Fall 2022

Arresting developments

Annual Federal Criminal Defense Newsletter
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Message from the Defender

Dear Colleagues:

I hope this message finds you well. We are finally getting our groove back after COVID upended our lives for the better part of two years. Jury trials are resuming, and we will begin hosting in-person trainings this winter. Despite the hardships created by the pandemic, there were some positive advances, including the use of a new video conferencing system for remote jails in Delaware, Broome, and Clinton counties. I stress that the use of this system is not meant to replace meaningful in-person visits with our clients, but rather to supplement communication and aid in fostering regular contact when our clients are a great distance away. Sometimes just a brief update or acknowledgement that you haven't forgotten about them goes a long way to preserving client trust and confidence.

Our district has lost a handful of experienced CJA attorneys due to retirement or job changes. We are seeking qualified panel applicants to fill a large void we've experienced in recent years. In that vein, we are committed to helping lawyers lacking federal criminal experience gain the knowledge they need to be effective advocates for indigent clients in our district. AFPD Randi Bianco has put together a 13-part nuts-and-bolts training series for potential panel applicants. If you know of any energetic lawyers who are enthusiastic about doing federal criminal work, please refer them to our office. We can help navigate them through the process.

(*Continued next page)*

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Message from the Defender...*continued*

Remember to stay updated on changes in the law, practices, and policies. No matter our years of experience, it's critical to continue our legal education and seek to improve our skills. There is no substitute for hard work and dedication. Our clients' lives depend on it!

- Lisa Peebles

SECOND CHAIR MENTOR PROGRAM

By: Randi Juda Bianco, Supervising AFPD

If you are interested in training to apply for the Criminal Justice Act ("CJA") panel, or just want to brush up on some issues regarding criminal defense in federal court, we are offering access to our virtual training program. This program is intended to cover the nuts and bolts of a federal criminal case. It consists of 13 pre-recorded video segments lasting 30 minutes each. There are Power Point presentations connected with many of the video segments. The following topics are covered:

- What is and what goes on at an initial appearance?
- Advocating detention hearings
- Basics of the Federal Sentencing Guidelines
- Discovery and review of evidence
- Pre-Trial Motions
- Cooperation- is it worth it?
- Plea Agreements, offers of proof and change of pleas
- Pre-Trial submissions prior to trial
- Hiring experts as a CJA attorney
- Jury Trials – the difference between state and federal court
- What to do during the Presentence Report interview
- Sentencing Advocacy
- Supervised Release Violations

Whether you are a new attorney or an experienced attorney our training may be helpful.

Please contact us if you would like to gain access to this material. Additional information about admission to the Northern District of New York bar and joining the CJA panel is available at: https://www.nynd.uscourts.gov/criminal-justice-act

U.S. Sentencing Commission Back in Action: *Amendment Priorities for 2022-2023*

By: *Molly K. Corbett*, AFPD

The U.S. Sentencing Commission regained a quorum in August of this year. The newly confirmed members of the Commission are District Judge Carlton W. Reeves, who will serve as Chair of the Commission; Circuit Judge Luis Felipe Restrepo, Laura Mate and Claire McCusker Murray, who are expected to be designated as Vice Chairs; District Judge Claria Horn Boom; former District Judge John Gleeson; and Candice Wong. Laura Mate joins the Commission as a former Assistant Federal Public Defender and having most recently serviced as the Director of the Sentencing Resource Counsel for the Federal Public and Community Defenders from 2020 to 2022.

The Commission set its amendment priorities for this amendment cycle in late October and they are ambitious. The list as adopted includes:

1. Consideration of amendments to U.S.S.G. §1B1.13 guiding the Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) informally known as compassionate release to (A) implement the First Step Act of 2018 (Pub. L. 115–391) part of which allows for an inmate to seek relief directly from the district court ; and (B) further describe what should be considered extraordinary and compelling reasons for sentence reductions under 18 U.S.C. § 3582(c)(1)(A).

2. Consideration of amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), and related provisions in the Guidelines Manual, to implement the First Step Act of 2018 (Pub. L. 115–391).

3. Consideration of amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses.

4. Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991), including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to subsection (b) of §3E1.1 for Acceptance of Responsibility, because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. § 801 et seq.) to qualify as a "controlled substance offense" under subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

5. Implementation of any legislation warranting Commission action. Will likely include addressing amendments and new offenses from the Bipartisan Safer Communities Act.

6. Continuation of multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.

7. Consideration of amendments to criminal history related to "status points" (points awarded based on release status); the treatment of defendant's with zero criminal history points and the impact of simple possession of marihuana offenses may also be resolved.

8. Consideration of amendments to the Guidelines Manual prohibiting the use of acquitted conduct.

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Introducing New Members of the Office of the Federal Public Defender

Jeremy B. Sporn joined the Albany office as an Assistant Federal Public Defender in June after serving as a Trial Attorney in Yakima for the Federal Defenders of Eastern Washington & Idaho since 2015. He handled all manner of trial and appellate work, including cases involving narcotics, firearms and explosives, fraud, violent crime and sexual offenses. Most recently, he was part of the trial team defending against five charged murders and other violent crimes that occurred on the Yakama Nation reservation in Washington. Before heading west, Jeremy practiced in New York City at a small firm for five years, focusing on federal criminal defense and cases ranging from high-profile frauds to drug trafficking, Hobbs Act robberies, money laundering and other offenses. He began his legal career as a law clerk in the Eastern District of New York, after graduating from Tulane Law School in New Orleans, and the University of Michigan as an undergrad. Jeremy is a second-generation defense lawyer and a New York City native, but has spent significant time in the Capitol region before making it his new home. He is looking forward to his first full Upstate winter, and to getting to know the members of the local defense bar.

Anne LaFex joined the Syracuse office in September as our latest Assistant Federal Public Defender. Prior to joining the Office of the Federal Public Defender, Anne was a law clerk for 11 years in the United States District Court for the Northern District of New York. Anne began as a temporary law clerk for District Judge Suddaby, and a year later transitioned to Magistrate Judge Peebles' career law clerk until 2018, when Magistrate Judge Peebles moved to Recall status. From 2018-2022, Anne was a law clerk in the Inmate Litigation Unit, drafting decisions for the NDNY judges in prisoner civil rights matters.

U.S.S.C Priorities...*continued*

9. Consideration of amendments to the Guidelines Manual to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed by law enforcement or correctional personnel.

10. Consideration of possible amendments to the Guidelines Manual addressing 28 U.S.C. § 994(j) likely to include increases in the availability of alternatives to incarceration for non-violent first-time offenders and others at the lower levels of the guidelines. .

11. Multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary.

12. Continuation of multiyear examination of the structure of the guidelines post-*Booker* to simplify the guidelines while promoting the statutory purposes of sentencing.

