FEDERAL PUBLIC DEFENDER REPORT

Federal Public Defender
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VETERANS TREATMENT COURT GRADUATES FIRST FEDERAL PARTICIPANT

Judge Robert Russell's Veterans Treatment Court was launched in Buffalo in 2008. Through voluntary participation in this Court, veterans are offered a second chance to avoid a criminal record and return to the community as productive members of society. Veterans Court focuses on veterans returning home with post-traumatic stress disorder, traumatic brain injuries or drug and alcohol abuse issues who are faciing criminal charges and offers the unique assistance of veteran mentors as well a direct link to various services available through the Veterans Administration and affiliated support groups. Judge Russell's Veterans Court, the first in the country, has since become a prototype for similar courts nationwide.

On March 6, 2012, Britten Walker, an Army veteran who honorably served in Iraq and

Afghanistan, became the first federal defendant to graduate having successfully completed all the terms and conditions of Veterans Treatment Court. This is a noteworthy accomplishment in that he is he first federal participant in the Western District of New York, and in the entire country. All eyes of the federal court community have been monitoring Britten's progression through this program.

In 2010, United States Magistrate Judge Jeremiah J. McCarthy was receptive to an alternative resolution of Britten's serious federal charges. After months of ground-breaking efforts undertaken by Assistant Federal Public Defender Tracy Hayes, assisted by Paralegal Jo Anne DeVoy, of the Buffalo Federal Public Defender's Office, a Pretrial Diversion Agreement was reached with the coordinated efforts of Assistant U.S. Attorney Edward H. White and Zenaida Piotrowicz, Pretrial Diversion Coordinator of the United States Probation Office .

In August, 2010, Magistrate Judge McCarthy placed Britten's case on reserve to allow him an opportunity to comply with the terms of his Pretrial Diversion Agreement which specifically required successful participation and completion of Judge Russell's Veterans Treatment Court. For eighteen months Britten met with Lillian Cullen, his Probation Officer, attended Veterans Court sessions and fully complied with the Court's various conditions and assistance components as well as the terms of his Pretrial Diversion Agreement. That Agreement also included a provision that upon his graduation from Veterans Treatment Court all criminal charges would be dismissed in Federal Court. Magistrate Judge McCarthy confirmed the dismissal of his federal criminal charges in his congratulatory remarks at Britten's graduation.

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CELL PHONES AND PRIVACY

Robert G. Smith,
Assistant Federal Public Defender
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As demonstrated by the Supreme Court's recent decision in *United States v. Jones*, ___ U.S. ___, 2012 WL 171117 (Jan. 23, 2012) (no. 10-1259), law enforcement is using sophisticated high tech methods to place a criminal defendant at the location of a crime. Unbeknownst to many of our clients, sometimes it is their very own cellular telephones that the government is using against them. Recently, we have started seeing the government use "historical cell phone location information" to track a suspects movements and place him at the scene of a crime.[1] Given the increasing use of "historical cell phone location information" by law enforcement, the Federal Public Defender's Office has begun looking into ways to challenge admission of this information in Court.

This article addresses the government's seizure of location information, not the seizure of conversations. In order to "seize" a conversation, the government must obtain a state or federal wiretap warrant. However, the

[1]The term "historical cell phone location information" refers to data kept by cell phone providers that have identified the dates and times when cell phone numbers were used in relation to cell phone towers. The "location information" does not reveal the substance of the cell phone conversation. However, many of our clients use their cellular telephones so often, that their locations can give away their activities, or hint at the substance of their conversations.

government may seize location information with a simple subpoena to your client's cell phone provider. In trying to suppress the government's use of location information at trial, you may need to address the following: how the cell phone location information was obtained; your client's expectation of privacy in his location and movement; and the possible use of the prolonged surveillance doctrine.

Cell Phone Location Technology

Cell phone location technology has advanced dramatically over the past five years. The advance in location technology has been driven by both competition in the cell phone market, and by regulatory changes. This new cell phone technology has advanced more quickly than the case law regarding the use of historical cell phone location information.

