# FEDERAL PUBLIC DEFENDER REPORT

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## THE UNITED STATES SUPREME COURT HOLDS THAT FLORIDA'S SIMPLE BATTERY OFFENSE IS NOT A "VIOLENT FELONY" UNDER ACCA

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In Johnson v. United States, 559 U.S. ___, decided on March 2, 2010, the Supreme Court held that Florida's offense of simple battery, which prohibits the "actual" and "intentional" non-consensual "touching"of another person, does not constitute a "violent felony" justifying enhanced penalties under ACCA.

Defendant Curtis Johnson pled guilty to knowingly possessing ammunition after having been convicted of a felony in violation of 18 U.S.C. § 922(g)(1). The Government sought an enhanced penalty under 18 U.S.C. § 924(e), which provides a 15 year minimum sentence of imprisonment for a person who violates 18 U.S.C. § 922(g) and who has three previous convictions for a "violent felony" committed on "occasions different from one another." Section 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another," that constitutes certain enumerated offenses, or which "otherwise involves conduct that presents a serious potential risk of physical injury to another."

At sentencing, the Government insisted that three of Johnson's five prior felony convictions – for aggravated battery, burglary of a dwelling, and simply battery – rendered him eligible for the ACCA enhancement. Johnson objected to counting his simple battery conviction under Florida Statute § 784.03 as a "violent felony." Under Florida Statute 784.03(1)(a), a "battery" occurs when a person either "actually and intentionally touches or strikes another person against the

will of the other" or "intentionally causes bodily harm to another person."

The Court held that Johnson's prior conviction for "actually and physically touching" another person did not amount to the use of "physical force" within the meaning of 18 U.S.C. § 924(e)(2)(B)(I), and therefore, was not a "violent felony" under ACCA. In delivering the opinion of the Court, Justice Scalia (joined by Justices Roberts, Stevens, Kennedy, Ginsburg, Breyer, and Sotomayor) concluded that: (1) the meaning of the term "physical force" was a question of federal rather than state law and; (2) to be classified as a felony which has "as an element the use, attempted use, or threatened use of physical force against the person of another" under 18 U.S.C. § 924(e)(2)(B), a prior conviction must involve "violent force – that is, force capable of causing physical pain or injury to another person."

The crime of simple battery under Florida law, the court reasoned, can be proven among other ways by showing that the defendant "merely actually and intentionally touched" the victim. Since nothing in Johnson's record indicated that his prior battery conviction involved anything other than non-violent "touching," his prior crime did not amount to a "violent felony" predicate under ACCA.

The Government argued that interpreting 18 U.S.C. § 924(e)(2)(B)(I) to require "violent force" would undermine its ability to enforce the firearm disability against persons previously convicted of misdemeanor domestic violence and would make it more difficult to remove, pursuant to 8 U.S.C. § 1127(a)(2)(E), an alien convicted of a "crime of domestic violence." In refuting these arguments, the Court made clear that it interpreted the phrase "physical force" only in the context of the statutory definition of "violent felony," and not in the context of defining a misdemeanor crime of domestic violence, an issue which was not implicated by Johnson's case.

The Court also reiterated its approval of a sentencing court employing a "modified categorical approach" to determine whether an prior conviction involved violent force. "When the law under which the defendant had been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the 'modified categorical approach' . . . permits a court to determine which statutory phrase was the basis of the conviction by consulting the trial record – including the charging document, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms."

In Johnson's case in particular, the Court declined to remand to the Eleventh Circuit the issue of whether simple battery under Florida law was a violent felony under ACCA's so-called "residual clause," which brings within the definition of enhancement-eligible felonies those that "otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The Court found that at Johnson's sentencing, the Government disclaimed any reliance on the residual clause to justify the ACCA enhancement. Ultimately, the Court reversed the judgment of the Eleventh Circuit, set aside Johnson's sentence, and remanded the case for further proceedings consistent with the opinion.

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## TIME TO RECONSIDER WHETHER FELON IN POSSESSION OF AMMUNITION IS A CRIME OF VIOLENCE AUTHORIZING THE GOVERNMENT TO SEEK DETENTION

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The Bail Reform Act of 1984 authorized a detention hearing under one of six statutory bases as codified in 18 USC § 3142(f). These included: a crime of violence; an offense with a maximum sentence of life imprisonment or death; a drug offense with a maximum term of ten years or more; any felony committed after the person had been convicted of two or more of the above offenses; a serious risk of flight; and a serious risk a person would seek to obstruct justice or threaten a prospective witness or juror. Absent application of any of these prerequisites for conducting a detention hearing, pretrial release was required.