13. Multiyear study of court-sponsored diversion and alternatives-to-incarceration programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the Guidelines Manual that might be appropriate.

14. Consideration of amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) to address offenses involving misrepresentation or marketing of a controlled substance as another substance.

15. Consideration of amendments to §3D1.2 (Grouping of Closely Related Counts) to address the interaction between §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and §3D1.2(d).

The amendment cycle ends May 1, 2023. The proposed amendments will be addressed January to March of 2023 with the final amendments published in April and May.

The Bipartisan Safer Communities Act of 2022

Earlier this summer President Biden signed the *Bipartisan Safer Communities Act* (BSCA) into law. The Act changed some prior federal sentences, added some new federal offenses, and expanded the application of others in certain federal criminal contexts.

Among the changes wrought by the BSCA:

- **Raised the statutory maximum for 18 U.S.C. § 922(d) & (g) offenses from 10 to 15 years.** *See* § 12001 (BSCA at 10-11), § 12004(d) (BCSA at 17).

- **Expanded the definition of "misdemeanor crime of domestic violence"** to include domestic violence against dating partners (defined in new 18 U.S.C. § 921(33)(C). *See* § 12005 (BCSA at 20).

- **Expanded the conduct, mental state, and penalties (from a statutory maximum of 10 years to 15 years) for §§ 924(h) & (k).** (§ 12004(e) & (f)) (BCSA at 17-18).

  Under the new § 924(h), it is illegal to knowingly receive or transfer a firearm or ammunition, or to attempt or conspire to do so, if you know or have reasonable cause to believe that the firearm will be used to commit a long list of offenses, including a "felony" (defined by the new § 932(a) to mean "any offense under Federal or State law punishable by a term exceeding 1 year").

  Under the new § 924(k), it is illegal to smuggle or knowingly bring a firearm or ammunition in or out of the United States, or to attempt or conspire to do so, with the intent to "engage in or promote conduct" that includes a long list of offenses, including a "felony" (defined by the new § 932(a) to mean "any offense under Federal or State law punishable by a term exceeding 1 year").

- **Created new broad firearms offenses, at 18 U.S.C. §§ 932 (Straw purchasing of firearms) & 933 (Trafficking of firearms), punishable by 15-25 years.** *See* § 12004(a)(1) (BCSA at 14-16).

  Section 933 creates a new offense that covers, not just trafficking, but transport and receipt of firearms. Its breadth is notable as it prohibits giving a firearm to someone if you knew or had reasonable cause to believe they were prohibited because of drug use, a prior conviction, or any of the list of factors disqualifying a person from possessing a firearm under federal law.

  Section 932 and 933(1) also are added as permissible bases for a Title III wiretap; are added as the type of conduct constituting "racketeering activity" under 18 U.S.C. § 1961(1)(B), and are added to the list of predicate offenses for money laundering at 18 U.S.C. § 1956(c)(7)(D). *See* § 12004(a)(2) (BCSA at 16).

- **Directed the sentencing commission to promulgate guidelines for the new offenses, "and other offenses applicable to the straw purchases and trafficking of firearms," in order to ensure increased penalties in comparison to those currently provided.** § 12004(a)(5) (BCSA at 16).

Trauma is the Cause —- Compassion is the Cure

By: *Melissa A. Tuohey, AFPD*

We learned nearly 30 years ago that trauma is a pervasive societal problem. In the late 1990's the federal government, through the Center for Disease Control (CDC), partnered with Kaiser Permanente (CDC-Kaiser ACE Study), to study the effects of childhood abuse and neglect, commonly referred to as "adverse childhood experiences" (ACEs), in adulthood.[1] It is considered one of the largest scientific investigations[2] of this issue even though it was limited in time—conducted during a two year period (1995-1997); limited in participants—17,000 Kaiser Permanente employees; and limited in diversity—most participants were white, middle-and-upper-middle class, college educated, employed, and had great health care.[3] Yet, the results of the study were extraordinary.

The study revealed that much of a person's suffering in adulthood, whether it be through chronic disease, mental health disorders, relationship difficulties, substance abuse, committing acts of violence, becoming a victim of violence, criminal activity, financial difficulties, learning deficiencies are all a direct result of traumatic childhood experiences that occurred in an individual's home before they reached the age of 18.[4] Put another way, a person who grows up in a loving and supportive home is more likely to live a happy and healthy life than a person with one or more ACEs.

A person's ACE score is calculated through some variation of the following 10 questions:[5]

1. Did a parent or other adult in the household often or very often…Swear at you, insult you, put you down, or humiliate you? or Act in a way that made you afraid that you might be physically hurt?
2. Did a parent or other adult in the household often or very often…Push, grab, slap, or throw something at you? or Ever hit you so hard that you had marks or were injured?
3. Did an adult or person at least 5 years older than you ever…Touch or fondle you or have you touch their body in a sexual way? or Attempt or actually have oral, anal, or vaginal intercourse with you?
4. Did you often or very often feel that…No one in your family loved you or thought you were important or special? or Your family didn't look out for each other, feel close to each other, or support each other?
5. Did you often or very often feel that…You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you? or Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?
6. Were your parents ever separated or divorced?
7. Was your mother or stepmother: Often or very often pushed, grabbed, slapped, or had something thrown at her? Or Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard? Or Ever repeatedly hit over at least a few minutes or threatened with a gun or knife?
8. Did you live with anyone who was a problem drinker or alcoholic, or who used street drugs?
9. Was a household member depressed or mentally ill, or did a household member attempt suicide?
10. Did a household member go to prison?

Each question receives 1 point if answered in the affirmative. The higher the ACE score, the more likely the person has a higher risk of negative outcomes later in life. Currently, according to the CDC, about 61% of adults (not in prison or another institution) surveyed across 25 states experienced at least one ACE before age 18, and nearly 1 in 6 experienced four or more.[6]

The compelling results of the ACE study inspired additional research, and has expanded to include other factors,[7] such as "[s]tressors outside the home (e.g., violence, poverty, racism, other forms of discrimination, isolation, chaotic environment, lack of services); [p]rotective factors (e.g., supportive relationships, community services, skill-building opportunities); [i]ndividual differences (i.e., not all children who experience multiple ACEs will have poor outcomes and not all children who experience no ACEs will avoid poor outcomes-a high ACEs score is simply an indicator of greater risk)." [8]

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Experiencing many ACEs, along with stressors outside the home, without protective factors, leads to toxic stress.[9] Toxic stress harms the child's developing brain and damages the body through the over production of stress hormones such as cortisol and adrenaline, leading to a multitude of serious physical and mental health conditions.[10] A chronically stressed person, who experiences a new traumatic event, will have a difficult time returning to a normal state, and will develop a hair-trigger response to events that may generate no reaction in other people.[11]

The equally crucial part of the science is that ACEs and their consequences can be prevented.[12] Prevention reduces social and economic costs. The CDC estimates that "[a] 10% reduction in ACEs in North America could equate to an annual savings of $56 billion."[13]

There are 5 known strategies that help stop ACEs before they start.[14] First, strengthen economic support for families by strengthening household financial security and creating family-friendly work policies. Second, promote social norms that protect against violence and adversity through public education campaigns, creating legislation to reduce corporal punishment, and finding allies in prevention. Third, ensure a strong start for children through quality childcare and preschool. Fourth, connect at-risk youth to caring adults and activities through mentoring programs and after-school programs. Fifth, intervene to lessen immediate and long-term harms through enhanced primary care, victim-centered services, and treatment.

