FEDERAL PUBLIC DEFENDER REPORT

Federal Public Defender
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NO PROXIMATE CAUSE BETWEEN POSSESSION OF CHILD PORNOGRAPHY AND A DEPICTED VICTIM'S LOSSES

Tracy Hayes
Assistant Federal Public Defender

The Second Circuit Court of Appeals recently decided that proximate cause is required for an order of restitution in child pornography possessor cases. *United States v. Aumais*, No. 10-3160-cr, __ F.3d __, 2011 WL 3926922 (2d Cir. Sept. 8, 2011). Employing the framework of 18 U.S.C. § 2259, the Second Circuit Court joined the D.C. Circuit, Third Circuit, Ninth Circuit and Eleventh Circuit, in holding that under § 2259, a victim's losses must be proximately caused by the defendant's offense to justify restitution. *Aumais*, 2011 WL 3926922, at * 5. The Fifth Circuit is the only Court to find that proximate cause is not required. *See In re Amy Unknown*, 636 F.3d 190, 198 (5th Cir. 2011).

In *Aumais*, the defendant pleaded guilty to transporting and possessing child pornography. The district court sentenced him to a prison term of 121 months on Count 1 and 120 months on Count 2, concurrently with five years of supervised released. Additionally the court ordered, pursuant to 18 U.S.C. § 2259, the defendant to pay $48,483 in restitution to finance future counseling costs for "Amy," one of the victims depicted in the pornographic images. *Aumais*. 2011 WL 3926922 at *1.

On appeal, the Second Circuit found that based on the facts elicited at restitution hearing, Aumais' possession of Amy's images was not a substantial factor in causing her loss. Consistent with this finding, the Court of

Appeals reversed the sentencing court's restitution order.

Facts and Proceedings Before the District Court

In November 2008, the defendant attempted to enter to United States from Canada at Fort Covington, New York Port of Entry. The border agents searched his car and found numerous child pornographic images stored on various electronic media. The defendant admitted to downloading the images from a peer-to-peer network. Subsequently, he entered a guilty plea, *without* the benefit of a written plea agreement. *Id.* at *2. The presentence report identified Amy as a victim depicted in the images, and acknowledged her $3.3 million demand for restitution pursuant to 18 U.S.C. § 2259. In her victim impact statement, Amy claimed that she was unable to forget the sexual abuse she suffered at the hands of her uncle because "the disgusting images of what he did to [her] are still out there on the internet." In rendering it's sentence, the district court bifurcated the issue of restitution and referred the to the magistrate judge for report and recommendation. *Id.*

Magistrate Judge David Homer held an evidentiary hearing at which Dr. Joyanna Silberg testified that she evaluated Amy in June, July and November of 2008. The doctor testified that Amy had been sexually abused by her uncle between the ages of 4 and approximately 7 or 8 years old. Amy had, according Dr. Silberg, undergone psychological treatment which helped her function "pretty well normally" until she was advised by the National Center for Missing and Exploited Children that her images were being traded on the internet. After learning of this fact, Amy experienced fear of being at parties and public gatherings, developed a sense of "pervasive helplessness," took to alcohol and could not finish college. Dr. Silberg opined that Amy was a direct victim of Aumais' conduct and that "Mr. Aumais represent[ed] one component of the damages, because [he] is one of the individuals arrested for having looked and her picture and possessing it."

Based on Amy's Victim Impact Statement and Dr. Silberg's testimony, the Magistrate Judge found that, although Amy had neither contact with Aumais nor knowledge of his existence, his possession of her images exacerbated the harm (originally caused by her uncle) by creating a market for distribution and by inflicting the humiliation of knowing that the images are out there being exploited by a group of consumers, of whom Aumais was one. *Id*. at *6. The Magistrate reasoned that Amy's harm was not obviated or diminished by the fact that Aumais was but one of hundreds or perhaps thousands of such consumers; rather, "it exacerbate[d] the harm by confirming how expansive has become the number of individuals exploiting Amy's images." *Id.* These findings were adopted by the District Court and a restitution order was entered on August 3, 2010.