Much litigation ensued to determine whether a felon in possession of a firearm qualified as a crime of violence. Most of the circuits decided such a crime did not satisfy the definition of a crime of violence authorizing the government to seek pretrial detention. *See United States v. Ingle*, 454 F.3d 1082, 1085-1086 (10th Cir. 2006); *United States v. Bowers,* 432 F.3d 518, 524 (3d Cir. 2005); *United States v. Johnson,* 399 F.3d 1297, 1302 (11th Cir. 2005); *United States v. Twine,* 344 F.3d 987, 987-88 (9th Cir. 2003); *United States v. Lane,* 252 F.3d 905, 906-08 (7th Cir. 2001); *United States v. Singleton,* 182 F.3d 7, 16 (D.C. Cir. 1999); *see also United States v. Hardon*, No. 98-1625, 1998 WL 320945, at *1 (6th Cir. June 4, 1998) (unpub.) (holding that possession of a firearm and ammunition by a felon are not crimes of violence.). The Second Circuit held to the contrary in *United States v. Dillard,* 241 F.3d 88, 104 (2d Cir. 2000) ("We believe the crime of illegal possession of a firearm by a previously convicted felon involves....a substantial risk of violence.")

The Adam Walsh Child Protection & Safety Act of 2006 amended the statutory grounds permitting the government to seek pretrial detention. A new subparagraph (E) was added to 18 USC § 3142(f)(1). If the case involves:

> (E) any felony that is not otherwise a crime of violence that [1] involves a minor victim or that [2] involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or [3] involves a failure to register under section 2250 of title 18, United States Code.

This new subsection adds three specified offenses to the existing four categories of § 3142(f)(1). Nothing in the amendment authorizes the government to request pretrial detention when the charged offense is limited to possession of ammunition without possessing or using a firearm.

A Second Circuit Panel determined felon in possession of a firearm is a crime of violence for purposes of the Bail Reform Act. *United States v. Dillard,* supra. That panel reviewed the definition of a "crime of violence" found in 18 USC § 3156(a)(4). The opinion focused on subsection (B) as its definition was "intended to cast a wider net." *Id.* at 92.

18 USC § 3156(a)(4)(B) requires five elements be met in order to apply the detention provisions to an underlying felony offense:

(1) the offense must be a felony;
(2) the crime must involve a risk that physical force may be used against a person or property of another;

(3) the risk must result from the nature of the offense;
(4) the risk must be that the use of physical force would occur in the course of the offense; and
(5) the risk must be substantial.

The majority holding in *Dillard* was based on the following conclusions: first, felon in possession of a firearm is a felony offense; second, firearms have no functional utility other than to threaten or to cause harm to persons, animals, or property; third, criminals are more likely to cause harm if they possess firearms; fourth, "[i]f one uses a gun in an act of violence, that violence necessarily occurs during the possession of the gun;" and fifth, there is a substantial risk that a felon in possession of a gun will cause violence. *Id.* at 93-94.

Applying the elements of 18 USC § 3156(a)(4)(B) to a felon in possession of ammunition charge demonstrates that the offense does **not**, by its nature, involve "a substantial risk that physical force....may be used in the course of committing the offense." First, the charge is a felony offense; second, the possession of ammunition does not involve a risk that physical force may be used against the person or property of another; third, there is no risk resulting from the nature of the offense. Unlike the possession of a firearm, there is no increased risk that a felon in possession of ammunition solely will engage in violent acts; fourth, there is little risk that physical force would occur in the course of the possession; and fifth, there is no substantial risk that force will be used. Thus, the statutory elements are not met when one is simply accused of being a felon in possession of ammunition.

Some decisions have applied the *Dillard* determination that felon in possession of a firearm is a crime of violence supporting the government's call for detention in an ammunition prosecution. *See United States v. Jefferson,* Case No. 10-MJ-515, *United States v. Deponceau,* Case No.05-CR-6124L, *United States v. Carswell,* 144 F.Supp.2d 123 (N.D.N.Y. 2001) and *United States v. Ellison,* Case No. 00-CR-6117(CJS), 12 Fed.Appx. 25 (2d Cir. 2000) (affirming the order of detention on serious risk of flight.)

Most of the cited decisions reflexively apply the *Dillard* standard without a thorough review of the five elements required by 18 USC § 3156(a)(4)(B). For example, in *Carswell,* the defendant was found by the district court judge to possess a shotgun shell which the defendant used in a shotgun to fire rounds through an apartment door into a refrigerator under circumstances which might have killed the occupant who refused to let the defendant into the residence. *Id.* at 131. The court's findings may be limited to the unique facts present in that case:

> At the risk of using logic that may appear circuitous, the court believes that the current facts demonstrate that the same rationale applies to ammunition. The court may not consider Carswell's uncharged use of the shotgun to hold a hearing in the first instance **nor is it likely that all possession of ammunition will be accompanied by evidence of gun use**. Nonetheless, Carswell, a convicted two-time, violent felon, illegally possessed ammunition which, in fact, served as a precursor to his using the ammunition to load a shotgun and discharge it into an innocent victim's apartment. Those facts amply demonstrate that ammunition possession by convicted felons carries the same inherent risk as does gun possession.

*Id*. at 133 (emphasis supplied).