The science of resilience teaches that "the brain is plastic, and the body wants to heal."[15] Not all children experience lasting harm from ACEs, some may develop "resilience," or "an adaptive response to serious hardship."[16] Resilience develops through protective experiences and adaptive skills that counterbalance significant childhood adversity.[17] Think of it as a balance scale or seesaw where positive experiences are on one side and ACEs on the other. The goal is to create more positive childhood experiences to tip the scale toward more positive future outcomes.[18] Resilience comes through "(1) providing supportive adult-child relationships; (2) scaffolding learning so the child builds a sense of self-efficacy and control; (3) helping strengthen adaptive skills and self-regulatory capacities; and (4) using faith and cultural traditions as a foundation for hope and stability."[19]

Undoubtedly, most, if not all, of our indigent clients have high ACE scores, who had little to no access to these valuable tools that help build resilience. This is not an overstatement, we have heard our client's stories, read their "Background and Characteristics" in Presentence Reports (PSR), and watched them go to prison, often returning after committing another crime, or because they were unable to comply with their conditions of supervised release.

The CDC's lack of data for institutionalized people is unfortunate, because, as Dr. Gabor Mate, a Hungarian-Canadian physician and author who specializes in childhood development and trauma, notes, "[i]f you study prison populations as I have, you see a common preponderance of childhood trauma and mental illness. The two go together. So a lot of people are being punished for being mentally ill and they are mentally ill because they were traumatized as kids. So what we have in [prisons] are the most traumatized people in our society."[20]

Often, a client's history is described in a PSR with reference to several ACEs, but those experiences are never described as trauma. The client may have left school at a young age, was placed in special education classes, suffered from ADD/ADHD, had disciplinary problems, started abusing drugs and alcohol at a young age, lived in a neighborhood riddled with violent crime, was raised in a home with a single parent, was abused, witnessed abuse, did not have enough to eat, had a series of health issues, currently suffers from a multitude of health issues, has a criminal history that runs from youth to adult, and so on.

In many cases, the PSR will include this type of background information and report that the client has no history of mental health issues if they did not receive formal treatment. Yet, the established and accepted science proves that any one of these factors constitutes childhood trauma. Rarely in the pages of the PSR will you find experiences that include a supportive adult relationship, either within the family or outside the family, which is "the

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single most common factor for children who end up doing well." Supportive adult relationships can "buffer children from developmental disruption." [22]

This does not mean an adult with a high ACE score should not bear the consequences of their criminal activity. But it does mean that many of our clients with high ACE scores, who lacked positive childhood experiences, have brain damage. Worst of all, it was entirely preventable. Best of all, it can be healed through specialized treatment.

Trauma-Informed Care (TIC) shifts the focus from "What's wrong with you?" to "What happened to you?"[23] TIC seeks to "[r]ealize the widespread impact of trauma and understand paths for recovery; [r]ecognize the signs and symptoms of trauma in patients, families, and staff; [i]ntegrate knowledge about trauma into policies, procedures, and practices; and [a]ctively avoid re-traumatization."[24] The core principles of TIC include safety; trustworthiness and transparency; peer support; collaboration; empowerment; and humility and responsiveness. [25]

Although there may be mental health treatment programs in some prisons, and clients may be required to participate in mental health treatment through a condition of supervised release, TIC is not likely the method of treatment used. In effect, the dehumanizing nature of the prison setting can work to re-traumatize our clients. Incarceration can include abuse from correctional officers or inmates, solitary confinement for misbehavior, poor diet, limited health care, and lack of programs.

In the supervised release setting, a client is expected to comply with a multitude of conditions that can become overwhelming for a person with unhealed trauma who lacks coping skills. The probation officer may not even pay attention to a client's ACEs. Very often a client with a mental health treatment condition will be discharged from treatment for failing to participate as expected by the treatment provider. But this may be the client's first time at treatment, and the client may not know they even have unresolved trauma. Or maybe the client with multiple unacknowledged ACEs doesn't have a mental health treatment condition but can't seem to comply with other conditions of supervised release. In either case, the client likely does not have the language or knowledge to account for their inability to just do better, as is often asked of them. Emotions that arise include shame and guilt or aggression and defensiveness, none of which bring forward productive results. Noncompliance results in more prison time, more supervised release. It becomes a never-ending cycle of despair.

TIC stresses the importance of implementing this type of care at both the clinical and organizational levels. Meaning, all those involved in working with a person with unhealed trauma—clinical and non-clinical staff—must adopt the principles of TIC. The patient who never felt safe as a child, needs to have a safe environment to heal. If they don't feel safe, they can't heal. "When a person experiences trauma, he or she may feel unsafe, betrayed, and/or have difficulty trusting others. This can lead to heightened emotions, such as anger or aggression, or a tendency toward shame, numbing, and/or isolation. Within the context of health care, this can negatively impact the bond between a patient and their provider, and thus a patient's engagement in care."[26] Within the context of supervised release, the client must report to a probation officer who has the power of sending them back to prison and neither one trusts the other. The relationship is often oppositional, which is never going to produce better behavior. The power dynamic alone works to re-traumatize the supervisee because it is based in fear, which causes the harmful overproduction of cortisol and adrenaline.

Probation's account of a client's conduct on supervised release primarily focuses on the client's negative behavior. But a person with unhealed trauma who complies in some areas while failing to comply in other areas deserves recognition for the things that they do right. Often, we hear a client's frustrated account of the things they are doing right that are not credited, like working and providing for their families, but they missed a drug test or a treatment appointment. They may have completed 30 drug tests but are being violated for missing 5. Sometimes, because of their financial constraints, they must make choices between paying their court ordered restitution or paying their bills. Very few of us working with indigent clients truly knows what it feels like to have no money. Poverty is traumatizing, being punished for that circumstance is also traumatizing.