The Second Circuit Panel's Analysis

The Second Circuit panel first addressed "whether a defendant convicted only as a consumer of child pornography may be liable for restitution under 18 U.S.C. § 2259 to a child victim," *Id.* at *4, and concluded that such a defendant could be liable provided that there was a direct relationship between the defendant's actions and the victim's losses. Section 2259 states that "the court shall order restitution" for any applicable offense and "shall direct the defendant to pay the victim . . . the full amount of the victim's losses." The statute defines a "victim" as "the individual harmed as a result of a commission of a crime under this chapter [18 U.S.C. §§ 2251–2260]." It provides that the "full amount of the victim's losses" include any costs incurred by the victim for:

> (A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;
(C) necessary transportation, temporary housing, and child care expenses;
(D) lost income;
(E) attorneys' fees, as well as other costs incurred; and
(F) any other losses suffered by the victim as a proximate result of the offense.

The statute states that "[t]he issuance of a restitution order under this section is mandatory," and forbids a sentencing court from declining to issue an order due to: "(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source." *See* 18 U.S.C. § 2259.

Next, the panel found that Amy was a "victim" as defined in 18 U.S.C. § 2259(c). Id. at *4 (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982), and *United States v. McDaniel*, 631 F.3d 1204, 1208 (11th Cir. 2011)). The panel reiterated the reasoning of *Ferber* and *McDaniel* that distribution of child pornography is "intrinsically related to the sexual abuse of children" because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." And, the panel further noted that, "because the child's actions are reduced to a recording, the pornography may haunt [the child] in future years, long after the original misdeed took place." *Id*. at *5 (quoting *McDaniel*, 631 F.3d at 1208).

However, the panel disagreed that the facts in Aumais' case "establish[ed] a causal connection between Aumais' possession of Amy's images and Amy's losses." *Id*. at *6. In other words, the panel found that the government did not establish proximate cause between Aumais criminal act and Amy's damages. In reaching this conclusion, the panel reasoned that 18 U.S.C. § 2259 is grounded in "traditional principles of tort and criminal law," and the "bedrock rule . . . that a defendant is only liable for harms he proximately caused." The panel rejected the notion that it is enough to show causation between a defendant's acts and a victim's losses more generally.

The Court's conclusion that there was no proximate cause in *Aumais* was predicated primarily on the fact that Amy's psychological damage was evaluated before Aumais was even arrested for possessing her image. "[W]here the Victim Impact Statement and the psychological evaluation were drafted <u>before</u> the defendant was even arrested-or might as well have been – we hold <u>as a matter of law</u> that the victim's loss was not proximately caused by a defendant's possession of the victim's image." *Id*. at *7 (emphasis added).

The *Aumais* Court also determined how designating restitution through a joint and several liability theory would prove a "baffling and intractable issue." *Id*. Here, the panel acknowledged a statutory impediment from imposing restitution orders moving forward. The *Aumais* Court explained that 18 U.S.C. § 2259(b)(2) – the statute governing the enforcement of the restitution order – cross references 18 U.S.C. § 3664. Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment). *Id*. at *8. Concluding, the panel noted that, "it would seem that the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country." *Id.*

CRACK REDUCTION MOTIONS (TAKE 2)

Mary Beth Covert
Research and Writing Attorney
Federal Public Defender's Office

On June 30, 2011 the United States Sentencing Commission voted unanimously to give retroactive effect to its proposed permanent amendment to the federal sentencing guidelines that implements the Fair Sentencing Act of 2010. Retroactivity of the amendment will become effective on November 1, 2011 the same day that the proposed permanent amendment would take effect unless Congress acts to disapprove the amendment.

