FEDERAL PUBLIC DEFENDER REPORT

Federal Public Defender
Volume 19, No. 1 Western District of New York Fall 2012

CHALLENGING SORNA

Robert G. Smith
Assistant Federal Public Defender

In 2006, Congress created the Adam Walsh Child Protection and Safety Act. Pub.L.No. 109-248. Title I of the Adam Walsh Child Protection and Safety Act is the Sex Offender Registration and Notification Act [hereinafter "SORNA"]. The purpose of SORNA is "to protect the public from sex offenders and offenders against children." § 102, *codified at* 42 U.S.C. § 16911 *et seq*. Criminal provisions were established in order to enforce SORNA, and to provide penalties for those who do not comply with its requirements. *See* 18 U.S.C. § 2250.

In recent years the Federal Public Defender's Office has seen a greater number of prosecutions being brought against individuals who have failed to register under SORNA. The purpose of this article is to address some of the challenges you may want to raise on your client's behalf in the event you must defend an individual for violating § 2250.

A prosecution under SORNA begins when a previously convicted sex offender fails to register and then travels in interstate commerce.[1] Note that a person convicted of a state sex offense who remains in the state where he was convicted is not covered by SORNA. However, if you represent someone with a state sex offense that requires registering and that individual subsequently crosses state lines, he is covered by SORNA.

There are four areas an attorney should be familiar with in order to effectively represent an individual charged with failing to register under SORNA. First, is an understanding of the SORNA registration requirements and the elements the government must prove to establish a SORNA violation. Second, attorneys should be familiar with the recent Supreme Court's holdings that address SORNA. Third, attorneys must understand that Second Circuit Case law may limit some

[1] SORNA also has a provision for prosecuting federal sex offenders without the interstate travel requirement.

of the defenses an attorney may seek to raise. Last, attorneys should comprehend how SORNA interacts with the Bail Reform Act of 1984. This article will discuss each of these issues in turn, starting with the question of bail.

Bail Reform Act of 1984

A violation of SORNA is not a crime of violence. Nonetheless, on a detention motion from the government, a judge is permitted to reach the issue of "safety of any other person in the community." 18 U.S.C. § 3142(f)(1)(E). Although a SORNA violation does not create a presumption of dangerousness, the judge is allowed to reach the issue of danger which makes release on conditions for a person charged with a SORNA violation more difficult.

Elements and Registration Requirements

Under SORNA, a convicted sexual offender is required to do the following:

> provide the address of each residence at which the sex offender resides or will reside; keep the registration current, in each jurisdiction where the offender resides, is employed or is a student; and within three business days after each change of name, residence, employment, or student status, appear in person and inform the jurisdiction of all changes.

42 U.S.C. § 16913; *see id*. § 16914 (setting forth information required in registration).

In order to convict a defendant for failing to register under SORNA, the government must prove three elements: (1) the defendant was required to register under SORNA; (2) he traveled in interstate commerce; and (3) he knowingly failed to update his registration as required by SORNA. 18 U.S.C. § 2250(a); *see United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009) (identifying elements); *United States v. Hester*, No. 07-CR-376(GLS), 2008 WL 351677, at *1 (N.D.N.Y. Feb. 7, 2008) (same).

The elements of § 2250 that the government must prove should be read sequentially. *Carr v. United States*, 130 S.Ct. 2229, 2235 (2010). This is important because a sequential reading "helps to assure a nexus between a defendant's interstate travel and his failure to register as a sex offender." *Id*. Most of the recent challenges have focused on pre-Act offenders and whether traveling in interstate commerce either before or after the Attorney General specified that SORNA applied to pre-Act offenders constitutes a SORNA violation.