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The United States leads the world in total number of people incarcerated.[27] And we know that incarcerated people are the most traumatized people in our society. People coming out of prison could be on supervised release indefinitely, either through imposition of a life term of supervised release, or through the commission of violations that bring a new term of supervised release. Our experience teaches us that telling people to do better and sending them to prison when they fail, without ever teaching them that their behavior is a byproduct of their unhealed trauma, or providing them with specialized care to heal it, only keeps them stuck in negative outcomes. The government has known for nearly 30 years that trauma causes brain damage, while also knowing it is preventable and will be aggravated if left untreated. Yet, it rarely receives attention in the criminal justice system. Incorporating this established science into our collective work within the criminal justice system is the compassionate response to a fixable problem and will no doubt be in society's best interest.

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1 https://www.cdc.gov/violenceprevention/aces/about.html
2 *Id.*
3 https://acestoohigh.com/aces-101/
4 https://www.cdc.gov/violenceprevention/aces/about.html
5 https://developingchild.harvard.edu/media-coverage/take-the-ace-quiz-and-learn-what-it-does-anddoesnt-mean/
6 https://www.cdc.gov/violenceprevention/aces/fastfact.html. The data is from "non-institutionalized U.S. adults." https://www.cdc.gov/violenceprevention/aces-brfss.html
7 https://acestoohigh.com/aces-101/
8 https://developingchild.harvard.edu/media-coverage/take-the-ace-quiz-and-learn-what-it-does-anddoesnt-mean/
9 https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/
10 https://acestoohigh.com/aces-101/
11 *Id.*
12 https://www.cdc.gov/violenceprevention/aces/fastfact.html; https://developingchild.harvard.edu/resources/inbrief-resilience-series/;https://acestoohigh.com/aces-101/
13 *Id.*
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The New Second Amendment Standard:
Are federal firearm prohibitions still constitutional?

By: *Molly K. Corbett., AFPD*[1]

This summer the Supreme Court decided *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, 142 S.Ct. (2022), a case that originated in Rensselaer County in the Northern District of New York. The Court addressed the issue of whether a New York state law requiring "good cause" for issuing concealed-carry license was constitutional. Two individuals challenged the requirement after their applications were denied. The majority of the Supreme Court in an opinion authored by Justice Thomas jettisoned the prior test for reviewing the constitutionality of firearm regulation. The rejected standard had first determined whether the restriction regulated conduct protected by the original scope of the Second Amendment and then, if so, asked whether the restriction was narrow enough to advance a significant public interest. In its place, Justice Thomas created a "text and history" test where if "the Second Amendment's plain text covers an individual's conduct," the government has the burden to show that the regulation is consistent with "the Nation's historical tradition of firearm regulation."

What does the invalidation of New York's good cause licensing requirement have to do with federal criminal defense? Not a lot, but the new legal standard for assessing the constitutionality of prohibitions on the possession of firearms and types of firearms may become a beneficial criminal defense tool for challenging the constitutionality of certain sections of 18 U.S.C. §922.

The question now is which prohibitions involving firearms is consistent with "the Nation's historical tradition of firearm regulation?" If the Second Amendment's plain text covers conduct like the general right to privately and publicly possess a firearm, the burden is upon the government to demonstrate the specific prohibition is consistent with the historical tradition of the regulation of firearms.

Some district courts are beginning to weigh in on this question. There is yet to be a decision ruling the prior felony conviction prohibition in section 922(g)(1) unconstitutional, but the Second Circuit has yet to address any of the firearm prohibitions. A sampling of recent decisions are listed from which to glean some hope, some understanding of the new legal standard, and a framework upon which to build your challenges.

Constitutional challenges post-*Bruen*:

United States v. Quiroz, No. PE:22-CR-00104-DC, 2022 WL 4352482, (W.D. Tex. Sept. 19, 2022) (finding § 922(n) prohibiting those under felony indictment from obtaining a firearm is unconstitutional); *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 WL 16936043 (W.D. Okla. Nov. 14, 2022) (same)

United States v. Perez-Gallan, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022) (holding § 922(g)(8) prohibiting possession of a firearm while subject to a court order is unconstitutional)

United States v. Price, ___ F.Supp.3d___, 2022 WL 6968457 (S.D.W.Va. 2022)(holding §922(k) prohibiting possession of a firearm with an obliterated serial number is unconstitutional). *But see United States v. Holton*, No. 3:21-CR-0482-B, 2022 WL 16701935, at *4 (N.D. Tex. Nov. 3, 2022)

United States v. Daniels, ___ F.Supp.3d ---___, 2022 WL 2654232 (S.D.Miss.2022) (affirming constitutionality of Section 922(g)(3) prohibiting possession of firearm a person who is an unlawful user of, or addicted to any controlled substance)

United States v. Nutter, ___F.Supp.3d ___, 2022 WL 3718518 (S.D.W.Va. 2022) (affirming constitutionality of § 922(g)(9) prohibiting possession after conviction for a misdemeanor crime of domestic violence).

United States v. Teerlink, No. 2:22-CR-0024-TS, 2022 WL 17093425 (D. Utah Nov. 21, 2022) (affirming constitutionality of § 922(g)(9) prohibiting possession after felony conviction); *United States v. Gray,* No. 22-CR-00247-CNS, 2022 WL 16855696 (D. Colo. Nov. 10, 2022 (same); *United States v. Reese*, No. 19-257, 2022 WL 16796771 (W.D. Pa. No. 8, 2022)(same); *United States v. Charles*, No. MO:22-CR-00154-DC, 2022 WL 4913900, at *12 (W.D. Tex. 2022) (same)

Immigration Cases from the Northern Border

By: *Paul J. Evangelista, First Assistant Federal Public Defender*

A recent rise in immigration cases necessitates a review of these types of prosecutions. Over thirty-six percent of the prosecutions brought in the Northern District of New York through June 2022 have been "immigration" cases. According to the Transactional Records Access Clearinghouse ("TRAC") at Syracuse University (https://tracfed.syr.edu/results/9x206350145b4b.html), the government reported 595 new cases this fiscal year through June (9 months). If activity continues at this same pace the total number of prosecutions will be almost 800, over a seventeen percent increase from last fiscal year. Accordingly, "immigration" cases will total approximately 290 cases.

As the table on the following page shows, 8 U.S.C. §1324, 8 U.S.C. §1325 and 8 U.S.C. §1326 cases make up the majority of immigration prosecutions. Almost all of these immigration prosecutions originate in the NDNY Plattsburgh courthouse. Part time Magistrate, the Honorable Gary L. Favro, is the only Judge sitting in Plattsburgh. The United States Attorney's Office and the Probation Office for the Northern District of New York each maintain staffed offices in Plattsburgh. The Federal Defender Office has a physical office, but that office is not staffed full time. Instead, a duty attorney from either the Albany or Syracuse office handles the cases on a weekly basis. The volume of cases has created a need for experienced CJA attorneys to assume a portion of the immigration case load originating at the northern border.