"In passing the Fair Sentencing Act, Congress recognized the fundamental unfairness of federal cocaine sentencing policy and ameliorated it through bipartisan legislation," noted Commission chair, Judge Patti B. Saris. "Today's action by the Commission ensures that the longstanding injustice recognized by Congress is remedied, and that federal crack cocaine offenders who meet certain criteria established by the Commission and considered by the courts may have their sentences reduced to a level consistent with the Fair Sentencing Act of 2010."

The Commission's vote to give retroactive application to the proposed amendments to the federal sentencing guidelines **does not** give retroactive effect to the Fair Sentencing Act of 2010. Only Congress can make a statute retroactive. Many crack offenders will still be required under federal law to serve mandatory five- or 10-year sentences because of the amount of crack cocaine involved in their offenses.

You will recall that in December 2007, the Commission voted to give retroactive effect to its 2007 crack cocaine amendment effective March 3, 2008. Locally, the Western District of New York implemented District Procedures for Retroactive Application of the Crack Amendment which outlined the process by which defendants could seek a reduction in their sentence based on the 2007 amendments. Currently, our office in conjunction with the US Attorney's Office and the US Probation Office are working in an effort to streamline those procedures.

Unlike last time, it is anticipated that the Federal Public Defender's Office will represent all eligible defendants in seeking a reduction in their sentence. In an effort to identify those defendants, please contact MaryBeth Covert in our Buffalo office with the names of any potentially eligible clients to be added to the list for review. Referrals should include anyone who received a reduction under the 2007 amendment who remains in BOP custody, as well as any crack case sentenced from November 1, 2007 to November 1, 2010 that was not sentenced to a mandatory minimum sentence.

CONGRATULATIONS BETH!

Assistant Federal Public Defender Elizabeth J. Switzer married her longtime beau Parker Eberwein, on September 24, 2011, in a ceremony performed by the Honorable Charles J. Siragusa. This joyous occasion does bring some sadness to the Federal Public Defender's Office, as Beth (and Grover) leaves us to join Parker in Minneapolis. We wish you all the best as the two of you start your new life together!

THE GOVERNMENT'S KNOWING USE OF FALSE TESTIMONY AND ITS FAILURE TO INVESTIGATE ITS WITNESSES

Mark D. Hosken
Supervisory Assistant
Federal Public Defender

What should happen when the government knowingly introduces a witness' false testimony in a trial. That question was recently before the Seventh Circuit in *United States v. Freeman*, No. 09-4043, ___ F.3d ___ (7th Cir. June 17, 2011). There, the panel affirmed the District Court's order granting the defendant a new trial. While taking place in the Seventh Circuit, the panel's holding serves as a reminder as to what defense counsel should do if you are faced with the government introducing testimony known to be false.

In *Freeman*, an individual charged in a multi-defendant drug conspiracy decides to cooperate, and testifies before the grand jury. He told the grand jury that he participated in the drug conspiracy by mixing and bagging up the drugs for one of the other defendants, and explains how the other defendants fit into the operation. He chronicles his meetings with the defendants and the occasions when he witnessed them together. He testifies to a specific time frame (2003) when he saw all of the defendants at a specific location known as the "penthouse." That testimony was not true. It was undisputed that one of the defendants, Brian Wilbourn, was incarcerated during a three and a half year period (between 2002 and 2005) when the witness claimed he was present while the defendants were bagging drugs at a specific location.

Defense counsel reviews the witness' grand jury testimony while preparing for trial. He notifies the government that his client could not have been seen with the other defendants as the witness claimed because his client was incarcerated. As the Seventh Circuit panel noted, "the government plowed ahead and still had [its witness] testify. It solicited testimony about Wilbourn's presence at the penthouse; it even encouraged [its witness]to specifically detail Wilbourn's participation in [the] operation there. . . . What's more, when Wilbourn's attorney began cross-examining [the witness] about the impossibility of Wilbourn being at the penthouse, the prosecutor objected, stating in the presence of the jury, 'Objection. That's not true.'" *Freeman*, 2011 WL 2417091, at *2-3.

