrusion into a government computer, an intent to cause damage, or a disruption of a critical infrastructure), only the greatest applicable increase would apply. The amendment responds to concerns that a case involving those other harms is different in kind from a case involving an intent to obtain personal information. Moving the intent to obtain personal information prong out of the computer crime enhancement and into the new enhancement ensures that a defendant convicted under section 1030 receives an incremental increase in punishment if the offense involved both an intent to obtain personal information and another harm addressed by the computer crime enhancement.

The "(B)" prong of the new personal information enhancement ensures that any defendant, regardless of the statute of conviction, receives an additional incremental increase in punishment if the offense involved the unauthorized public dissemination of personal information. This prong accounts for the greater harm to privacy caused by such an offense.

Second, the amendment changes the Commentary to §2B1.1 to provide that, for purposes of the victims table in subsection (b)(2), an individual whose means of identification was used unlawfully or without authority is considered a "victim." The Commentary to §2B1.1 in Application Note 1 defines "victim" in pertinent part to mean "any person who sustained any part of the actual loss determined under subsection (b)(1)." An identity theft case may involve an individual whose means of identification was taken and used but who was fully reimbursed

[3] An existing enhancement, which addresses offenses under 18 U.S.C. § 1030 (i.e., computer crimes), was at subsection (b)(15) but has been redesignated as subsection (b)(16).

by a third party (e.g., a bank or credit card company).

Some courts have held that such an individual is not counted as a "victim" for purposes of the victims table at §2B1.1(b)(2). *See United States v. Kennedy*, 554 F.3d 415 (3d Cir. 2009) (discussing various cases addressing this issue, including *United States v. Armstead*, 552 F.3d 769 (9th Cir. 2008); *United States v. Abiodun*, 536 F.3d 162 (2d Cir. 2008); *United States v. Connor*, 537 F.3d 480 (5th Cir. 2008); *United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007); *United States v. Lee*, 427 F.3d 881 (11th Cir. 2005); and *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005)). The Commission determined that such an individual should be considered a "victim" for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines. The Commission received testimony that the incidence of data breach cases, in which large numbers of means of identification are compromised, is increasing. This new category of "victim" for purposes of subsection (b)(2) is appropriately limited, however, to cover only those individuals whose means of identification are actually used.

Third, the amendment makes two changes to Application Note 3(C) regarding the calculation of loss. The first change specifies that the estimate of loss may be based upon the fair market value of property that is copied. This change responds to concerns that the calculation of loss does not adequately account for a case in which an owner of proprietary information retains possession of such information, but the proprietary information is unlawfully copied. The amendment recognizes, for example, that a computer crime that does not deprive the owner of the information in the computer nonetheless may cause loss inasmuch as it reduces the value of the information. The amendment makes clear that in such a case the court may use the fair market value of the copied property to estimate loss. The second change adds a new provision to Application Note 3(C) specifying that, in a case involving proprietary information (e.g., trade secrets), the court may estimate loss using the cost of developing that information or the reduction in the value of that information that resulted from the offense. The new provision responds to concerns that the guidelines did not adequately explain how to estimate loss in a case involving proprietary information such as trade secrets.

Fourth, the amendment moves the definitions of "means of identification" and "personal information" to Application Note 1, and clarifies that for information to be considered "personal information," it must involve information of an *identifiable* individual.

Fifth, the amendment amends §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals. As a conforming change, Application Note 4 was amended to add definitions of "means of identification" and "personal information" that are identical to the definitions of those terms in §2B1.1. The departure provision responds to concerns that the guideline may not adequately account for the rare wiretapping offense that involves a substantial number of victims.

Sixth, the amendment clarifies Application Note 2(B) of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). The first sentence of Application Note 2(B) specifies that an adjustment under §3B1.3 shall apply to a defendant who exceeds or abuses his or her

authority to "obtain" or "use" a means of identification. The second sentence then provides, as an example of such a defendant, an employee of a state motor vehicle department who exceeds or abuses his or her authority by "issuing" a means of identification. To make the two sentences consistent, the amendment clarifies the first sentence so that it expressly applies not only to obtaining or using a means of identification, but also to issuing or transferring a means of identification.

Finally, the amendment makes several technical changes not detailed herein.

* * *

FEDERAL RULE AMENDMENTS

Congress has approved several amendments to the federal rules which are due to take effect December 1, 2009.

I. TIME-COMPUTATION AMENDMENTS

Over 90 time-computation amendments are taking place across the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure. The amendments are designed to provide for the same time-computation method for each set of rules and make the application of the method clearer and simpler. The principal simplifying change is a "days are days" approach to computing all time periods in each set of rules, counting intermediate weekend days and holidays regardless of the length of the specified period. Under the present rules, intermediate weekends and holidays are sometimes counted and sometimes not depending on the length of the specified period. To further simplify time counting, most periods shorter than 30 days are changed to multiples of 7 days (7, 14, 21, or 28 days) so that deadlines will usually fall on weekdays. The proposed amendments add clarity by addressing forward and backward counting periods and addressing how concepts such as the "inaccessibility" of the clerk's office and when a day "ends" apply to electronic filing. These amendments replace the inconsistent and often unclear approach of the existing rules.