The Supreme Court and SORNA

The Supreme Court has addressed SORNA in *Carr v. United States*, 130 S.Ct. 2229 (2010), and *Reynolds v. United States*, 132 S.Ct. 975 (2012). In *Carr*, the Supreme Court held that SORNA does not apply to sex offenders whose interstate travel occurred before SORNA's effective date. 130 S.Ct. at 2233. The Court rejected the government's view that §2250(a) requires a sex-offense conviction, subsequent interstate travel, and then a failure to register, and that only the last event must occur after SORNA took effect. The Court instead adopted the interpretation that the statute does not impose liability unless a person, after becoming subject to SORNA's registration requirements, travels across state lines and then fails to register. Likewise, in *Reynolds* the Court addressed whether SORNA required pre-Act offenders to register before the Attorney General specified that the Act's registration provision applied to them. The Supreme Court in *Reynolds* held that SORNA does not require sex offenders whose convictions pre-dated SORNA to register

before the Attorney General validly specifies that the Act's registration provision applies to them. *Id.* at 978. The Court left unanswered the question of whether the Attorney's General's Interim Rule (*see infra* below) sets forth a valid specification of applicability and remanded the case for further proceedings consistent with its opinion. 132 S.Ct. at 224.

Thus, SORNA is going to apply to pre-Act offenders and anyone convicted of a sex offense in state court and required to register under SORNA is at risk of committing a federal offense. The open question that remains, however, is whether the Attorney General has "validly so specified" a date on which SORNA's application retroactively commenced. Once a specification date is established by the Second Circuit or the Supreme Court, the key question will become whether your client traveled in interstate commerce after the valid specification date.

There remains a dispute about ***when*** a valid rule requiring a sex offender to register was enacted by the Attorney General. There are six potential dates upon which a pre-Act sex offender could be required to register. These dates correspond to (1) the Interim Rule; (2) the Proposed Guidelines; (3) the Final Guidelines; (4) the Proposed Supplemental Guidelines; (5) the Final Rule and (6) the Final Supplemental Guidelines. Note that some of the rules and guidelines specify effective dates that are 30 days past their published dates.

The Supreme Court recognized that, "February 28, 2007 (or a later date if the February 28th specification was invalid)," is the date a sex offender is required to register. *Reynolds*, 123 S.Ct. at 979. This February 28, 2007 date refers to the date on which the Attorney General issued an "interim" regulation retroactively applying SORNA to all persons convicted of a sex offense prior to July 27, 2006, – the date Congress enacted SORNA. *See* 28 C.F.R. § 72.3. The February 28, 2007, rule is referred to as the "Interim Rule." As set forth below, attorneys may wish to challenge the "Interim rule" and February 28, 2007 date because the Attorney General failed to follow the Administrative Procedures Act [hereinafter "APA"] when he enacted the Interim Rule without complying with the requisite notice and comment period . *See* 5 U.S.C. §§ 553(b) and (c) (setting forth the notice provisions along with the right to comment provisions).

Indeed, the APA requires agencies to publish a proposed rule in the Federal Register and give interested parties the opportunity to submit comments and other relevant material before the rule becomes effective. 5 U.S.C. § 553(d). Generally, a substantive rule must be published in the Federal Register at least 30 days before it becomes effective. *See* 5 U.S.C. § 553(d). The APA permits agencies to enact rules without a notice and comment period only for "good cause" where it is "impractical, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). However, the "'good cause' exception is to be 'narrowly construed and only reluctantly countenanced.' The exception is not an 'escape clause'; its use 'should be limited to emergency situations.'" *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 236 F.3d 749, 754 (D.C. Cir. 2001)(citations omitted)(emphasis added).

Here, an argument should be made that the Interim Rule violates the APA since it was promulgated without the required 30-day notice and comment period and that sufficient good cause to circumvent this requirement was not established by the Attorney General.

Recent Litigation in the Second Circuit

The Second Circuit has not yet addressed the

question as to the effective date of SORNA,[2] however the question has however been presented to Judge Sessions, in the District of Vermont and is currently pending in the Second Circuit Court of Appeals. *See United States v. Mullins*, No. 11-cr-103, 2012 WL 3777067 (D.Vt. Aug. 29, 2012), *appeal docketed*, No. 12-3838-cr (2d Cir. Sept. 27, 2012). The defendant in *Mullins* was charged with traveling three months prior to the enactment of the SMART Guidelines.[3] Judge Sessions concluded that, "SORNA could only have applied to [the defendant] if the Interim Rule, issued about a year before the charged period, was a valid exercise of the Attorney General's authority." *Id*. at *3. Judge Sessions concluded that the Attorney General violated the APA when he invoked the good cause exception when issuing the Interim Rule. *Id*. at *7 (agreeing with the Fifth, Sixth, and Ninth Circuits); *see United States v. Johnson*, 632 F.3d 912, 930 (5th Cir. 2011) (concluding that the Attorney General did not have good cause for failing to publish the rule thirty days before its effective date, or for failing to bypass the notice and comment requirements of the APA); *United States v. Utesch*, 596 F.3d 302, 309-310 (6th Cir. 2010) (concluding that there was no indication that the notice and comment process of the APA was carried out); *United States v. Valverde*, 628 F.3d 1159 (9th Cir. 2010) (concluding that, "the Attorney General's statement accompanying the interim rule provided no rational justification for why complying with the normal requirements of the APA would have resulted in a sufficient risk of harm to justify the issuance of the February 28, 2007 retroactivity determination on an emergency basis.").