Immigration prosecutions are predominately brought under 8 U.S.C. § 1325(a). These are cases in which a non-citizen is prosecuted for improper entry by the non-citizen. "1325" cases as they are commonly referred to, are class "B" misdemeanors, punishable by up to 6 months in jail. 18 U.S.C. §3559(a)(7). Probation of up to 5 years and a fine of up to $5000.00 are authorized but rarely imposed. 18 U.S.C. § 3561(c)(2); 18 U.S.C. §3571(b)(6). Typically, after serving between 10 and 20 days, 1325 cases are resolved with a misdemeanor conviction and a sentence of time served. The alien then moves into immigration custody for immigration proceedings.

The predominant felony immigration prosecutions coming from the northern border include violations of 8 U.S.C. §§ 1326(a) and 1324. Section 1326(a) cases, commonly known as "re-entry cases", are punishable by up to two years in prison, probation of between one and five years, and a fine of not more than $250,000.00. 18 U.S.C. §3559(a)(5); 18 U.S.C. §3561 (c)(1); 18 U.S.C. §3571(b)(3). Supervised release of up to a year is also a possible sentence if imprisonment is imposed. 18 U.S.C. §3583((b)(3). Typically, for defendant with no other criminal history, most district court judges will agree to sentence the client at the change of plea proceeding. This type of consideration should be requested by defense counsel via letter motion. To ensure the sufficiency of the record to sentence the client at the time of the plea, usually a pre-trial services interview and report should be generated, despite low chances of release at the detention hearing. The report will supplement your letter motion and add to the record available to the Court at plea/sentence.

Section 8 U.S.C. 1324 cases include those charges brought against the "smuggler" or the "transporter". In general, if the client assisted in anyway in the "bringing in" of the alien for profit, a likely charge of 8 U.S.C. 1324(a)(2) will be brought. Many factors go into the determination of the sentencing exposure for these cases. If the offense was done for profit, the penalties can be as severe as a three-year mandatory minimum for the first or second alien, and a five-year mandatory minimum for three or more aliens. These penalties often chill a defendant from seeking trial on the "bringing in" cases. A typical bringing in case leads to cooperation and a motion by the government for a sentence less than the mandatory minimum required. The sentence in a typical case with full cooperation is often significantly below what the mandatory minimum sentence would be without cooperation.

The best scenario is when defense counsel is able to negotiate a transporting charge rather than a "bringing in" charge. In this case, exposure is greatly

(*Cont'd next page)*

reduced and no mandatory minimums apply. This should be a major consideration in for profit 1324 cases.

Immigration cases can seem daunting. The language barrier, the ever-changing law, both criminal and administrative, and the potential penalties if convicted, can be overwhelming to the new practitioner. Training, knowledge and experience can go a long way to demystifying the immigration case.

Coming up on December 14th at the FCBA/Federal Defender Training, there will be a session on handling immigration cases. The goal of the fifty-minute session is to summarize the legal and administrative components of an immigration case in the hope of encouraging more panel members to take on these cases. Representatives from the Defender's Office, Prisoner Legal Services-Immigration Unit, and a CJA Panel attorney versed in the vouchering process will be on hand to discuss the ins and outs of immigration defense.

Follow up sessions are planned for February to dig deeper into the substance of immigration defense. If interested please reach out to me for more details. Space in these follow-up sessions will be limited to small groups of participants interested in assignments in this area of criminal defense.

Prosecutions in the Northern District of New York 2022

Lead Charge	Count	Rank	1 yr ago	5 yrs ago	10 yrs ago	20 yrs ago	
08 USC 1325 - Entry of alien at improper time or place; etc.	159	1	7	4	4	4	More
21 USC 841 - Drug Abuse Prevention & Control-Prohibited acts A	78	2	1	1	1	3	More
Other US Code Section	50	3	3	17	33	43	More
08 USC 1324 - Bringing in and harboring certain aliens	34	4	6	7	6	11	More
21 USC 846 - Attempt and conspiracy	29	5	4	5	3	1	More
18 USC 922 - Firearms; Unlawful acts	27	6	2	9	7	6	More
18 USC 7 - Special Maritime/Territorial Jurisdiction of US	25	7	8	3	5	7	More
08 USC 1326 - Reentry of deported alien	23	8	9	2	2	5	More
18 USC 2252 - Material involving sexual exploitation of minors	16	9	5	6	8	16	More
18 USC 2252A - Activity relating material constituting/containing child pornography	12	10	9	21	26	21	More

available at: https://tracfed.syr.edu/results/9x206350145b4b.html

Supreme Court Update

By: *Molly Corbett, AFPD*

Recent decisions, petitions granted and potential grants

Decisions

***U.S. v. Zubaydah*, __ U.S. __, 142 S.Ct. 659, 212 L.Ed.2d 65, No. 20-827 (2022)**
Holding: The U.S. Court of Appeals for the 9th Circuit's judgment that the district court erred in dismissing Zubaydah's discovery request on the basis of the state secrets privilege is reversed, and the case is remanded with instructions to dismiss Zubaydah's current discovery application.

***Denezpi v. U.S.*, __ U.S. __, 142 S.Ct. 1838, 213 L.Ed.2d 141, No. 20-7622 (2022)**
Holding: The double jeopardy clause does not bar successive prosecutions of distinct offenses arising from a single act, even if a single sovereign prosecutes them.

***N. Y. State Rifle & Pistol Association. Inc. v. Bruen*, __ U.S. __, 142 S.Ct. 2111, 213 L.Ed.2d 387, No. 20-843 (2022).**
Holding: New York's proper-cause requirement for obtaining an unrestricted license to carry a concealed firearm violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms.

***Hemphill v. New York*, __ U.S. __, 142 S.Ct. 681, 211 L.Ed.2d 534, No. 20-637 (2022)**
Holding: The trial court's admission—over Hemphill's objection—of the plea allocution transcript of an unavailable witness violated Hemphill's Sixth Amendment right to confront the witnesses against him.

***Ruan v. U.S.*, __ U.S. __, 142 S.Ct. 2370, 213 L.Ed.2d 706, No. 20-1410 (2022)**
Holding: For the crime of prescribing controlled substances outside the usual course of professional practice in violation of 21 U.S.C. § 841, the *mens rea* "knowingly or intentionally" applies to the statute's "except as authorized" clause.

***Wooden v. U.S.*, __ U.S. __, 142 S.Ct. 1063, 212 L.Ed.2d 187, No. 20-5279 (2022)**
Holding: William Dale Wooden's ten burglary offenses arising from a single criminal episode did not occur on different "occasions" and thus count as only one prior conviction under the Armed Career Criminal Act.