Near the end of the trial the government stipulated that that Wilbourn was in prison from April 2002 until September 2005. Twelve days after the government's witness testified, the stipulation was read to the jury. Notwithstanding the stipulation, the government relied on its witness' testimony during its closing argument. According to the government, its witness did not lie during his testimony. Rather, the government argued that he was just imprecise or mildly mistaken about the dates on which some events occurred.

The District Court sustained several defense objections, and informed the government that its argument was both inaccurate and an attempt to bolster its witness' testimony. The District Court later determined that this constituted prosecutorial misconduct. The defendants were ultimately found guilty of the conspiracy charge. However, the defendants moved for a new trial on the ground that the false testimony of the government's witness violated thier due process rights. The District Court agreed.

In *Freeman*, 2011 WL 2417091, a 7th Circuit panel affirmed the district court's grant of a new trial. Relying on the Supreme Court's holdings in *Napue v. Illinois,* 360 U.S. 264 (1959), *United States v. Bagley,* 473 U.S. 667

(1984), and *United States v. Agurs,* 427 U.S. 97 (1976), the panel upheld the district court's determination that there was a reasonable likelihood that the false testimony could have affected the jury's judgment and that if not for the improprieties, the defendants would have been acquitted.

More importantly, the panel extended the government's duty beyond merely determining the accuracy of its claims. Now, the government must not forgo its duty to investigate its witnesses.

> The government's duty to assure the accuracy of its representations has been well stated many times before. . . . This means that when the government learns that part of its case may be inaccurate, it must investigate. . . . It cannot simply ignore evidence that its witness is lying. . . . Here, the government abdicated its responsibility by failing to investigate and determine whether (the defendant) could have been (where the witness) claimed he was.

2011 WL 2417091 *5. (internal cites omitted).

In *United States v. Agurs,* 427 U.S. 97 (1976), the Supreme Court explained that the rule of *Brady v. Maryland,* 373 U.S. 83 (1963), applied in different situations. The first being those instances when the prosecution knew or should have known about perjured testimony. These situations are fundamentally unfair. Convictions obtained therein must be set aside. This requires a finding that there existed a reasonable likelihood that the false testimony could have affected the jury's judgment. *Agurs*, 427 U.S. at 103.

The Second Circuit has applied the *Agurs* analysis to set aside convictions when the government's witnesses have presented perjured testimony. See, *United States v. Mele,* 462 F.2d 918 (2d Cir. 1972) (the government's deceit including untruthful testimony, deliberate excisions from reports, preparation of false reports and repeated misrepresentations required a new trial); *Perkins v. LeFevre,* 691 F.2d 616 (2d Cir. 1982) (the prosecution's failure to provide the witness' rap sheet to the defense after the witness denied any convictions which were recorded on his criminal history resulted in the granting of a writ of habeas corpus.); *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) (the perjury of the government's witness required a reversal of the convictions when the government in redirect and in closing argument made much of the witness' motive for telling the truth.); *United States v. Vozzella,* 124 F.3d 389 (2d Cir. 1997) (the government's use of business record evidence that it knew contained fictitious entries, and according to its author were false in their entirety, required reversal when the government conducted no further inquiry into the veracity of the records.); *Jenkins v. Artuz,* 294 F.3d 284 (2d Cir. 2002) (the prosecutor's failure to correct the record in spite of the witness' false testimony and her argument in summation relying on that false testimony was sufficient basis to grant a writ of habeas corpus); and *Drake v. Portuondo,* 553 F.3d 230 (2d Cir. 2009) (the prosecutor knowingly elicited false statements from a witness and did not correct the record when the witness testified falsely about conversations he had with the prosecutor - this was sufficient to grant a writ of habeas corpus.).