As a result of the Attorney General's failure to adhere to the requirements of the APA, Judge Sessions granted the defendant's motion to dismiss the indictment. 2012 WL 3777067, at *14. The Court's Order is currently stayed pending the government's appeal.[4]

Settled Second Circuit Case Law

Not withstanding the pending appeal in *Mullins*, there is additional Second Circuit case law addressing SORNA of which attorneys should be aware. The Act has withstood a commerce clause challenge; a challenge that the registration's requirement violated the non-delegation doctrine; a challenge that the registration requirements apply even though New York has not implemented SORNA; and a challenge that the registration requirements violate the *ex post facto* clause. *See United States v. Guzman*, 591 F.3d 88 (2d Cir. 2010). The Second Circuit has also held that SORNA's registration requirement does not require actual knowledge by a defendant of SORNA's registration requirements. *See United States v. Hester*, 589 F.3d 86 (2d Cir. 2009) (knowledge that a defendant is required to register and update his registration in the state of his conviction is all that is required).

Conclusion

SORNA charges have many issues that lead to challenges. Please contact the Federal Public Defender's Office for sample briefs and memorandums.

[2] Previously, the Second Circuitd used the SORNA enactment date in *United States v. Fuller*, 627 F.3d 499 (2d Cir. 2010), *vacated* 132 S.Ct. 1534 (2012) (No. 10-10721). However, *Fuller* was vacated in light of *Reynolds*.

[3] The SMART Guidelines became binding on August 1, 2008. *See* 73 Fed. Reg. 38030-01 (July 2, 2008); *Mullins*, 2012 WL 3777067, at *3.

[4] The government's (appellant's) brief is scheduled to be filed on January 4, 2013.

POTENTIAL CONSEQUENCES FOR FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT AT TRIAL

Matthew F. Meyers, Law Clerk[1]
Federal Public Defender's Office
Rochester, New York

Because they are the last statements jurors hear before their deliberations, closing arguments made by the parties have the potential to be "outcome determinative." *People v. Fisher*, 18 N.Y.3d 964, 967 (2012). Thus, there are valid tactical reasons why a defense attorney would not object to improper comments made by a prosecutor during summation. A jury might construe an objection as impolite and unnecessarily argumentative.

This undermines the credibility an attorney has fostered with the jury. Jurors could infer that the prosecutor is making a strong argument if the defense is objecting to it. An overruled objection may encourage the prosecutor to continue making improper comments.

However, the consequences for failing to object to improper comments far outweigh these possibilities. Therefore, defense attorneys would be well-advised to object to this kind of prosecutorial misconduct. At trial, objections permit the judge to issue curative instructions, which minimize the risk that such comments will have a prejudicial effect on jurors. Obtaining a curative instruction is crucial, because "improper suggestions, insinuations, and, especially, assertions of personal knowledge [by the prosecuting attorney] are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935).

On appeal, defense attorneys who failed to preserve objections to prosecutorial misconduct face a more burdensome standard of review. On the bright side, the reviewing court may decide the issue on Sixth Amendment grounds. *See Fisher*, 18 N.Y.3d at 967 (holding that defense attorney's failure to object to prosecutorial misconduct constituted ineffective assistance of counsel). But the burden incurred by not objecting could mean the difference between an appellate court reversing a conviction and affirming it. Generally, courts review improper comments for egregious misconduct. *United States v. Batista*, Nos. 10-3284-cr(L), 10-4024-cr(CON), 2012 WL 2477694, at *6 (2d Cir. May 17, 2012). However, unpreserved objections are reviewed for plain error. *Id.* at *6 n.16.