Including intermediate weekend days and holidays in calculating deadlines effectively shortens those deadlines. For example, a 10-day period under the present rules is in effect a 14-day period because the weekend days are excluded. The proposed amendments to 14 Appellate Rules and 13 Criminal Rules extend virtually all short deadlines to offset this effect of including intermediate weekend days and holidays in the calculation.

A. Federal Rules of Criminal Procedure

Rule 5.1 - Initial Appearance - 14 days (instead of 10) to conduct a preliminary hearing if in custody and 21 days (instead of 20) if not in custody.

Rule 29 - Motion for a Judgment of Acquittal Subsection (c) amended to provide 14 days (instead of 7) after verdict to file or renew a motion for judgment of acquittal.

Rule 33 - New Trial - Subsection (b)(2) amended to provide 14 days (instead of 7) to file a motion for a new trial on grounds other than newly discovered evidence.

Rule 34 - Arresting Judgment - Subsection (b) amended to provide 14 days (instead of 7) to file a motion for arrest of judgment.

Rule 35 - Correcting or Reducing Sentence - Subsection (a) amended to provide 14 days (instead of 7) after sentencing for court to correct clear, mathematical or technical error.

Rule 45 - Computing and Extending Time - Subsection (a)(1)(B) amended to provide for counting every intermediate Saturday, Sunday and holiday (no longer not counted for time periods under 10 days).

Rule 47 - Motions and Supporting Affidavits - Subsection (c) amended timing of motions so that a motion must be filed at least 7 days (instead of 5) before any hearing date unless a rule or court order sets a different time period.

Rule 58 - Petty Offenses and Other Misdemeanors - Subsection (g)(2) amended to provide that any appeal from a magistrate's order or judgment of conviction be filed within 14 days (instead of 10) of entry.

Rule 59 - Matters Before a Magistrate Judge - Subsection (b)(2) amended to require objections be filed within 14 days (instead of 10) of magistrate's findings and recommendations.

B. Federal Rules of Appellate Procedure

Fed.R.App.P. 4 - Appeal as of Right – When Taken - Subsection (b) (Appeal in Criminal Case) amended to provide that a notice of appeal must be filed within 14 days (instead of 10) after entry of judgment or order or 14 days after disposition of motions under Fed.R.Crim.P. 29, 33 and 34.

Fed.R.App.P. 26 - Computing and Extending Time - Amended to provide for the counting of intermediate Saturday, Sunday and holidays.

Fed.R.App.P. 27 - Motions - Amended to provide for 10 days (instead of 8) to respond to a motion.

Fed.R.App.P. 31 - Serving and Filing Briefs - Amended to provide for filing a reply brief 14 days after service of appellee's brief but at least 7 days (instead of 3) before argument.

II. NON-TIME COMPUTATION RULES AMENDMENTS AND NEW RULES

The amendments which impact upon the work of CJA attorneys are summarized below.

A. Federal Rules of Criminal Procedure

Rule 7 - The Indictment and the Information - Deletes as unnecessary a forfeiture-related provision that is more appropriately located in Rule 32.2, which consolidates the forfeiture procedures in a single rule.

Rule 32 - Sentencing and Judgment - Provides that a presentence report should state whether the government is seeking forfeiture, to facilitate timely consideration of forfeiture issues during sentencing.

Rule 32.2 - Criminal Forfeiture - (1) states that the government's notice of forfeiture should not be a count in an indictment or information; (2) provides that the notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture; (3) requires the court to enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to comment; (4) expressly authorizes the court to enter a general forfeiture order when it is not possible to identify all of the property subject to forfeiture; and (5) makes various clarifying and technical changes.

Rule 41 - Search and Seizure - Clarifies the application of the rule's warrant provisions to the search and seizure of electronically stored information. The amendment establishes a two-stage process, authorizing: (1) the seizure of electronic storage media or the seizure and copying of electronically stored information; and (2) a subsequent review, consistent with the warrant, of the storage media or electronically stored information.

Additionally, Rules 11 and 12 of the Rules Governing § 2254 Cases and Rule 11 of the Rules Governing § 2255 Cases are amended to clarify the requirements for certificates of appealability. The amendment requires the district court to rule on the certificate of appealability when a final order is issued, rather than later after a notice of appeal is filed.