The importance of the *Freeman* decision is the imposition of a duty on the prosecutor to investigate his/her witnesses. The government's counsel may no longer contend "I didn't know," or "the witness was simply mistaken," or "the defense attorney had a sufficient opportunity to cross examine the witness." Defense counsel should put the government on notice of a witness' perjury, record proper objections, and challenge the government's failure to correct the record. Building on the Supreme Court decisions and

adding the direction in *Freeman,* counsel should argue the government's failure to fully investigate its witnesses is a sufficient basis to set aside a conviction, obtain a new trial or otherwise secure a dismissal in the appropriate criminal prosecution.

FEDERAL CRIMINAL DEFENSE PRACTICE SEMINAR - FALL 2011

Friday, November 4, 2011
8:30 a.m. - 4:00 p.m.
Genesee Community College
Batavia, New York

See Agenda and Registration Form on Page 11

GOVERNMENT CANNOT WITHHOLD THIRD ACCEPTANCE POINT FOR CHALLENGING PRESENTENCE REPORT

Hillary K. Green
Research and Writing Attorney
Federal Public Defender's Office

The government cannot refuse to move for a third point reduction under U.S.S.G. § 3E1.1(b) simply because a defendant objects to the presentence report thereby requiring a *Fatico* hearing, the Second Circuit recently held. *United States v. Lee*, No. 10-493-cr, ___ F.3d ___, 2011 WL 3084958 (2d Cir. July 26, 2011) . In *Lee,* the defendant pleaded guilty without a plea agreement to four counts of narcotics violations. Lee objected to certain findings in the presentence report including, among other things, the probation officer's conclusion that Lee had threatened to kill drug couriers if they agreed to cooperate with law enforcement against him. On the eve of the scheduled *Fatico* hearing, Lee withdrew all of his objections but one: he continued to deny that he had threatened the couriers. After the hearing, the district court found that he had in fact, made the threats.

At sentencing, the government agreed to recommend a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a), but refused to move for the third acceptance point, arguing that:

> [T]he defendant required the government to undergo extensive preparation for a *Fatico* hearing on multiple sentencing issues and, after the government had undergone such preparation, the defendant elected to proceed with a *Fatico* hearing on narrower issues. The preparation involved with respect to the initial, broader *Fatico* hearing involved multiple witnesses and was akin to preparing for trial.

The sentencing court denied Lee's own request for the third point, reasoning that the defendant had not argued that the government's refusal was "without good faith."

Second Circuit Court of Appeals Judges Parker and Chin, and District Judge Korman (E.D.N.Y., sitting by designation) found that the sentencing court in *Lee* abused its discretion by declining to grant a third-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b). In so doing, the *Lee* Court acknowledged that generally, "a government motion is a necessary prerequisite to the granting of the third point." In two circumstances, the Court noted, a sentencing court can grant the additional point even where the government has not moved for it: "(1) where the government's refusal to move is based on an unconstitutional motive, or where

a plea agreement leaves the decision to move to the government's discretion and the government acts in bad faith." *Lee*, 2011 WL 3084958, at *2 (citing *United States v. Sloley*, 464 F.3d 355, 359 (2d Cir. 2006).

In Lee's case, the Court found, the government's refusal to move for the reduction was based on an unlawful reason, that is, that it had been required to prepare for a *Fatico* hearing. First, the Court noted, the plain language of U.S.S.G. § 3E1.1(b) provides that the third acceptance point is properly granted where a defendant's timely guilty plea "permit[s] the government to avoid preparing for *trial.*" "A *Fatico* hearing is not a trial," the Court reasoned, and it is undisputed that Lee plead guilty in a timely manner, thereby sparing the government from having to prosecute him. Second, the Application Notes for U.S.S.G. § 3E1.1(b) make no mention of resources saved by the government having to prepare for a *Fatico* hearing or any other proceeding, only those saved by not having to go to trial. Finally, the Court reasoned, "defendant – even one who pleads guilty–has a due process right to reasonably contest errors in the PSR that affect his sentence." *Lee*, 2011 WL 3084958, at *3 (citing *United States v. Eschman*, 227 F.3d 886, 890 (7th Cir. 2000)). A defendant should not be punished for exercising that right, the *Lee* Court held. "If there is a good faith dispute as to the accuracy of factual assertions in the PSR, the defendant's request that the dispute be resolved is not a permissible reason for the government to refuse to make the § 3E1.1(b) motion, even if resolution of the dispute requires a *Fatico* hearing." Under the facts of Lee's case, the government's refusal to move for the third acceptance point ignored the language of the Guideline, its purpose and the intent of Congress, the Court held.