Three recent cases decided by the Second Circuit send a clear message: improper comments alone will not justify a reversal of conviction under plain error review. *United States v. Williams*, No. 11-676-cr, 2012 WL 2616387, at *6-7 (2d Cir. July 6, 2012) ("[T]his statement was improper and should not have been made . . . [but] Williams has not made out a showing of plain error."); *Batista,* 2012 WL 2477694, at *6, n.16 ("[Defendant] has not pointed to in any way in which the comments affected his substantial rights."); *United States v. Barlow*, No. 10-5025-cr, 2012 WL 1548114, at *2 (2d. Cir. May 3, 2012) ("While we do find the . . . comment . . . to be an improper remark . . . Barlow has not suffered the substantial prejudice that would require us to vacate his conviction.").

[1]Mr. Meyers was a law clerk in our Rochester Officer during the summer of 2012. He has since returned to his studies at Wake Forest University School of Law.

Review for Plain Error

The plain error standard is an exercise in judicial discretion. This is because an appellate court has limited power to correct errors that were not raised at trial. *United States v. Olano*, 507 U.S. 725, 731 (1993). "Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc). The fourth element is satisfied when a "miscarriage of justice would result" if the appellate court declined to exercise its discretion. *United States v. Zangari*, 677 F.3d 86, 96 (2d Cir. 2012).

Such appellate discretion is problematic for two reasons. First, the standard for determining whether an error affects substantial rights or would result in a miscarriage of justice is unclear. A finding of plain error is necessarily fact-specific, and any "*per se* approach to plain-error review is flawed." *United States v. Young*, 470 U.S. 1, 16 n.14 (1985). This means that courts have great discretion and little guidance in determining whether certain prosecutorial misconduct constitutes plain error. For example, the Supreme Court held that a prosecutor's improper statements made during summation did not amount to plain error. *Id.* at 20. The majority and concurring opinions disputed the sufficient factors that would establish plain error, with the former focusing on whether the error "had an unfair prejudicial impact on the jury's deliberations," and the latter taking the view "that certain extreme circumstances, such as egregious misbehavior or a pattern and practice of intentional prosecutorial misconduct" would establish plain error. *Young*, 470 U.S. at 1055 n.16 (Brennan, J., concurring). Justice Stevens, in his dissent, noted how critical one's own judgment is in discerning the difference between harmless and plain error:

> The Court has commented on the difficulty of applying the harmless-error standard . . . This, in part, because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

Young, 470 U.S. at 37 n.6 (Stevens, J., dissenting) (citations omitted). Plain error review allows judges to base their decisions on their own predilections, rather than the severity of the misconduct. Furthermore, issues that defendants could never anticipate when preparing their arguments for appeal could take on importance if a particular judge is so disposed. This limits an attorney's ability to craft a successful argument on appeal. In *Young*, the general ethical responsibilities of a prosecutor came into focus as an important factor, even though neither of the parties contemplated the issue in their briefs to the court. 470 U.S. at 25 (Brennan, J., concurring) ("I believe the Court's . . . analysis is critically flawed: it overlooks the ethical responsibilities of federal prosecutors . . . it fails completely to acknowledge that we have long emphasized

that a representative of the United States Government is held to a higher standard of behavior.").

The second problem is that judicial discretion affords judges the opportunity to shy away from the unpalatable task of upsetting a jury verdict. Judges do not want to engage in the "mentally taxing and inherently speculative task of determining what [the jury] would have done had the error not occurred." *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005). This kind of substantive inquiry is required under the more generous egregious misconduct standard of review, because courts need to assess improper comments based on a clear set of factors. Under plain error review a mentally taxing analysis is unnecessary. For example, in *United States v. Batista* the Second Circuit panel reviewed thirty allegedly improper comments made by a prosecutor, two of which the defense attorney had objected to at trial. The two comments reviewed for egregious misconduct occupied a page of the opinion, *id.* at *6-*7, while the other twenty-eight comments were reviewed in a single footnote. *Id.* at *6 n.16.