Cellular telephones, unlike conventional hard wire telephones, use radio waves to communicate between the user's handset and the telephone network. *ECPA Reform and the Revolution in Location Based Technologies and Services: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 20 (2010) (Statement of Prof. Matt Blaze). Cellular service providers maintain networks of radio-based stations "cell sites" spread throughout the geographic coverage areas. *Id*. Wireless antenna at each cell site detects the radio signal from the handset and connects it to the local telephone network, the internet, or another wireless network. Cell phones identify themselves to the nearby base station as they move about the coverage area, a process called "registration." The registration process is automatic, and occurs whenever the phone is on, without the user's input or control. The registration signal is carried over a channel separate and apart from the channel used to carry the call itself. During a cell phone call, if the phone moves nearer to another base station, the call is handed off between the base stations without interruption or the caller's knowledge. *Id*.

The location of the cell phone making a call is calculated by the cell phone network based on data collected and analyzed at the cell site receiving the cell phone's signals. This is done without explicit assistance from the user or his cell phone. One technique is to identify the particular base station or section of base station within which the cell phone was communicating every time the cell phone makes or receives a call plus when the cell phone moves from one base station to another. *Id*. at 22-23. The relative precision of the location found by the cell site depends on the size of the cell sector. *Id.* at 24. The smaller the sector, the more precise the location. *Id*. In earlier cellular systems, five years ago, base stations were placed as far apart as possible to provide maximum coverage. *Id*. The distance between the base stations resulted in calls being dropped at various spots within the base station's coverage area. Based on market factors and the increased use of cell phones, the size of the typical cell sector has been steadily shrinking. *Id*. As the size of the cell phone sector shrinks, the more precise the location of the individual cell phone making a call can be determined. It has become possible for a cell phone "network operator to pinpoint a phone's latitude and longitude at a level of accuracy that can approach that of a GPS[,]" within 50 meters or less. *Id*. at 26.

Cell phone location information is silently and automatically calculated by the cell phone network, without unusual or overt intervention that might be detected by the cell phone user, and is preserved by the cell phone carrier. *Id*. Cell phone call carriers typically create "call detail records" that include the most accurate location information available to them. *Id*. at 26-28. Some carriers also store frequently

updated, highly precise, location information not just when calls are made or received, but as the device moves around the network.

Expectation of Privacy in Cell Phone Location Information

The first step in raising a Fourth Amendment challenge is to identify a legitimate expectation of privacy that belongs to the client. *See generally Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting that, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). The Supreme Court's recent decision in *Jones*, 2012 WL 171117, suggests that people have an expectation of privacy in their location. The Court held that, "the [g]overnment's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movement's constitutes a 'search.'" *Id*. at *3. While the Court's holding has no precedential effect on the use of cell phone location information, the separate writings of Justice Sotomayor, *id*. at *8-10 (Sotomayor, J., concurring), and Justice Alito, *id*. at 10-18 (Alito, J., concurring in the judgment), are relevant as to whether a defendant has standing to challenge the receipt and use of cell site location records.

In her concurring opinion, Justice Sotomayor notes that, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." 2012 WL 171117, at *10. The Justice explained that,

> [t]his approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

Id. The underlying question as to whether a defendant has a right to privacy in his movements involves recorded historical cell site information in the hands of third parties. The Justice expressed doubts as to whether

> people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.

Id. Justice Sotomayor "would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." *Id*.

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, was critical of the majority's analysis, and would have looked at whether the defendant's "reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." *Id*. at *11 (Alito, J., concurring in the judgment). In rejecting the majority's analysis, Justice Alito was concerned that, "the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked." *Id*. at *15. The issue of privacy is present because

of the emergence of new technologies, most significantly cell phones and other wireless devices that "permit wireless carriers to track and record the location of users." *Id*. at *17. Justice Alito concluded by asking, "whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Id*.

The majority opinion chose not to address whether there was a right to privacy in information unknowingly disclosed to third parties because the question was not properly before the Court. *Id*. at *7 ("It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question."); *see also id*. at *10 ("Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision.") (Sotomayor, J., concurring).

As the Court in *Jones* points out, society is prepared to accept as reasonable a person's privacy interest despite the fact that cell phone records are being held by third parties.