In vacating and remanding the case, the *Lee* Court acknowledged as "instructive" a Fourth Circuit case which held that the government cannot refuse to move for a third point reduction under U.S.S.G. § 3E1.1(b), because the defendant refused to sign an appeal waiver. *Id*. (citing *United States v. Divens*, No. 09-4967, ___ F.3d ___, 2011 WL 2624434 (4th Cir. July 5, 2011)). The Court concurred with *Divens* that U.S.S.G. § 3E1.1(b) "does not permit the government to withhold a motion for a one-level reduction because the defendant had declined to perform some . . . act [other than pleading guilty] to assist the government." *Id.* at *5.

If you have a similar case where the government has refused to move for a third acceptance point because your client has necessitated a hearing or refused to waive his or her appellate rights, make a record of the government's reasons for its refusal and move for the acceptance point yourself. Provided that your client is acting in good faith and has spared the government a trial, he or she is certainly entitled to his third point under *Lee.*

SAVE THE DATE!!!

FEDERAL CRIMINAL DEFENSE PRACTICE SEMINAR - SPRING 2012

FRIDAY, MAY 4, 2012
8:30 AM - 4:00 PM
Genesee Community College
Batavia, New York

Save the date on your calendar and watch for further announcements in the Spring!

PROPOSED CHANGES TO FEDERAL RULES

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules have proposed amendments to their respective rules, and have begun seeking public comment. If approved, the proposed amendments would become effective on December 1, 2013. The information below, taken verbatim from material prepared by the Administrative Office of United States Courts, has been provided to the Bench and the Bar to summarize the proposed changes:

Proposed Amendments to the Rules of Criminal Procedure

Changes have been proposed to Rules 11, 12, and 34 of the Federal Rules of Criminal Procedure. The proposed amendment to Rule 11 expands the plea colloquy to advise a defendant who is pleading guilty or nolo contendere of possible immigration consequences of the plea. The proposed amendment is made in response to the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The proposed amendment to Rule 12 clarifies which motions must be raised before trial, if the basis for the motion is then reasonably available and a trial on the merits is not necessary to determine the motion. The proposed amendment also addresses the consequences of an untimely motion, providing that Rule 52 does not apply and that, with two exceptions, the court may consider the defense, objection, or request raised by an untimely motion if the party shows "cause and prejudice," a phrase chosen to reflect the Supreme Court's interpretation of "good cause" in the current rule. For motions asserting failure to state an offense or double jeopardy, the party must show only prejudice.

Comment is sought on all aspects of the revised rule, including the standard for late-filed motions asserting the defense of double jeopardy. Although the law is not uniform, most cases currently give double-jeopardy claims preferential treatment under Rule 12 and analyze a late-filed claim for "plain error." The advisory committee decided that rather than have three different standards in the rule — cause plus prejudice, prejudice only, and plain error — it would be better to abandon the "plain error" test and have double-jeopardy claims, like claims of failure to state an offense, be governed by the prejudice-only standard. The advisory committee determined that using the "prejudice-only" standard for double jeopardy claims was unlikely to change the result in any case. The proposed amendment to Rule 34 conforms to the proposed amendment to Rule 12.