Egregious Misconduct Standard of Review

Unlike plain error review, there is an articulable standard courts follow when reviewing comments for egregious misconduct. The egregious misconduct standard of review applies when a defense attorney has objected to the improper comment at trial. Improper comments constitute egregious misconduct when they cause "the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005). Appellate courts will reverse a conviction in such circumstances. *Id.* Determining whether substantial prejudice results from a comment requires evaluation of three factors: "the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements." *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981).

Precedent provides guidance for assessing the scope of these factors. Isolated remarks made during a trial that is otherwise free from "passion and prejudice" tend not to be considered severe enough to be substantially prejudicial. *Id.* Intentional misconduct is adjudged to be more severe than comments made in response to a defense attorney's summation. *Id*. at 1181. Curative instructions can lessen the prejudice that might result from even severely improper statements. *See Batista*, 2012 WL 2477694, at *7 ("[E]ven if there were some risk of prejudice, here it is of the type that can be cured with proper instructions."). And a finding of substantial prejudice is not appropriate if the defendant's conviction was otherwise certain. *See Modica*, 663 F.2d at 1182 (holding that prosecutor's remarks, though "improper and uncorrected," did not result in substantial prejudice, because "[a]ppellant's [defense] was so inherently implausible").

While the three-factor test set forth in *Modica* is not mechanical, it clearly expresses what a reviewing court must address in coming to its determination. This is beneficial for both the court and defense attorneys. For the reviewing court, there is guidance on what kind of misconduct is substantially prejudicial. It also puts lower courts on notice as to what kind of prosecutorial conduct is intolerable, alleviating any reservations an appellate court may have in using its power to reverse determinations made at trial. *Cf. Floyd v. Meachum*, 907 F.2d 347 (2d Cir. 1990) (admonishing trial court's response to prosecutor's egregious misconduct as inadequate). For the defense attorney, the

standard provides a criteria with which he can clarify the issues on appeal, determine relevant facts, and tailor his argument.

Conclusion

The Second Circuit recognizes that its power to correct unpreserved errors should only be used sparingly. *Modica*, 663 F.3d at 1181. A reviewing court must not only take into account the interests of justice when deciding whether to reverse a conviction, but also the more practical factors of the additional time, resources, and disruption a retrial requires. *Id.* Courts do not want to discourage the zealous advocacy that is required of prosecutors. *Young*, 470 U.S. at 7. These interests weigh against correcting unpreserved errors.

A recent case serves as an example of the cost of not objecting to comments at trial. In *Williams*, the Second Circuit panel assessed whether a prosecutor's comment - that the jury's deliberation was "not a search for reasonable doubt, but a search for truth" - was a plain error warranting a reversal of conviction. 2012 WL 2616387, at *7. It noted that the comment had the "potential to distract the jury from the bedrock principles that even if the jury strongly suspects that the government's version of events is true, it cannot vote to convict unless it finds that the government has actually proved each element of the charged crime beyond a reasonable doubt." *Id*. The court described the comment as both "unwise and erroneous," and even the government admitted that it was improper. *Id.* at *6-*7.

However, the defense attorney had not objected to the comment at trial. This had two consequences that damaged the defendant's case. First, no curative instruction was obtained to combat the prejudice the comment caused. *Id.* at *7. If the jurors followed the prosecutor's assertion and focused on determining "the truth," the defendant may have lost his right to a fair trial. Second, because the court could only review the comment for plain error, the defendant's conviction was not reversed on appeal. *Id.* at *8. Perhaps the defense attorney believed that refraining from making an objection was more tactically advantageous. Whatever his reason, that action also foreclosed the possibility that his client's conviction would be reversed on appeal. As *Williams* makes clear, reviewing courts will not remedy the prejudice caused by prosecutorial misconduct under plain error review. It is up to defense attorneys to guard against prosecutorial misconduct by preserving their objections for appeal.

✣ ✣ ✣

Congrats . . .

Congratulations go to Assistant Federal Public Defender Anne Burger, this year's recipient of the Jeffrey A. Jacobs Memorial Award presented at the third annual Defense Community Dinner sponsored by the Monroe County Public Defenders Office. Jeff Jacobs was a long time public defender who enjoyed and thrived while defending difficult, complex cases that required familiarity with novel scientific concepts. The award recognizes a criminal defense attorney from the Monroe County area who has performed truly outstanding trial work in the past year. Anne was recognized for her outstanding work in representing Danial E. Widner. Mr. Widner was charged with two counts of possession of child pornography. Anne's outstanding cross-examination of the government's experts and her terrific use of her own DNA expert assisted her successful defense of Mr. Widner. Also, Anne's dedication to understanding all of the intricacies of the computer's operating system coupled with her fearless advocacy resulted in a verdict of Not Guilty on both counts.