The Still Evolving Prolonged Surveillance Doctrine

The acceptability of prolonged surveillance of an individual under the Fourth Amendment is still evolving. The Third Circuit in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), the companion case to *Jones*, recognized a "prolonged surveillance" doctrine as a distinguishing feature from the rule in *United States v. Knotts* 460 U.S. 276 (1983). Remember, *Knotts* held that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. *Knotts*, 460 U.S. at 281. However, *Knotts* expressly reserved the question whether a warrant would be required for prolonged (24 hour) surveillance. *Knotts*, 460 U.S. at 283-84 (if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable). The Third Circuit in *Maynard* distinguished *Knotts* when it concluded that an individual has a legitimate expectation of privacy regarding the "intimate picture of his life" revealed by prolonged surveillance. *Maynard*, 615 F.3d at 564-65. The Supreme Court, in its review of *Maynard* did not address the prolonged surveillance doctrine.

Conclusion

Cell Phone Location Information is a new favorite tool of Prosecutors. The information can be presented to the jury by location pinpointed on a map. The information can place your client , or at least your client's cell phone, at relevant places set forth in the indictment. The courts are responding by making challenges available under the Fourth Amendment. The first step is for defense counsel to remember that clients have an expectation of privacy in their location. Thus, do no accept a prosecutor's representation that there is no right to privacy since the government will not use the substance of your client's cellular telephone calls. Typically, the government is not in possession of the conversations; the government will only have the location information. The location information can be challenged. If you need assistance, contact the Federal Public Defender's Office for examples on how to challenge the government's use of historical cell phone location information.

Summary of 2011 Amendments to the Sentencing Guidelines

Sentencing Resource Counsel Project

On November 1, 2011, the following guideline amendments took effect. Please be sure to read the actual language of the amendments in your guideline manual.

Mitigating Role: A significant favorable change was made to §3B1.2. The Commission voted to delete two sentences from the Application Notes to §3B1.2 (Mitigating Role), recognizing that these now-deleted sentences have had "the unintended result of discouraging courts from applying the adjustment." Amendment: Role. The Commission struck (1) from Application Note 3(C) the statement that the court "is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted," and (2) from Application Note 4 the statement that "It is intended that the downward adjustment for minimal participant will be used infrequently." With these changes, you can argue the Commission is signaling that a court can, and should, give an adjustment when the only evidence of role rests upon circumstantial evidence and the defendant's statement about his or her participation in the offense. The Commission is also encouraging greater use of the minimal role adjustment.

Another positive change is the Commission's addition to Application Note 3(A), providing that "a defendant who is accountable under §1B1.3 (Relevant Conduct) for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for an adjustment under this guideline."

Note: the first two changes to §3B1.2 are found in the proposed amendment on Role; the latter is found in the proposed amendment on Fraud.

Illegal Reentry: The Commission reduced, but did not eliminate, enhancements based on stale convictions or convictions that do not receive criminal history points under Chapter 4. As set forth in §2L1.2(b)(1)(A) and (B), a defendant is subject to a 16- or 12-level enhancement *if the conviction receives criminal history points under Chapter 4*, and an alternative 12- or 8- level enhancement, respectively, if it does not. The Commission also provided for an upward departure if the new 12- or 8-level enhancement "does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction."

This amendment is less of a reduction than the one the Commission originally proposed, which would have provided for an 8-level enhancement for defendants with stale convictions who would otherwise have been subject to the 16-level enhancements. The reason is unclear. Commissioner Friedrich stated the she did not support the original proposal, but did so now. She also expressed the view that the immigration guideline should be addressed in a more comprehensive fashion. Judge Hinojosa stated that the change brought 2L more in line with the career offender provision and other guidelines that contain offense level enhancements based upon criminal history.

You should argue that while the amendment moves in the right direction, it still unfairly counts stale convictions when they are not counted elsewhere in the guidelines. There is no empirical evidence that supports the Commission's decision to treat stale convictions under 2L1.2 differently than anywhere else in the guidelines.

Supervised Release: The Commission's changes to §5D1.1 also are helpful to defendants.

No supervised release for deportable aliens. In a move that will benefit deportable clients, the Commission added subsection (c) providing: "The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." In Commentary regarding this new subsection, the Commission stated:

> "The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case."
>
> In the synopsis of this proposed amendment, the Commission acknowledges that removal is nearly automatic for a broad class of noncitizen offenders. It also observed that deported offenders "likely would face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States."