Proposed Amendments to the Rules of Evidence

A change has also been proposed to Rule 803 of the Federal Rules of Evidence. The proposed amendment aligns Rule 803(10) with the Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009). *Melendez-Diaz* held that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), making the admission of such certificates in lieu of in-court testimony a violation of the accused's right of confrontation. The amendment adopts a "notice-and-demand" procedure that would require production of the person who prepared the certificate stating the absence of a public record only if the defendant, after receiving

notice from the government, made a timely pretrial demand for production of the witness.

Proposed Amendments
to the
Rules of Appellate Procedure

A number of changes have been proposed to the Federal Rules of Appellate procedure. Of relevance to those of us practicing criminal law in the federal courts are the amendments to Rules 28 and 28.1. Rule 28 would be amended to remove the requirement of separate statements of the case and of the facts. The amended rule would instead provide for one "statement." This change would allow the brief to present the factual and procedural history chronologically, but would also permit flexibility to depart from chronological ordering. Parallel conforming amendments are proposed for Rule 28.1.

Public Comment

All of the proposed Rules changes can be read, on-line, at the website for United States Courts: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx. The text of the proposed amendments and the accompanying committee notes are available for your perusal Anyone interested in submitting public comments may do so by mailing them to the Secretary of the Committee on Rules of Practice and Procedure:

Peter G. McCabe,
Secretary Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,
Thurgood Marshall Federal Judiciary Building, Washington, D.C. 20544

Comments may also be submitted electronically to the following address:

rules_comments@ao.uscourts.gov

The deadline for public comment is February 15, 2012.

WELCOME STEVE SLAWINSKI!

The Federal Public Defender's Office is pleased to announce that Assistant Federal Public Defender Steven Slawinski has joined our Office. Steve is a graduate of Georgetown University and the University at Buffalo School of Law. For the past five years Steve has served as an Assistant Federal Public Defender with the Federal Defenders of Western North Carolina. Prior to that he served as defense trial counsel with the U.S. Army Jag Corps.
Steve is working out of the Rochester Office.

Check out the district court website:
www.nywd.uscourts.gov
to access the new Local Rules of Criminal Procedure,
which went into effect January 1, 2011

FEDERAL CRIMINAL DEFENSE PRACTICE SEMINAR
FALL 2011
Genesee Community College - Batavia
Friday, November 4, 2011
8:30 am - 4:00 pm

8:30 am CHECK-IN
Coffee & Danish

8:45 am WELCOME & OPENING REMARKS

Marianne Mariano
Federal Public Defender - WDNY

9:00 am NATIONAL ACADEMY OF SCIENCE (NAS) REPORT
Overview and Introductory Comments

***Marvin E. Schechter*, Esq.**
New York, New York

10:15 am MORNING BREAK

10:30 am NAS REPORT
Junk Science; Cross-Examination; and Recent Developments

***Marvin E. Schechter*, Esq.**
New York, New York

12:15 pm LUNCHEON
Luncheon Buffet will be served in Room T-119

1:00 pm FEDERAL BUREAU OF PRISONS UPDATE - Sentencing Issues Including State and Federal Sentences

Henry J. Sadowski
Regional Counsel - Northeast Region
Federal Bureau of Prisons
Philadelphia, Pennsylvania

2:15 pm ETHICS

Terrence M. Connors
Connors & Vilardo, LLP
Buffalo, New York

3:05 pm SECOND CIRCUIT UPDATE
Herbert L. Greenman, Esq.
Lipsitz Green Scime Cambria, LLP
Buffalo, New York

4:00 pm CLOSING REMARKS
CLE Certificate Distribution

REGISTRATION FORM

Federal Criminal Defense Practice Seminar - Fall 2011

The seminar registration fee is $50 for current CJA Panel members and applicants for membership. The registration fee for all others is $100.

Please make Check Payable to:

MONROE COUNTY BAR CENTER FOR EDUCATION
and mail with this registration form
NO LATER THAN October 21, 2011 to:

Federal Public Defender's Office
300 Pearl Street, Suite 200
Buffalo, New York 14202

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Please accept my registration as:
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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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