✣ ✣ ✣

Juror Research and Your Obligation to Disclose

MaryBeth Covert
Research & Writing Attorney

As more and more research is done on prospective jurors, defense lawyers must be aware of their obligations to the Court to disclose information of which they are aware about a potential juror which contradicts information the juror discloses during *voir dire*. To be sure, the obligation to disclose does not end when the jury is seated, but extends to any information gathered about a juror during the trial as well. Failure to disclose the information of which you are aware, may well be to the detriment of your client.

For a look at the ramifications see *United States v. Daugeradas, et al.*, No. S3 09 cr 581 (WHP) ___ F. Supp. 2d ___, 2012 WL 2149238 (S.D.N.Y. June 4, 2012). In a Memorandum and Order, United States District Judge William H. Pauley III, details the outrageous lengths to which a prospective juror lied to ensure that she was seated on the jury in a three month long tax shelter fraud prosecution. Without getting into the extraordinary details (which are worth the read when you have time), Judge Pauley described it as follow:

> [The juror's] lies are breathtaking. In response to direct and unambiguous questions, she intentionally provided numerous false and misleading answers and omitted material information. [The juror's] lies were calculated to prevent the Court and the parties from learning her true identity, which would have prevented her from serving on the jury. . . Had this Court known the facts, [the juror] would have been subject to a valid challenge for cause. She was manifestly incapable of performing the central functions of a juror-evaluating witness credibility and making a fair assessment of the evidence. Solely on the basis of her false voir dire testimony, the Court could easily infer that she is inherently unable to perform the crucial function of ascertaining the truth. The fact is, however, that there is a mountain of other evidence showing that not only did she lie to this Court on voir dire, but that she is a pathological liar who does not know the difference between truth and lie. The presence of such a tainted juror, who cannot appreciate the meaning of an oath is simply intolerable.

The remedy for a juror who fails to honestly answer a material question on *voir dire*, where a correct response would have provided a valid basis for a challenge for cause, is a new trial. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984); *United States v. Colombo*, 869 F.2d 149, 152 (2d Cir. 1989).

As a result of the findings regarding the juror in *Daugeradas*, the question turned to what defense lawyers knew about these falsehoods and when did they know it. Simply stated, those defendants whose lawyers did not know of the falsehoods received new trials.

The lone defendant whose lawyers conducted research of the prospective juror both during voir dire and again prior to deliberations, David Parse, waived his claim for a new trial based on the juror's misconduct because his lawyers knew "or with a modicum of diligence would have known" that the juror was providing false and misleading testimony during voir dire. The lawyers were called to task by Judge Pauley for not disclosing what they knew. (On a side note, Mr. Parse now

has new counsel and a pending motion for a new trial on the basis of his trial counsel's ineffective assistance based on the failure to disclose the juror misconduct. He may just get his new trial anyway.)

While *Daugeradas* appears to be the first case in the Second Circuit to warrant the remedy of a new trial for a juror's misconduct during voir dire, the occasion may arise more frequently as more and more defense counsel conduct research into prospective jurors. With the advent of social media sites and the tools of the Internet, there just may be more opportunity for falsehoods to be caught. Just remember your obligation to advise the Court of what you know.

* * *

Welcome Aboard . . .

Jennifer L. Dimitroff
Investigator/Paralegal

Before joining our Buffalo Office in August, Jennifer worked as a paralegal at Bond, Schoeneck & King PLLC for 13 years in their Labor and Employment Department. Prior to that she was a paralegal at Nixon Peabody LLP and Saperston & Day. Jennifer earned her B.S. in Business Administration from SUNY, College at Oswego with a concentration in Human Resources.

Jacqueline A. Downey
Legal Assistant

Jackie received her Bachelors Degree from Hilbert College where she also participated in the Leadership Program and the Criminal Justice Club. Immediately prior to joining our office in June, Jackie worked as a legal assistant for Downey & Downey and as a dietary aide for Father Baker Manor.