Notwithstanding the recommendation in *Dillard* that the interpretation of 18 § USC

3156(a)(4)(B)'s "*risk of violence must result from the categorical nature of the offense and that the statute would not be satisfied where a defendant used violence in the commission of an offense whose nature ordinarily does not give rise to a substantial risk of violence*," the *Carswell* decision is clearly determined by the specific facts present. 214 F.3d at 92.

Currently, the amended detention statute authorizes the government to seek detention in those cases which involve the possession or use of a firearm. *See* 18 USC § 3142(f)(1)(E). Thus, the tortured logic employed by the district court to detain Carswell for possession of ammunition is no longer necessary as the facts recited in that case likely fall within the amended section's use of a firearm. The continued viability of that holding to permit the government to seek detention of a felon in possession of ammunition must be challenged.

Counsel must be prepared to vigorously contest the government's ability to seek detention when there exist no allegations that the possession of ammunition was coupled with the possession or use of a firearm. The government seldom accuses a defendant of solely possessing ammunition after a prior felony conviction. Occasionally, the charge is filed as a precursor to additional offenses. Counsel must effectively present an analysis of the five elements found in 18 USC § 3156(a)(4)(B)'s definition of a crime of violence to establish why felon in possession of ammunition does not involve "a substantial risk that physical force....may be used in the course of committing the offense." This is critical when there is no reasonable basis to support a claim the defendant is a serious risk of flight. Contrary to the current belief, *Dillard* does not hold felon in possession of ammunition is a crime of violence authorizing the government to pursue detention.

The Supreme Court addressed the limited application of the detention statutes.

> The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 USC § 3142(f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest.....Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of serious crimes.

*United States v. Salerno*, 481 U.S. 739, 750 (1987).

Counsel should constantly remind the hearing judge that "*[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Id.* at 755.

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**FEDERAL CRIMINAL DEFENSE PRACTICE SPRING 2010 SEMINAR**

**Friday, May 7, 2010**
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 soon!

# WHAT IS LEFT OF *MIRANDA*?

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The Supreme Court on February 24, 2010 issued a decision in *Maryland v. Shatzer*, 08-680, establishing new rules for police who want to question a suspect for a second time after the suspect invokes his right to counsel under *Miranda*. The new ruling permits subsequent questioning when there is a "break in custody" between the first and subsequent police efforts to question the suspect.

In *Shatzer*, police tried to question the defendant, who was in prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer invoked his Miranda right to counsel and the interview was terminated. Shatzer was placed back in general population and the investigation was closed. Police reopened the investigation and Shatzer was questioned 2½ years later while he was still in prison. At the second questioning, investigators read the defendant his rights again, at which time he signed a waiver, and made incriminating statements. He was indicted on abuse charges, and moved to suppress his statements as having been taken in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981) (creating a presumption that once a suspect invokes the *Miranda* right to counsel, any waiver of that right in response to a subsequent police attempt at interrogation is involuntary).

Justice Antonin Scalia, writing for the majority, said the *Edwards* rule should not act as an "eternal" bar against further police questioning. "In a country that harbors a large number of repeat offenders, this consequence is disastrous." Finding that it would be impractical to leave the question of *how long* after a break in custody the termination of *Edwards* protection occurs for case-by-case adjudication, the Court took the unusual step of setting forth a precise time limit – Justice Scalia said the Court agreed that, after a 14-day "break of custody," police may try to question a suspect again without fear that a subsequent confession would be suppressed. "That provides plenty of time for the suspect to get re-acclimated to his normal life ... and to shake off any residual coercive effect of his prior custody," Scalia wrote. In Shatzer's case, Scalia said the fact that he was actually in prison during the "break in custody" did not change the result.

Justices Clarence Thomas and John Paul Stevens joined Scalia's decision except for the 14-day duration of the new rule.

On February 23, 2010, in *Florida v. Powell*, 08-1175, writing for the majority, Justice Ruth Bader Ginsburg found that police satisfied the requirements of *Miranda* in telling the defendant that he had "the right to talk to a lawyer" before answering police questions, and that he could use "any of these rights at any time you want" during the interview. The suspect was not explicitly warned that he had the right to have a lawyer present during questioning. The Florida Supreme Court found that this wording was inadequate and misleading and held that the confession should be suppressed. However, the Supreme Court held that, in combination, the police warnings "reasonably conveyed [the defendant's] right to have an attorney present at all times." Justice Ginsburg noted that the FBI, like many other jurisdictions, explicitly state the right to have a lawyer present, "but we decline to declare its precise formulation necessary to meet Miranda's requirements."

Watch for another *Miranda* decision to come out soon. On March 1, 2010, the Court heard argument in *Berghius v. Tompkins*, 08-1470, which asks whether police can try to noncoercively persuade a suspect to answer questions after the *Miranda* warning has been

given, but before the suspect has invoked or waived any rights thereunder.