***U.S. v. Taylor*, __ U.S. __, 142 S.Ct. 1838, 213 L.Ed.2d 349, No. 20-1459 (2022)**
Holding: Attempted Hobbs Act robbery does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because no element of the offense requires proof that the defendant used, attempted to use, or threatened to use force.

***Concepcion v. U.S.*, __ U.S. __, 142 S.Ct. 2389, 213 L.Ed.2d 731, No. 20-1650 (2022)**
Holding: Section 404(b) of the First Step Act of 2018 allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence.

***Kemp v. U.S.*, __ U.S. __, 142 S.Ct. 1856, 213 L.Ed.2d 90, No. 20-5726 (2022)**
Holding: The term "mistake" in Federal Rule of Civil Procedure 60(b)(1) includes a judge's errors of law; because Dexter Kemp's motion alleged such an error, it was cognizable under Rule 60(b)(1) and untimely under Rule 60(c)'s one-year limitations period.

Pending Decision

***Percoco v. United States*, No. 21-1158 (2d Cir.) [Arg: 11/28/22]**
Issue: Whether a private citizen who holds no elected office or government employment but has informal political or other influence over governmental decisionmaking, owes a fiduciary duty to the general public such that he can be convicted of honest-services fraud.

***Bartenwerfer v. Buckley*, No. 21-908 (9th Cir.) [Arg: 12/6/2022]**
Issue: Whether an individual may be subject to liability for the fraud of another that is barred from discharge in bankruptcy under 11 U.S.C. § 523(a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own.

***Ciminelli v. United States*, No. 21-1170 (2d Cir.) [Arg. 11/28/2022]**
Issue: Whether the Second Circuit's "right to control" theory of fraud, which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud, states a valid basis for liability under the federal wire fraud statute.

(Continued next page)

Supreme Court Update...*continued*

Certiorari Granted & Pending Argument

Dubin v. U.S., No. 22-10 (5th Cir.)
Issue: Whether a person commits aggravated identity theft any time they mention or otherwise recite someone else's name while committing a predicate offense.

Potential Cert. Grants -Preserve Issues

***U.S. v. Hansen*,** No. 22-179
Question Presented: Whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.

Counterman v. Colorado, No. 22-138
Question Presented: Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

Samia v. U.S. No. 22-196
Question Presented: Whether admitting a codefendant's redacted out-of-court confession that immediately inculpates a defendant based on the surrounding context violates the defendant's rights under the confrontation clause of the Sixth Amendment.

Ruiz v. Massachusetts, No. 22-132
Question Presented: Whether the Fifth and 14th Amendments forbid judges (or prosecutors) from instructing (or inviting) the jury to take into account a non-testifying criminal defendant's courtroom demeanor as a basis for finding guilt.

***Pulsifer v. U.S.*,** No. 22-340
Question Presented: Whether a defendant satisfies the criteria in 18 U.S.C. § 3553(f)(1) as amended by the First Step Act of 2018 in order to qualify for the federal drug-sentencing "safety valve" provision so long as he does not have (a) more than four criminal history points, (b) a three-point offense, and (c) a two-point offense, or whether the defendant satisfies the criteria so long as he does not have (a), (b), or (c).

***Reed v. U.S.*,** No. 22-336
Question Presented: Whether the Constitution requires an indictment, jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act.

Moses v. U.S., No. 22-163
Questions Presented: (1) Whether the limits on agency deference announced in *Kisor v. Wilkie* constrain the deference that courts may accord to interpretive or explanatory commentary in the U.S. Sentencing Guidelines Manual; and (2) whether deference to the Guidelines commentary is impermissible in any form.

Second Circuit Highlights

By: *Courtenay McKeon, AFPD*

A summary of recent Second Circuit decisions relevant to criminal defense and representation

CHILD PORNOGRAPHY SENTENCING

United States v. Ragonese, 47 F.4th 106 (Aug. 31, 2022) (Sack, J.; Bianco, J.; Lynch, J.) (appeal from SDNY): The defendant was convicted of two counts of receiving child pornography. The district court found that the mandatory minimum sentence was increased because the defendant had a prior conviction under New York State law for attempted sodomy in the first degree against an eight-year-old victim. The defendant appealed, arguing that (1) his prior conviction did not "relate to" the sexual abuse of a minor because the New York statute does not require that the offense be committed for the purpose of sexual gratification; and (2) a broader interpretation of the phrase "relating to" would be unconstitutionally vague. The Second Circuit disagreed and affirmed the sentence.

COMPASSIONATE RELEASE

United States v. Amato, 48 F.4th 61 (Aug. 31, 2022) (Nathan, J.; Pooler, J.; Sack, J.) (per curiam) (appeal from EDNY): In the early 1990s, Victor Orena was sentenced to life in prison for racketeering and murder. In July 2021, Orena filed a motion for compassionate release. He argued that he was entitled to compassionate release because he had a host of medical conditions and because exculpatory and impeachment evidence was withheld during his original prosecution. The district court denied the motion, finding that Orena's "undeniably serious" medical conditions did not outweigh the factors under 18 U.S.C. § 3553(a) that supported his continued imprisonment. The district court refused to consider Orena's arguments about his original prosecution because such arguments "are properly made in a petition for habeas relief." Orena appealed. The Second Circuit affirmed, holding that arguments challenging the validity of an underlying conviction cannot be raised in a compassionate release motion.

"CRIME OF VIOLENCE"

United States v. Castillo, 36 F.4th 431 (June 8, 2022) (Nardini, J.; Lohier, J.; Sack, J.) (appeal from SDNY): The defendant pled guilty to being a felon in possession of a firearm. He was sentenced as a career offender. On appeal, he argued that his previous conviction for attempted second-degree gang assault (New York Penal Law §§ 126.06 and 110.00) did not qualify as a "crime of violence" within the meaning of the career offender Guideline (Guideline § 4B1.2). The Second Circuit agreed, vacated the sentence, and remanded for resentencing.

United States v. Chappelle, 41 F.4th 102 (July 21, 2022) (Nardini, J.; Calabresi, J.; Chin, J.) (appeal from SDNY): The Second Circuit held that Hobbs Act robbery is not a "crime of violence" under either the elements clause or the enumerated offenses clause of the career offender Guideline (Guideline § 4B1.2).