Lesser terms of supervised release. The Commission also lowered the minimum term of supervised release under §2D1.2 from three (Class A and B felonies) and two years (Class C and D felonies) to two years and one year, respectively.

Guidance on imposing terms of supervised release. The Commissions inserted commentary into §§5D1.1 and 5D1.2 on the factors a court should consider in determining whether to impose supervised release, and for how long. In addition to the statutory factors set forth in 18 U.S.C. § 3583, the Commission specifically mentioned criminal history and substance abuse.

Early termination of supervised release. The Commission also added commentary to §5D1.2, which specifically encourages courts to consider early termination of supervised release "in appropriate cases." The amendment provides as an example a substance abuser who successfully completes a treatment program, "thereby reducing the risk to the public from further crimes of the defendant."

Firearms: The Commission amended both §2K2.1, and §2M5.2. These changes are not as bad as they could have been, but they are not good.

§2K2.1:

The Commission increased penalties for straw purchasers convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) based on uncharged conduct where the defendant "committed the offense with knowledge, intent or reason to believe that the offense would result in the transfer of a firearm to a prohibited person."

The Commission added a 4-level enhancement (and floor of 18) where a defendant "possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or

transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States."

Finally, the Commission invited a downward departure for straw purchasers convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A) where "(A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

§2M5.2:

The Commission raised penalties for cases involving small arms crossing the border, increasing the base offense level from 14 to 26 in cases involving more than two (it used to be ten) non-fully automatic small arms. The Commission also specifically addressed ammunition (on which the Guidelines had previously been silent), specifying that a defendant is subject to the lower level 14 if the offense involved 500 rounds or less of ammunition for non-fully automatic small arms. Level 14 is also to be applied where the offense involved both small arms and ammunition in the quantities specified above.

Fraud: Responding to directives in recent health care legislation, the Commission made two amendments to §2B1.1 that apply where a "defendant was convicted of a Federal health care offense involving a Government health care program." First, the Commission added tiered enhancements for loss amounts more than $1 million. Second, the Commission added a rebuttable special prima facie evidence rule for loss amount in health care fraud cases: "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted." The proposed amendment also defines "Federal health care offense" and "Government health care program." The latter definition is broader than the directive may have required. For a further analysis of the issue, see the Defender Comments on the 2011 Amendments, available at fd.org.

Child Support: The Commission resolved a circuit conflict in a manner favorable to defendants. Defendants convicted under 18 U.S.C. §228 for the willful failure to pay court-ordered child support are not subject to the 2-level enhancement under §2B1.1(b)(8)(C) (which applies where the offense involves a violation of any prior order). Back in 2004 and 2005, the Eleventh and Second circuits, respectively, held the enhancement did apply, so this amendment changes the law in those circuits. (The Seventh Circuit got it right in 2010, and held the enhancement did not apply.)

Drug Disposal Act: The Commission amended Application Note 8 to §2D1.1 to expand the list of people who may be subject to an enhancement for abuse of position of trust or use of special skill. The addition states: "Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility."

UPCOMING CLES

FEDERAL CRIMINAL DEFENSE PRACTICE SPRING 2012 SEMINAR

Friday, May 4, 2012

See Registration Materials on pp. 10-11

FEDERAL CRIMINAL DEFENSE PRACTICE FALL 2012 SEMINAR

Friday, November 2, 2012

Genesee Community College
Batavia, New York

Save the dates on your calendar and look for our seminar mailings!

UPDATES ON PEER-TO-PEER FILE SHARING ENHANCEMENT

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Back in 2009 we cautioned the panel about agreeing to USSG § 2G2.2(b)(3)(B)'s 5-level enhancement based on the mere use of a peer-to-peer file sharing program (i.e., LimeWire, FrostWire, Kazaa, or Shareaza). *See FEDERAL PUBLIC DEFENDER REPORT*, Winter 2009 Edition. USSG Section 2G2.2(b)(3)(B) provides for this substantial enhancement where distribution was for receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.