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## INTERPRETERS AND THEIR DUTY TO UPHOLD THE ATTORNEY-CLIENT PRIVILEGE

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Does a court-appointed interpreter have any professional responsibility with respect to confidentiality during her participation in a private meeting between the attorney and client? What is an attorney's professional responsibility should the interpreter reveal any confidential information which emanates from that session? What, if any, preventative measures can an attorney take to prevent such a problem?

Consider this scenario with which a CJA attorney recently was faced: a voucher arrangement was made with a court-appointed interpreter to accompany the attorney to the county jail to speak with a Spanish-speaking client. During the meeting at the jail, the interpreter perceived that a "threat" was made by the client against the Assistant United States Attorney ("AUSA") assigned to the case.

Following the meeting at the jail, realizing that the interpreter seemed concerned about the "threat", the attorney brought her back to his office and, along with his staff, not only discussed her concerns but inquired as to what, if any, rules of conduct under which she operates. The attorney was surprised that she claimed to be aware of no such rules. The attorney then told her that he would research any rules of professional responsibility applicable to interpreters, and instructed her, in the meantime, to tell no one about any aspect of this scenario. However, to the attorney's shock and surprise, on the next business day, the U.S. Attorney's Office contacted the attorney's office to advise that the interpreter had alleged that a "threat" had been made against one of its Assistants.

A flurry of events ensued that caused the attorney to devote the entire following week on this issue. The Western District of the U.S. Attorney's Office recused itself from the investigation because it involved one of its own Assistants, and the case was assigned to the Northern District's U.S. Attorney's Office. Both the FBI and the U.S. Marshal's Office became involved in the investigation, and sent agents to the jail to interview the client at the jail *without notifying the attorney.* However, by week's end, the investigation ended, and the conclusion was reached that no viable threat was made.

Had the interpreter violated any rule? Under these circumstances, the attorney's professional responsibility is clear: under both the old Lawyers Code of Professional Responsibility ("the Code") and the New York Rules of Conduct ("the Rules"), which became effective April 1, 2009, there is a *permissive* exception to reveal threats of future criminal conduct. The Code, at DR 4-101(C), provided that

> "A lawyer ***may*** reveal:
> (3) The intention of a client to commit a crime and the information necessary to prevent the crime."

(Emphasis added). New Rule 1.6, entitled "CONFIDENTIALITY OF INFORMATION", provides in part that:

> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime.

Thus, new Rule 1.6(b) expands and adds an exception for when the lawyer reasonably believes such action is necessary "to prevent reasonably certain death or substantial bodily harm." But the basic premise of the Rule is consistent with its counterpart under the old Code: that a lawyer "may" (not "must") reveal such a perceived intention by a client. If the rule were otherwise, i.e., if the rule *required* the attorney to make such a revelation, it would deprive the attorney of the exercise of any independent judgment, and the results could be disastrous for the entire criminal justice system.

But what is an *interpreter's* responsibility under the same circumstances? The *Federal Court Interpreters Act* provides that "[t]he Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States[]" (28 U.S.C. § 1827[a]), and authorizes the promulgation of rules for such interpreters. The "Federal Court Interpreter Program", found online at: *uscourts.gov/interpretprog/ interp_prog.html*, contains a link to "Standards for Performance and Professional Responsibility" ("the Standards") for interpreters, which is provided to each interpreter before undertaking any interpreting assignment. The Preamble is as follows:

> "Federally certified court interpreters are highly skilled professionals who bring to the judicial process specialized language skills, impartiality, and propriety in dealing with parties, counsel, the court, and the jury. All contract court interpreters, regardless of certification, are appointed to serve the court pursuant to 28 U.S.C. § 1827. *When interpreters are sworn in they become, for the duration of the assignment, officers of the court* with the specific duty and responsibility of interpreting between English and the language specified. In their capacity as officers of the court, contract court interpreters are expected to follow the Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts."

(Emphasis added). These Standards include nine rules, including:

> 5: Confidentiality
>
> Interpreters shall protect the confidentiality of all privileged and other confidential information.

Thus, it appears that, unlike the comparable Rules which bind attorneys, there are no exceptions to the clear and unambiguous duty of an interpreter to abide by the strict code of confidentiality.

Each interpreter must sign a contract with the Government - "Contract Court Interpreter Services Terms and Conditions" (also found online at: *uscourts.gov/interpretprog/interp_ prog.html*) – before accepting any assignment, which includes (at section 9.2[c]) a discourse on confidentiality. The reason for the rule of confidentiality for interpreters – and the fact that no exceptions exist – is clear: *the system of justice with respect to a defendant in need of interpreter services would collapse if both the attorney and the client could not speak freely in the presence of an interpreter.*

In sum, to prevent the attorney's nightmare set forth above, when dealing with an interpreter for the first time in a situation involving a private conversation with a client, an attorney should ask if they are familiar with the Standards set forth above. If not, the attorney should provide a copy to them. And most importantly, the attorney should extract a promise that, under no circumstances, will the interpreter violate the duty of confidentiality with respect to anything stated either by the attorney or the client. If not – for the protection of both you and your clients – do not engage the services of that interpreter.