United States v. Pastore, 36 F.4th 423 (June 8, 2022) (Sullivan, J.; Nathan, J., Walker, J.) (appeal from SDNY): The defendant was convicted, after a jury trial, of using and carrying a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)(1)(A)(i)). The defendant appealed, arguing that he had not used or carried a firearm in furtherance of a "crime of violence." The Second Circuit agreed with the defendant that racketeering conspiracy, conspiracy to commit murder, and conspiracy to commit murder for hire are not "crimes of violence" within the meaning of § 924(c). The Second Circuit affirmed the conviction, however, because the defendant's conviction for attempted murder in aid of racketeering qualified as a "crime of violence" for § 924 (c).

JURY INSTRUCTIONS

United States v. Jenkins**,** 43 F.4th 300 (Aug. 5, 2022) (Nardini, J.; Jacobs, J.; Kearse, J.) (appeal from WDNY): Racketeering, narcotics, and firearms charges were brought against three members of a motorcycle gang. At trial, two of the three defendants testified on their own behalf. The district court gave an interested witness instruction. On appeal, one of the testifying defendants argued that the instruction undermined the presumption of innocence. The Second Circuit affirmed, finding that the district court's instruction was "guilt-neutral, not guilt-assuming."

MARIJUANA

United States v. Amalfi**,** 47 F.4th 114 (Aug. 31, 2022) (Sack, J; Bianco, J.; Underhill, J.) (appeal from WDNY): Defendants indicted on marijuana charges moved to dismiss the indictment, arguing that the classification of marijuana as a Schedule I controlled substance under the Controlled Substances Act ("CSA") violated equal protection and due process. The district court denied the motion. The Second Circuit affirmed. The Second Circuit held that (1) criminal defendants disputing the constitutional validity of a controlled substance's scheduling need not exhaust the CSA's administrative process for reclassifying a controlled substance;

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(2) rational basis review applies; (3) rational basis review did not require inquiry into whether it was rational for the government to conclude that marijuana met each statutory criterion for Schedule I; and (4) there are numerous conceivable public health and safety grounds providing a rational basis for classifying marijuana as a Schedule I controlled substance.

PLEA AGREEMENTS

United States v. Sealed Defendant One, 49 F.4th 690 (Sept. 21, 2022) (Sullivan, J.; Chin, J.; Newman, J.) (appeal from SDNY): The defendant pled guilty to one count of transmitting a threat in interstate commerce, one count of threatening to assault a federal officer, and one count of obstruction of justice. The plea agreement provided for a stipulated Guideline range of forty-six to fifty-seven months' imprisonment. The agreement provided that either party could seek a sentence outside of the stipulated range and "make all appropriate arguments" if the Probation Office calculated a different Guideline range. The Probation Office calculated a Guideline range of fifty-one to sixty-three months. In its sentencing memo, the government agreed with the Probation Office's Guideline range and argued for an above-Guideline sentence. The district court imposed a sentence of eighty-four months' imprisonment. The defendant appealed, arguing that the government breached the plea agreement by advocating for a sentence above the stipulated range. The Second Circuit rejected that argument, noting that the plea agreement allowed the government to argue for a sentence outside the stipulated Guideline range if the Probation Office calculated a different range, which it did.

RESTITUTION

***United States v. Shkreli*,** 47 F.4th 54 (Aug. 24, 2022) (Wesley, J.; Bianco, J.; Perez, J.) (appeal from EDNY): The defendant was found guilty of conspiracy to commit wire fraud and conspiracy to commit securities fraud and was ordered to pay $10,447,979 in restitution. The district court granted two government applications for writs of garnishment against the defendant's interest in two retirement accounts. The defendant appealed. The Second Circuit held that the Mandatory Victims Restitution Act permitted the government to garnish the defendant's 401(k) retirement funds to pay restitution, that the government had the same rights as the defendant had in his 401(k) accounts, that the defendant's interest in the 401(k) plans was subject to garnishment to fulfill the defendant's restitution obligation, that a 10% early withdrawal tax did not preclude the government from garnishing the 401(k) accounts, and that the Consumer Credit Protection Act's 25% cap on garnishments of an individual's weekly aggregate disposable earnings did not apply to limit the government's garnishment of the 401(k) accounts.

SEARCH AND SEIZURE

***United States v. Bodnar*,** 37 F.4th 833 (June 21, 2022) (Walker, J.; Calabresi, J.; Menashi, J.) (appeal from D. Conn): Federal regulations authorize suspicionless "ramp checks" of airplanes, during which pilots must produce credentials and other documents for inspection. Law enforcement conducted a pretextual "ramp check" of a private single-engine aircraft. The pilot acted nervous, told officers that there might be "some marijuana" on board, and consented to a search. In addition, a drug-sniffing dog alerted to the plane before the search was conducted. The district court denied a motion to suppress the evidence. The Second Circuit held, as a matter of first impression, that the vehicle exception to the search warrant requirement applies to privately owned and operated aircrafts and that the officers had the required probable cause to search under that exception.

United States v. Hawkins, 37 F.4th 854 (June 23, 2022) (Kearse, J.; Menashi, J.; Sack, J.) (per curiam) (appeal from SDNY): Officers received a report of shots fired from the roof level of a building. Within two minutes of the report, officers arrived at the scene and observed Hawkins and Diaz exit a building "in the vicinity" of where the shots were reportedly fired and enter a vestibule that separated the building from the street. The officers observed Diaz "turn his body slightly" and Hawkins "slightly pivot." Both Diaz and Hawkins had their hands in their pockets and Diaz's hands "created a tension in his pockets as he was pulling his sweatshirt down below the center waistline." The officers instructed the men to remove their hands from their pockets, which they did. An officer noticed a "bulge" below the middle of Diaz's waistband. The officers asked for consent to search the men, and both declined. The men were separated and questioned. As this questioning was taking place, a witness told an officer that he had seen the men "coming down from the rooftop." An officer frisked Diaz and recovered a plastic bag from the lower front waistline of Diaz's pants. The bag contained an unloaded firearm. Officers found one spent casing on the rooftop. Hawkins was also frisked, and no weapons were found at that time (although a later search of his person revealed a firearm). Both men were charged with being felons in possession of a firearm. They moved to suppress the evidence, arguing that the officers lacked

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reasonable suspicion to stop and frisk them and lacked probable cause to arrest Hawkins. The district court denied the motion and both men entered conditional guilty pleas. They appealed the suppression decision to the Second Circuit. The Second Circuit affirmed, finding that the facts known to the officers provided reasonable cause to stop and frisk and probable cause for the arrest.