Let's recap the terminology. Distribution is "[any act, including possession with intent to distribute...., related to the transfer of material involving the sexual exploitation of a minor." Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for pubic viewing. [USSG § 2G2.2 comment, note 1.]

"Receipt for a thing of value" is "[any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. Thing of value means anything of valuable consideration." [USSG § 2G2.2 comment, note 1.]

If the offense involved distribution other than for receipt, or expectation of receipt, of a thing of value, a two level increase applies instead. [USSG § 2G2.2(b)(3)(F).]

When we reported the issue in 2009, the

Government and Probation were arguing that a defendant's use of a peer-to-peer software program warrants the 5-level enhancement simply because the defendant knows that other users were able to download those files from the defendant's computer to their own. In 2009, District Judge David G. Larimer refused to apply the enhancement on that theory alone in *United States v. Mahaney*, 08-CR-6197.

Circuit level authority is now emerging. Recently, a panel of the Eleventh Circuit struck down the application of the five level enhancement finding the record did not support the conclusion that the defendant distributed child pornography for receipt, or expectation of receipt of a thing of value. *United States v. Spriggs*, 666 F.3d 1284 (11th Cir., January 10, 2012)

In *Spriggs*, the defendant was convicted of receiving child pornography. Spriggs downloaded the images through a file sharing program, Shareaza. This peer-to-peer program provided for reciprocal sharing. Others could access and download files from Spriggs' shared folder. The majority of Spriggs' collection of contraband images was located in this shared folder. The record supported a finding that Spriggs knew Shareaza enabled others to access files on his computer. Similarly, Spriggs admitted he used the program to download and upload files.

The panel determined the expectation of receiving a thing of value must be contextual. The use of a file sharing program enables free access to files. The files are free. There is no sharing for valuable consideration as required under the Guidelines. Without proof that Spriggs and another user specifically agreed to share their files on a return promise to share files, there was no transaction conducted for valuable consideration.

Notwithstanding Spriggs' plea to receiving child pornography, his use of a peer-to-peer file sharing program, the majority of the contraband images found in the shared folder, and his use of the program to download and upload files, there was insufficient evidence to support the five level enhancement for receipt, or expectation of receipt, of a thing of value.

The significance of this decision is the rejection of the enhancement for simply using a peer-to-peer file sharing program. Some sentencing courts previously considered the use of a file sharing program constituted bartering for something of value – more contraband images. Here, the panel in *Spriggs* specifically rejected that application. Moreover, the additional facts present in *Spriggs* (admissions of the use of shared folders and the distribution and receipt of contraband images) were not indicia of proof of sharing for valuable consideration. Simply put, the Guidelines' five level enhancement requires something more.

Look for the tide to change in other circuits. At least one Eighth Circuit court judge is convinced by the *Spriggs* rationale. Though the Eighth Circuit previously found that discovery of a program with a shared folder is usually sufficient for the five level enhancement, (*see United States v. Stults,* 575 F.3d 834, 847-849 (8th Cir. 2009)), one of the deciding circuit court judges (Circuit Judge Colloton) has expressed doubts. In a recent concurring opinion citing to *Spriggs,* Judge Colloton crystallized the issue:

> He who places an open box of treats in a common area of an office may be distributing treats, but USSG §2G2.2(b)(3)(B) applies only where the defendant is engaged in a transaction that is conducted for a thing of value.

United States v. Burman,666 F.3d 1113 (8th Cir., January 25, 2012)(Colloton, J. concurring). The issue remains open in the Second Circuit.

An individual facing sentencing for a child pornography offense, whether possession, receipt or distribution, should anticipate the government will seek to apply the five level enhancement in those instances in which the defendant used a peer-to-peer file sharing program. Counsel should rely on *Spriggs* (and the district court decision in *Mahaney*) when objecting to the government's claim. The government must be required to prove something more than the defendant installed utilized a file sharing application. Without more, the government's contention fails. The well reasoned holding in *Spriggs* properly concluded the simple use of a peer-to-peer program could not support the five level enhancement found in USSG § 2G2.2(b)(3)(B).