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## INCREASES IN CJA RATES

Congress authorized and provided funds to raise the non-capital hourly panel attorney compensation rate from $110 to $125 (and also raised the maximum hourly capital rate from $175 to $178 for federal capital prosecutions and capital post-conviction proceedings). These rates apply to attorneys appointed to represent eligible persons under the CJA, 18 U.S.C. § 3006A. **The new hourly compensation rates apply to work performed on or after January 1, 2010**. Where the appointment of counsel occurred before this effective date, the new compensation rates apply to that portion of services provided on or after January 1, 2010.

Pursuant to the "Judicial Administration and Technical Amendments Act of 2008," Pub. L. No. 110-406, the compensation maximums applicable to appointed panel attorneys in non-capital representations are "simultaneously" increased as follows:

$9,700 for felonies at the trial court level and $6,900 for appeal (previously $8,600/$6,100);

$2,800 for misdemeanors at the trial court level and $6,900 for appeal (previously $2,400/$6,100);

$9,700 for non-capital post-conviction proceedings under 18 U.S.C. §§ 2241, 2254 or 2255 and $6,900 for appeal (previously $8,600/$6,100);

$2,100 for most other non-capital representations and $2,100 for appeal (previously $1,800/$1,800).

The new case compensation maximums apply to a voucher submitted by appointed counsel if that person furnished any CJA-compensable work on or after January 1, 2010. The former case compensation maximums apply to a voucher submitted by appointed counsel if that person's CJA-compensable work on the representation was completed before January 1, 2010.

Panel Attorneys can access charts detailing Hourly Rates for CJA Panel Attorneys and Waivable Case Compensation Maximums for Non-Capital Cases, which indicate the new hourly rates and case compensation maximums at *www.fd.org.*

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## NEW CJA MANUAL!

The Second Circuit recently published the *CJA Policies and Procedures Manual* ("CJA Manual") which sets forth a standard of conduct for all CJA Panel Attorneys in both the district courts and the Circuit Court. The CJA Manual may be found on the Second Circuit's internet site under the CJA link: *http://www.ca2.uscourts.gov/cja_new.htm.*

# NEW SECOND CIRCUIT LOCAL RULES

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The Second Circuit instituted new Local Rules as of January 1, 2010. The Rule changes will affect how documents are to be filed in the Court, and how attorneys communicate with the Court. Most notable is the fact that the Circuit has implemented the CM/ECF system for all appeals docketed after the beginning of this year. In this essay, I will review some, but not all, of the significant Rules changes that have been made in an attempt to help you avoid some pitfalls when filing an appeal to the Second Circuit.

A copy of the Second Circuit's Local Rules can be found on the Second Circuit's website. The Clerk's Office provides links containing the Federal Rules of Appellate Procedure along with the Circuit's Local Rules of Procedure: *http://www.ca2.uscourts.gov/clerk/Rules/Rules_home.htm*. You can also find a link to just the Court's Internal Operating Procedures and Local Rules of Procedure that went into effect on January 1, 2010, at the following link: *http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rules.htm*. The Court also makes all of the forms that you that you need available on the Circuit's website in a .pdf format. These are fillable forms that, once completed, can then be printed from your computer. *See http://www.ca2.uscourts.gov/clerk/Forms_and_ instructions/forms_home.htm*.

## Initiating an Appeal

When initiating an appeal, you must still file a Notice of Appeal within ten days of entry of judgment in the District Court's Clerk's Office. A fillable .pdf is available on the Circuit's website. Local Rule 12.2 also requires counsel to file Form B, the Criminal Transcript Information Form, within 14 days of filing the Notice of Appeal. Form B is available on the Court's website, and it is used for ordering transcripts. The Form will contain the same information that was on the old Notice of Appeal Form as to those transcripts you wish to order. The original copy of the form is to be transmitted to the District Court, and copies are to be provided to the Court of Appeals, U.S. Attorney's Office, and Court Reporter(s).

Within 14 days of receiving the Docketing Notice from the Court of Appeals, Local Rule 12.3 requires counsel to Acknowledgment and Notice of Appearance Form. If substitute, additional, or amicus counsel become involved in the case, the Notice of Appearance Form for Substitute, Additional, or Amicus Counsel must be submitted at the time the attorney enters the case.

## CM/ECF

The Circuit placed the Case Management/Electronic Case Filing system (CM/ECF) into effect on January 20, 2010. *See* Local Rule 25.1. CM/ECF applies to all cases docketed in 2010; cases docketed prior to 2010 do not fall under the requirements of Rule 25.1. Before an attorney will be able to file any document with the Court of Appeals through the CM/ECF system, you must create a CM/ECF account. *This account is separate from the account you have for filing documents in the District Court*.[1] The starting point, once again, is the Second Circuit's website. *See http://www.ca2.uscourts.gov/clerk/Overview/Creating_and_updating_accounts.htm.*

[1] If you are like me, you may start to lose track of all of the different accounts you have. When creating your account, you may able to use the same account name as your District Court account. The registration program should give you an opportunity to select your own account name if that account name is available.