B. Federal Rules of Appellate Procedure

Fed.R.App.P. 4 - Appeal as of Right – When Taken - Eliminates an ambiguity arising from the 1998 restyling which might be construed to require an appellant to amend a prior notice of appeal whenever the district court amends the judgment, even if the amendment to the judgment favors the appellant.

Fed.R.App.P. 22 - Habeas Corpus and Section 2255 Proceedings - Conforms the rule to changes proposed to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

Fed.R.App.P. 26 - Computing and Extending Time - Clarifies the operation of the "three-day rule" when a time period ends on a weekend or holiday.

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LEGISLATION TO ELIMINATE THE CRACK/POWDER DISPARITY

H. R. 3245, which has been introduced in the U.S. House of Representatives, would amend the Controlled Substances Act and the Controlled Substances Import and Export Act regarding penalties for cocaine offenses. The bill, introduced by Rep. Robert Scott (D-Va.) has 36 co-sponsors, with Ron Paul (R-Tx) as the lone Republican co-sponsor. The bill provides for the repeal of sections under the Controlled Substances Act (21 U.S.C. 801 et seq.) and Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) which provide increased and mandatory minimum penalties for drug offenses involving crack cocaine.

This bill was considered in the House Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security which has recommended that the bill be considered by the full House. Although it has been placed on a calendar of business, no date has been set for House consideration. The majority party leadership determines the order in which legislation is considered and voted.

Only time will tell whether this long-overdue change will take place, but with the Obama Administration's recent call for the elimination of the crack/powder disparity, hopes are high that change is on the horizon.

Just this week the Congressional Budget Office issued a report estimating that the implementation of H.R. 3245 would lead to reduced spending by the federal prison system of $3 million over the 2010-2014 period.

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HOW LONG WILL *MELENDEZ-DIAZ* LAST?

By: MaryBeth Covert,
Research & Writing Attorney

The question the Supreme Court faced in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), was whether a crime lab report is a form of testimony, so that the prosecution may not use the report at trial to buttress its case unless the technician or chemist who prepared it is at the trial to defend the test results under cross-examination. The Supreme Court held, in a 5-4 decision, that a trial court violated a defendant's Sixth Amendment right to confrontation by allowing certificates of drug analysis to be admitted without in-court testimony by the analysts who prepared the reports. *Id.* at 2542. Since the lab certificates were testimonial statements and prepared for use at the trial, the Court held they could not be admitted without giving an opportunity to cross-examine the analysts. *Id.* at 2532.

Quoting from *Crawford v. Washington*, 541 U.S. 36, 42 (2004), the Court stated "the Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Id*. In *Crawford*, the Supreme Court made clear that the Confrontation Clause "applies to 'witnesses' against the accused – in other words, those who bear 'testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 42, 51. Examples of "testimonial statements" included prior testimony not subject to cross, police interrogations, and affidavits that "would be available for use at a later trial." *Id.* at 51-52.

Justice Scalia, writing for the majority, concluded there was "little doubt" that the drug lab certificates were within the "core class of testimonial statements." *Melendez-Diaz*, 129 S. Ct. at 2532. Because the lab certificates were "affidavits," "made for the purpose of establishing or proving some fact," and were prepared for use at trial, they were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* (citation omitted). Accordingly, the prosecution was required to make the analysts who prepared the certificates available for cross-examination. *Id.*

The potential impact of *Melendez-Diaz* is quite broad. The defense may insist on confronting a plethora of forensic analyses--drugs, fingerprints, blood chemistry, autopsies, firearms, etc. For example, in a DWI case, counsel can demand that the blood chemistry analyst be brought in to testify at trial. Justice Kennedy in dissent warned that the majority opinion will require testimony of witnesses to establish chain of custody or authentication of documents. "The defense bar today gains the formidable power to require the government to transport the analyst to the courtroom at the time of trial." 129 S.Ct. at 2557 (Kennedy, J., dissenting). The majority disagreed:

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody...,' this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation...from *United States v. Lott*,

> 854 F. 2d 244, 250 (7th Cir. 1988), 'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.

Melendez-Diaz, 129 S.Ct. at 2532, n.1.

Some question whether the Supreme Court's recent grant of certiorari in *Briscoe v. Virginia*, ___ S. Ct. ___, 2009 WL 1841615 (No. 07-11191) (June 29, 2009), jeopardizes the broad holding in *Melendez-Diaz*. In *Briscoe*, the question is whether the state can "avoid" the obligation of calling the lab analyst "by providing ... the accused ... a right to call the analyst as his own witness" at trial. The grant of certiorari in *Briscoe* seems contrary to the dicta of *Melendez-Diaz*. There, the Court explained:

> Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power-whether pursuant to state law or the Compulsory Process Clause-is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses."

129 S.Ct. at 2540 (citation omitted).

It will be interesting to see how the Court deals with *Briscoe* in the 2010 Term.

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