Jayme L. Feldman
Research and Writing Attorney

Jayme joined our Buffalo Office in June. Immediately prior she worked as an Associate Attorney with Thomas & Solomon LLP, and during law school interned with both our office and the United States Attorney's Office in Buffalo. She received her J.D., *cum laude*, from SUNY Buffalo Law School, and her B.S. in Communication Studies*, magna cum laude*, from Ohio University.

Bryant Graham
Investigator

In July we welcomed Bryant to our Rochester Office. He comes with much experience having spent the past 15 years working as an Investigator with the Capital Habeas Unit for the Federal Public Defender's Office in Harrisburg, Pennsylvania. Many of you may recall Bryant from his many years working in the New York State Capital Defender's Office in Rochester where he investigated capital murder cases from 1997 to 2005. Bryant earned his Bachelors Degree in Criminal Justice from the Rochester Institute of Technology in 1994. We welcome Bryant back to Western New York.

Daniel P. Greene
Assistant Federal Public Defender

Dan joined the Buffalo Office this past June. Prior to that he worked as a law clerk for Chief Judge Federico A. Moreno of the Southern District of Florida. Dan gained additional experience at The Legal Aid Society specializing in juvenile rights from 2008 to 2011. Dan earned his J.D. from Notre Dame Law School in 2008, and his Bachelors of Arts in Political Science and Anthropology from the University of Notre Dame.

Leslie E. Scott
Assistant Federal Public Defender

Leslie started with the Buffalo Office in August following her clerkship with the Honorable Victoria A. Roberts, U.S. District Court Judge for the Eastern District of Michigan. Prior to that, she clerked with the District of Columbia Court of Appeals. She earned her J.D., *cum laude*, in May 2009 from American University, Washington College of Law, and her Bachelor of Arts in Biopsychology, *with distinction*, from the University of Michigan in 2004.

* * *

SAVE THE DATE!!!

FEDERAL CRIMINAL DEFENSE PRACTICE SPRING SEMINAR - 2013

FRIDAY, APRIL 19, 2013
8:30 AM - 4:00 PM
GCC, Batavia, New York

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

Happy Retirement George Thompson!

After a long and distinguished career, those of us at the Federal Public Defender's Office wish our longtime investigator, George R. Thompson, a heartfelt happy retirement. George served as our Investigator for just over 20 years, having been one of the founding members of the Federal Public Defender's Office when it opened in 1992. We appreciate George's dedication and contributions to the success of the office these past twenty years. Prior to joining our office, George had a long career in law enforcement having served with the Rochester City Police and the New York State Troopers. The Honorable Charles J. Siragusa summed George up in these kind words:

> "*He was a consummate professional and an extremely skilled investigator. His passion and commitment were truly exemplary as a member of the Rochester City Police, the New York State Police and most recently with the Federal Public Defender's Office. George was a professional who recognized that integrity was all important. That served him well as it earned George much respect from the Court. I recall releasing a defendant into George's custody so he could attend a family member's wake. I was certain, as was the defendant, that George would guarantee he attended the wake and would return the defendant immediately thereafter to custody. That is the confidence I had in George Thompson. He is a tough person to replace. He will be missed.*"

We will surely miss George's companionship, friendship and his commitment to the defense of the indigent. We wish him, and his wife Rosa, every success in their retirement.

We will miss you!

FEDERAL PUBLIC DEFENDER REPORT

is published by the

Federal Public Defender's Office
Western District of New York

The ***Federal Public Defender Report*** will be issued bi-annually and is intended to help keep defense attorneys apprised of developments in federal criminal law. Unless otherwise noted, material appearing in this newsletter is in the public domain and may be reproduced or copied without permission from the Federal Public Defender's Office.

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:

MaryBeth Covert
Hillary K. Green
Jay Ovsiovitch
Editors
Federal Public Defender's Office
300 Pearl Street, Suite 200
Buffalo, New York 14202
716-551-3341/FAX: 716-551-3346

e-mail:
marybeth_covert@fd.org
hillary_green@fd.org
jay_ovsiovitch@fd.org

✣ ✣ ✣