Under the new rules, every document except an initiating document must be filed through the CM/ECF system. 2d Cir. Local Rule 25.1(c)(1). A document is any paper that is to be submitted to the Court in a case. 2d Cir. Local Rule 25.1(a)(1)(A). An initiating document that is filed in the Court of Appeals, which includes a petition for review of an agency decision, petition for a writ of mandamus, successive habeas petition, or motion for leave to file an appeal, filed directly in the Court of Appeals to initiate a proceeding seeking consideration by this court, must be filed e-mailing a .pdf to newcases@ca2.uscourts.gov. 2d Cir. Local Rule 25.1(c)(2).

There are changes regarding the filing of paper copies to the Court. With the exceptions of a brief and the joint appendix, no paper copies are to be filed in the Court unless the Court requests that you do so. 2d Cir. Local Rule 25.1(g)(2); 2d Cir. Local Rule 25.3. Paper copies of briefs and appendices are to be filed in accordance with 2d Cir. Local Rules 30.1(b) and 31.1. Sealed documents are exempt from this requirement, and must be filed in the manner prescribed by the Court. 2d Cir. Local Rule 25.1(j)(2).

**Appeals Initiated Before January 1, 2010**

In all cases filed prior to January 1, 2010, counsel must submit a paper copy of a document, along with a .pdf version of the document. Interim 2d Cir. Local Rule 25.2(b)(1). The .pdf must be "text-searchable." Interim 2d Cir. Local Rule 25.2(b)(3). The e-mail in criminal cases should be sent to the following address: criminalcases@ca2.uscourts.gov. Interim 2d Cir. Local Rule 25.2(d)(2)(B). The e-mail's subject line must contain the following information: the docket number, the party's name, the party's designation (i.e., appellant, appellee), the type of document (form, letter, brief), the date of submission. Interim 2d Cir. Local Rule 25.2(c)(1). The Court provides the following example of a proper subject line: # 01-2345-cv, ABC Corp, Appellant, Letter, 01/02/09. *Id*.

When filing documents that must be considered together, all documents must be in a single e-mail submission. Interim 2d Cir. Local Rule 25.2(c)(2). When submitting a motion, the T-1080 motion information form, affidavit, memorandum of law, and any other documents that are part of the motion, must be submitted in a single .pdf document. Interim 2d Cir. Local Rule 25.2(c)(3).

A .pdf version of the Joint Appendix is also required. Interim 2d Cir. Local Rule 25.2(h). Like other documents submitted in .pdf format, it must be text-searchable. *Id*. However, rather than submitting it through e-mail, counsel is to provide it to the Court on a CD-Rom or on DVD. *Id*. If counsel is unable to provide an electronic copy, the Interim 2d Cir. Local Rule provides for submission of an unbound copy of the document. Interim 2d Cir. Local Rule 25.2(I).

**Number of Paper Copies to File**

Under the new Local Rules, counsel is required to file fewer copies of papers with the Court of Appeals. According to Local Rule 25.1(g), unless requested by the Court, counsel will *only* file paper copies of the brief and appendix with the Court. That said, counsel is required to file the original and two copies of all motion papers with the Court. 2d Cir. Local Rule 27.1(a)(4).[2] The Court now

[2] Yes, there is an apparent contradiction between 2d Cir. Local Rule 25.1(g)(2), which requires, under CM/ECF, that only paper copies of Briefs and Appendices be filed with the Court, and 2d Cir. Local Rule 27.1(a)(4). Given that the interaction of these Rules can be interpreted in different ways, you may wish to contact the Clerk of the Court of Appeals before filing a motion in a case initiated after January 1, 2010. There appears to be no contradiction for cases

(continued...)

requires only six (6) copies of a brief to be filed. 2d Cir. Local Rule 31.1. Only three (3) copies of the appendix need be filed with the Court. 2d Cir. Local Rule 30.1(b).

**Briefing Schedule**

If you have not recently appealed a case to the Court of the Appeals, you may be surprised to learn that the Court no longer issues a scheduling order when it sends the docketing notice. A new procedure has been put in place that should provide counsel enough time to draft a brief–up to 120 days. However, it does have its drawbacks in that you must inform the Court of the status of the transcripts.

Upon filing the Transcript Information Form, i.e., Form B, the Court Reporter is expected to complete production of the transcripts within 30 days. 2d Cir. Local Rule 11.3(a). If the transcripts are not completed within 30 days, the appellant must notify the Clerk of the Court of Appeals in writing that the transcripts have not been filed. 2d Cir. Local Rule 11.3(c). Every 14 days thereafter, until the transcripts have been prepared, the appellant must update the Clerk of the Court, in writing, of the status of the transcripts. *Id*. The Clerk of the Court expects counsel to explain efforts made to obtain the transcripts. *See* How to Appeal a Criminal Case to the United States Court of Appeals for the Second Circuit, *available at*, *http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Criminal_case/How_to_appeal_a_criminal_case.htm*.