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Second Circuit CJA Committee Seeks Applicants

The Criminal Justice Act Committee for the United States Court of Appeals for the Second Circuit is accepting applications for service on the CJA Panel. CJA Panel members represent indigent criminal defendants and petitioners for *habeas corpus.*

Admission requirements and applications for admission may be found on the Circuit's website at www.ca2.uscourts.gov.

Completed applications are due Monday, April 2, 2012.

NEW U.S. COURTHOUSE OPENS FOR BUSINESS

Mike J. Roemer
Clerk of Court
Western District of New York

On November 28, 2011, the new U.S. Courthouse opened for business in Buffalo. To mark the occasion, the Court held a ceremonial event attended by the Judges, the Court staff, the Probation Office staff, the staff of the United States Marshal Service and the General Services Administration (GSA) building staff. As special guests, we welcomed Congressman Brian Higgins, who was instrumental in securing the courthouse project in Buffalo, Denise Pease, the Regional Administrator for the GSA's Northeast and Caribbean Region, and Joanna Rosato, GSA's Public Building Service Acting Regional Commissioner. Chief Judge William M. Skretny presided over the ceremonies, which started with a ceremonial flag raising by an honor guard composed of members of the 914th and 107th Air Wings stationed at the Niagara Falls Air Base. Willie Schoellkopf, confidential law clerk to Senior Judge John T. Curtin, and Linda Lewis, courtroom deputy to Magistrate Judge Jeremiah J. McCarthy, sang the National Anthem while the flag was being raised. The flag raising was followed by a ribbon-cutting ceremony by representatives from each agency housed in the new building. Then finally, after 12 years

of planning and 4 years of construction, we went to work in our new courthouse.

The elliptically-shaped courthouse is 10 stories high (which is the equivalent of an 18 story building) with a 238 foot high elevator tower topped with a glowing lantern. A glass veil partially surrounds the building and each 400 pound panel is beveled glass and fills the halls and interior spaces with rainbows when the sun is shining. The front of the building is a glass curtain wall through which the public can view the beautiful lobbies and courtroom entrances.

The building was designed by world-renowned architect William Pedersen from the firm of Kohn Pedersen Fox Associates of New York City. The glass front of the building symbolizes the transparency of justice for which we strive. The front of the building is also curved so as to embrace the traffic circle around Niagara Square. The public and staff enter the courthouse through an entry pavilion connected to the main building by the security entrance. Monumental colored glass panels adorn one side of the pavilion lobby. They

were designed by renowned artist Robert Mangold, a native of North Tonawanda. The

Constitution and Bill of Rights are etched into the glass panels in the front of the entry pavilion facing Niagara Square and are repeated seven times.

The new courthouse has nine courtrooms: five district judge courtrooms and four magistrate judge courtrooms. The courthouse also houses the Second Circuit Satellite Library. The Library was designed and built so that if in the future, an additional courtroom is needed, that

space can be built out and used as a tenth courtroom. Eight of the courtrooms are named after one of the eight counties in Western New York served by the court in Buffalo. For example, the "Erie Courtroom," Judge Arcara's courtroom, is named after Erie County and is the ceremonial courtroom. The ninth courtroom, Chief Judge Skretny's, is named the "Buffalo Courtroom" after the City of Buffalo. On the tenth floor of the courthouse is the judge's conference room, along with a chambers for a Second Circuit Court of Appeals judge in the event that someday we

have a circuit judge stationed here in Buffalo. All the courtrooms are equipped with state-of-the-art evidence presentation systems that are operated by the use of simple touchscreens. The courtrooms are also equipped with projection screens that drop from the ceiling. We are currently preparing and scheduling CLE classes to familiarize attorneys with using the evidence presentation systems.

Off the lobbies on the floors that house courtrooms (floors five to nine), there are three rooms designated as attorney conference rooms where attorneys may meet with clients and witnesses. On the fourth floor is an attorney lounge were attorneys may relax between court appearances. The lounge will be equipped with a television and Internet access.

United States Probation Office is located on the first and third floors of the building. The Supervision Unit is located on the first floor, while the Pretrial Services and Presentence Investigation Units are located on the third floor.

The Court Clerk's Office is located on the second floor, along with the jury assembly room. The jury assembly room will be used not only for juror orientation, but also for CLE and bar events.