Within 14 days of receiving the last transcript (the "ready date"), the appellant must notify, in writing, the Clerk of the Court the date in which counsel expects to file the appellant's brief. 2d Cir. Local Rule 31.2(a)(1)(A). The date must be within 120 days of the ready date. *Id*. The Court will normally "so order" the defendant's requested scheduling deadline. 2d Cir. Local Rule 31.2(a). If counsel fails to request a scheduling date, the deadline for filing the brief will be 40 days from the ready date. 2d Cir. Local Rule 31.2(a)(1)(A).

Within 14 days after the filing of the appellant's brief, the appellee must notify the Clerk of the Court, in writing, its requested deadline date for filing the appellee's brief. 2d Cir. Local Rule 31.2(a)(1)(B). The date must be within 120 days after the filing of the appellant's brief. *Id*. If the appellee fails to submit a scheduling request, the brief will be due within 30 days of the filing of the appellant's brief. *Id*.

Failure to file a brief in accordance with 2d Cir. Local Rule 31.2, or failure to meet a deadline in accordance with this rule, may result in dismissal of the appeal. 2d Cir. Local Rule 31.2(c).

**Oral Argument**

Each party must file an Oral Argument Statement within 21 days of filing of the final appellee's brief. 2d Cir. Local Rule 34.1(a). Failure to file an Oral Argument Statement will signify counsel's desire to have the Court take the case under submission without oral argument. *Id*. The Oral Argument Statement can be found at the following: http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/REVISED_LR_34_ORAL_ARGUMENT_STATEMENT_FOR_COMMENT_(December_09).pdf. A space is included to indicate dates in which counsel will be unavailable for oral argument.

[2](...continued)
initiated prior to January 1, 2010; hard copies of motions must be filed with the Court. *See* Interim 2d Cir. Local Rule 25.2(b)(1).

**Conclusion**

Regardless of how many appeals you have filed in the United States Court of Appeals for the Second Circuit, given the new 2d Cir. Local Rules, it will be in your interest to review the rule changes before pursuing a new appeal. With the implementation of the new CM/ECF system, the Federal Public Defender's Office has found that the Court is giving less leeway to small infractions of the 2d Cir. Local Rules. It will also be helpful to review the Court's document, "How to Appeal a Criminal Case to the United States Court of Appeals for the Second Circuit." Doing so, can help prevent receiving a phone call from the Clerk's Office asking you to correct and resubmit a document. And, as always, if you have any questions regarding an appeal, do not hesitate to contact one of the Research and Writing Attorneys in the Buffalo or Rochester Offices.

* * *

# Announcing...

The Federal Public Defender's Office is pleased to welcome **Sharon Southworth** as Branch Administrative Assistant/Paralegal.

Sharon hails from the United States Attorney's Office where she served as Executive Assistant/Supervisory Legal Assistant to the United States Attorney from March 2006 to September 2009. She held the title of Supervisory Legal Assistant from October 1998 to March 2006.

Sharon replaces Carol A. Steinbruckner who retired after 27 years of federal service. We wish Carol well in her retirement and welcome Sharon to our office!

# DISTRICT COURT AMENDS LOCAL RULES

While the District Court is currently in the process of revising its Local Rules of Criminal and Civil Procedure, effective May 1, 2003 ("Local Rules"), the Court issued a Standing Order effective December 1, 2009, in order to bring the Local Rules in conformance with the time period amendments effective the same date. Accordingly, the following Local Rules of Criminal Procedure were amended as indicated:

| Current Rule | Title | Old Time Period | New Time Period |
|---|---|---|---|
| 49.1( c) | Service and Filing of Papers | 15, 8, 3, 10, 3 | 14, 7, 3, 7, 3 |
| 58.2(a)(2) | Objections to Magistrate Judges' Order | 10 | 14 |
| 58.2(a)(3) | Objection to Magistrate Judges' Report and Recommendation | 10 | 14 |

Changes to the civil rules can be found on the District Court website.

* * *

# Congratulations are extended to

**Hon. William M. Skretny** on his assumption of the role of Chief Judge for the United States District Court for the Western District of New York.

* * *

# ECUADOR EMBRACES AN ADVERSARIAL JUDICIAL SYSTEM

**Roxanne Mendez Johnson**
**Assistant Federal Public Defender**

Recently, the Ecuadorian Constitution was dramatically altered in ways which changed their judicial system from an inquisitorial system to an accusatorial system as we have here in the United States. Previously, there were no oral trials in Ecuador as we know them here. Under the inquisitorial system practiced in Ecuador, the judges would assign the prosecutors to investigate and report on matters that interested them, pleadings would be filed by the prosecutor and the defense attorney, and the judge would rule on the matter without the assistance of any sort of oral argument. There were no juries and currently, even with the changing system, there are still no juries envisioned in the new adversarial judicial system. This jump from the inquisitorial system to the adversarial system is a revolutionary change for Ecuador.

From November 16, 2009, to November 20, 2009, I had the opportunity to travel to Cuenca, Ecuador, with the American Bar Association, Rule of Law Initiative (ROLI) to present a trial advocacy course entitled, "Techniques of the Oral Trial." The purpose of the trip was to present an American style advocacy course in Spanish to the local judges and attorneys in Ecuador. The goal of the Rule of Law Initiative was to not only show the legal practitioners what an adversarial trial looks like, but to allow each and every participant to learn, practice, and receive critique on the various components of an oral trial. We started with the theory of the case, themes, opening, direct, cross, proof and objections, and closings.

The most interesting aspects of the course regarded defense investigations, and direct examination. The concept of proactive defense investigation was completely uncharted territory for the Ecuadoran attorneys and law students. In the past, they would rely completely on the "official" investigation conducted by the police at the behest of the judge. The defense attorneys would have to convince the police to conduct any investigation that they wanted, and were often not satisfied with either the level or quality of such investigation. Because part of the Ecuadorian constitutional change involves a more developed and stronger defense bar, the attorneys had to be educated on the basic fact that they needed to go out there and investigate. Most public defense attorneys in Ecuador have no budget for investigations, and questioned myself and the rest of the ROLI panel extensively on the basics of defense investigation. We recommended going to the scene, taking photos, and bringing another person that would be able to testify at trial. As the beneficiary of excellent professional federal defense investigators, the plight of the Ecuadoran public defense attorneys poignantly highlighted how far the public defense bar in the United States has come since the first days after Gideon v. Wainwright.

During the course itself, I lectured on direct examination. What seems to us as second nature, proved very difficult to express to the participants in a way that was easily understood. We know that direct exam consists of laying out the story that you want to tell for the jury step-by-step, using open-ended questions that have been formulated after many interviews and much preparation. The Ecuadoran practitioner however, has no previous experience with oral practice. Most everything they have done is argue. As a result, on their first attempts at conducting a practice direct exam, participants were generally unable to avoid compound questions and falling straight into leading questions. It was only after much explanation, simulation, and actual individual practice, that the

practitioners got the feel for conducting a proper direct exam.

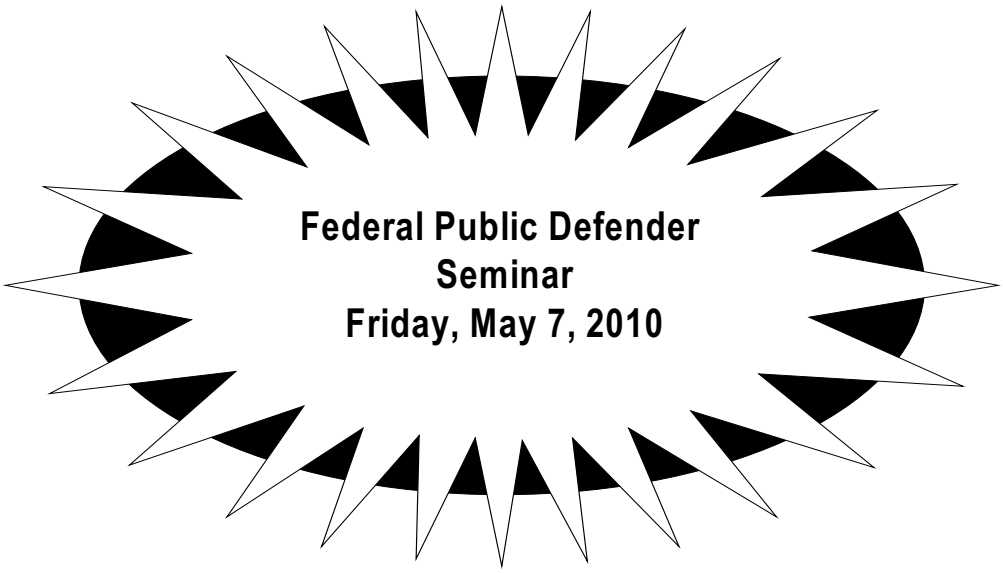
The last day of the course, the participants conducted a mock trial. They were broken down into groups, given a sample case, provided with witnesses to interview, and were left to investigate, develop and try their cases. It was a grueling day for all, but each participant had the opportunity to practice their new oral advocacy skills and receive critique from their fellow participants, as well as from the instructors. After hearing about all the many challenges facing Ecuadoran public defense attorneys, I am immensely grateful for not only the excellent resources available to the public defense bar in the United States, but also for how developed and intrinsic the public defense bar has become in this country. I understand much more fully what the Sixth Amendment of the Constitution truly means.

* * *

**Do you have an interesting issue to share with our panel attorneys???**

**Please contact one of our editors to submit an article for the next edition of the Federal Public Defender Report!**

**REMINDER . . . Mark your calendars now!**



# FEDERAL PUBLIC DEFENDER REPORT

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If you would like to submit an article or information related to criminal defense issues for publication, please feel free to mail, fax or e-mail your information to:

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