The United States Marshal Service is located on the fourth floor. The main holding cells are located within that space and contain interview rooms where attorneys may meet with defendants who are in custody.

The Federal Public Defender Office occupies trial preparation space on the first floor.

The Grand Jury will move from its current location within the United States Attorney's Office to a new grand jury suite on the third floor of the new courthouse. The Grand Jury suite also contains trial preparation and interview rooms for the United States Attorney.

Our congressional representatives, Brian Higgins and Kathy Hochul, have introduced a bill in the House of Representatives to name the building after Supreme Court Justice Robert H. Jackson. Justice Jackson was raised in Western New York and practiced law in Jamestown and Buffalo. He was an Associate Justice of the Supreme Court from 1941 to 1954, and in 1945 was appointed by President Harry S. Truman to serve as United States Chief War Crimes Prosecutor at Nuremberg.

A dedication ceremony for the new courthouse has been scheduled for Thursday, May 3, 2012. If you haven't seen the new courthouse yet, I urge you to schedule a visit. We would be more than happy to provide you with a tour of our beautiful facility.

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Federal Criminal Defense Practice Seminar -

Spring 2012

GENESEE COMMUNITY COLLEGE
Conable Technology Bldg, Room 102
One College Road
Batavia, New York 14020

Friday, May 4, 2012
8:30 a.m. - 3:30 p.m.

The Federal Public Defender's Office for the Western District of New York has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from May 14, 2010 through May 13, 2013.

This non-transitional program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 6.5 credit hours of which 3.5 credit hours may be applied toward the Professional Practice requirement, 1.5 credit hours may be applied toward the Skills requirement and 1.5 credit hours may be applied toward the Ethics requirement.

* * *

Reminder: CJA Panel members are required to attend at least one annual FPD program or an alternative 6 credit hours of federal criminal defense CLE as a condition of maintaining membership on the panel.

As an accredited provider of CLE credit, the Federal Defender's Office has a hardship policy for attorneys unable to pay the registration fee. For further information concerning this policy, or for questions concerning the seminar, please contact JoAnne DeVoy at the Federal Public Defender's Office at (716) 551-3341.

PLEASE REGISTER BY APRIL 13, 2012

FEDERAL CRIMINAL DEFENSE PRACTICE SEMINAR
SPRING 2012

8:30 am	CHECK-IN Coffee & Danish
8:45 am	WELCOME & OPENING REMARKS Marianne Mariano Federal Public Defender - WDNY
9:00 am	CJA UPDATE James P. Harrington, Esq. CJA Panel Administrator Harrington & Mahoney Buffalo, NY
9:30 am	THE CHOSEN FEW - A CASE STUDY IN PRE-TRIAL ADVOCACY - PART I Paul Cambria, Esq. Lipsitz Green Scime Cambria, LLP Buffalo, NY Joseph M. LaTona, Esq. Buffalo, NY Angelo Musitano, Esq. Buffalo, NY
10:45 am	MORNING BREAK
11:00 am	THE CHOSEN FEW - A CASE STUDY IN PRE-TRIAL ADVOCACY - PART II Paul Cambria, Esq. Joseph LaTona, Esq. Angelo Musitano, Esq.
12:15 pm	LUNCHEON
1:00 pm	PRE-TRIAL MOTIONS: The Differences between State and Federal Practice William T. Easton, Esq. Donald Thompson, Esq. Easton Thompson Kasperek Shiffrin LLP Rochester, NY
2:15 pm	ETHICAL CHALLENGES IN THE AGE OF THE INTERNET Barry N. Covert, Esq. Lipsitz Green Scime Cambria, LLP Buffalo, NY
3:30 pm	CLOSING REMARKS CLE Certificate Distribution

REGISTRATION FORM

Federal Criminal Defense Practice Seminar - Spring 2012

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 April 13, 2012 to:

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

_____
Name
(Print clearly, as you would like it to appear on your CLE Certificate)

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Address

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Telephone

Materials Preference: ☐ *paper* ☐ *.pdf download*

Please accept my registration as:
☐ *CJA Panel Attorney* *$ 50 Enclosed*
☐ *CJA Application Pending* *$ 50 Enclosed*
☐ *Non-CJA Panel Attorney* *$100 Enclosed*

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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