SENTENCING

United States v. Sealed Defendant One**,** 49 F.4th 690 (Sept. 21, 2022) (Sullivan, J.; Chin, J.; Newman, J.) (appeal from SDNY): The defendant served as an FBI confidential source regarding terrorism for more than twenty years. After the FBI informed him that he would no longer be used as an informant, the defendant sent text messages to federal officers he had worked with, threatening to kill them. The defendant also directed his wife to advise several suspected terrorists that they were under investigation and to offer them his help in evading capture. Ultimately, the defendant pled guilty to one count of transmitting a threat in interstate commerce, one count of threatening to assault a federal officer, and one count of obstruction of justice. The district court imposed an above-Guideline sentence. The defendant appealed, arguing that the district court had improperly departed upward without adequately providing notice of its intent to do so or considering the proper factors. The Second Circuit affirmed the district court, finding that the district court had varied upward rather than imposing an upward departure and was thus not required to provide advance notice of its intent. Further, the Second Circuit found that the district court made an adequate record of its reasons. Finally, the Second Circuit found that the district court properly imposed the "special victim" enhancement under Guideline § 3A1.2.

United States v. Wynn, 37 F.4th 63 (June 15, 2022) (Korman, J.; Calabresi, J.; Pooler, J.) (appeal from NDNY, Judge Scullin): Wynn was one of fourteen defendants in a RICO prosecution against the 110 gang. Wynn did not personally use weapons and was in prison for four of the six years of the conspiracy. At sentencing, he argued that (1) the district court should not impose a two-level weapons enhancement on him under Guideline § 2D1.1(b)(1); and (2) he was entitled to at least a two-point reduction under Guideline § 3B1.2 based on his minor role in the conspiracy. The district court rejected both arguments and imposed a sentence of ninety-two months' imprisonment, the bottom of the Guideline range. The Second Circuit affirmed the district court's imposition of the two-level weapons enhancement because the record showed that the gang's use of firearms was reasonably foreseeable to Wynn. However, the Second Circuit reversed the district court's refusal to apply a minor participant reduction. The Second Circuit found that the district court failed to consider the factors relevant to that reduction and that the record showed that three of the factors weighed in favor of the reduction. (Note: on remand, the district court once again imposed a ninety-two-month sentence.)

SPEEDY TRIAL

United States v. Pikus, 39 F.4th 39 (June 30, 2022) (Rakoff, J.; Park, J.; Robinson, J.) (appeal from EDNY): The defendant in a money laundering case filed a motion to dismiss on speedy trial grounds. The district court denied the motion. The defendant was convicted after a jury trial and appealed. The Second Circuit held that (1) the district court's perfunctory findings that the case was complex were not sufficient to justify multiple continuances of trial; (2) multiple continuances of trial for a period totaling 181 days during which the defendant was attempting to secure audit documents from state agencies involved in the investigation did not come within ends-of-justice exception to speedy trial clock; and (3) pretrial delay of seventy-six days between the time the defendant's mandamus petition was denied and the date a codefendant filed a motion related to audit documents from a state agency that the defendant had been attempting to secure was not excludable from seventy-day speedy trial clock. The Second Circuit reversed and remanded with directions to vacate the judgment.

SUPERVISED RELEASE VIOLATIONS

United States v. Peguero**,** 34 F.4th 143 (May 13, 2022) (Bianco, J. and Sack, J.) (Underhill, J., dissents) (appeal from SDNY): This is a case that is much more interesting for its dissent and dicta than it is for its holding. The facts follow a familiar pattern. Peguero was on federal supervised release when police responded to a report of domestic violence at the residence of Peguero's ex-girlfriend, J.D. The incident report prepared at the scene, which included statements from J.D., did not mention that Peguero had used any kind of sharp object or weapon. No such object was recovered at the scene. The day after the incident, J.D. gave a formal statement to the police that Peguero hit her on the head with a bottle. Peguero was charged in state court with second degree assault, an element of which is the use of a deadly weapon or dangerous instrument. The state charges were dropped at J.D.'s request. Thereafter, Peguero was

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charged with violating the conditions of his supervised release by committing the state crime of second degree assault. J.D. refused to testify at the revocation hearing. The district court admitted her formal statement regarding the bottle under Federal Rule of Criminal Procedure 32.1(b)(2)(C), finding that the reliability of the statement and J.D.'s unavailability as a witness outweighed Peguero's right to confront the witness. The statement was the only evidence of Peguero's use of a deadly weapon or dangerous instrument. The district court found by a preponderance of the evidence that Peguero committed second degree assault. On appeal, Peguero argued that the statement should not have been admitted and that there was insufficient evidence that he used a deadly weapon or dangerous instrument. The Second Circuit held that the district court properly found good cause to admit the statement and that the statement provided sufficient evidence that Peguero hit J.D. with a bottle. The case is notable for the interplay between the majority opinion and a dissent by Judge Underhill, who argued that a defendant is entitled in instances like these to indictment by a grand jury and all the related Constitutional protections of indictment, including the right to confront witnesses and be found guilty beyond a reasonable doubt.

VIDEO HEARINGS

United States v. Leroux, 36 F.4th 115 (June 3, 2022) (Lohier, J; Chin, J.; Robinson, J.) (appeal from SDNY): In this case, the Second Circuit set forth the findings that a district court must make under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") before sentencing a defendant by video rather than in person. Under the text of the CARES Act, sentencing can proceed by video if (1) the Judicial Conference of the United States finds that emergency conditions with respect to COVID-19 will materially affect the functioning of either the federal courts generally or a particular district court; (2) the chief district judge finds that felony sentencing hearings cannot be conducted in person without seriously jeopardizing public health; (3) the district judge in a particular case finds for specific reasons that the sentencing cannot be further delayed without serious harm to the interests of justice; and (4) the defendant consents after consultation with counsel. The defendant's consent must be knowing and voluntary. The burden is on the government to establish consent by a preponderance of the evidence. Generally, an oral statement by the defendant expressing his consent to sentencing by video and asserting that he consulted with counsel about his right to be present is sufficient to establish consent.

United States v. Sealed Defendant One**,** 49 F.4th 690 (Sept. 21, 2022) (Sullivan, J.; Chin, J.; Newman, J.) (appeal from SDNY): The defendant pled guilty to one count of transmitting a threat in interstate commerce, one count of threatening to assault a federal officer, and one count of obstruction of justice. The district court conducted the sentencing hearing by video. On appeal, the defendant argued that the district court (1) failed to lay an adequate foundation for its conclusion that the sentencing could not be further delayed without doing serious harm to the interests of justice; and (2) failed to ensure that the defendant's waiver of his right to be present at sentencing was knowing and voluntary. The Second Circuit affirmed the district court, finding that the district court (1) was not required to make a CARES Act finding about the interests of justice because the sentencing was conducted under seal (unlike the public sentencing conducted in *Leroux*, above); and (2) properly ensured that the defendant waived his right to be present knowingly and voluntarily.

Earned Time Credits *aka* First Step Act (FSA) Credits: *Mistakes, Miscalculations and Delays Thwart Early Release*

By: Molly K. Corbett, AFPD

In December of 2018 the Earned Time Credit was created as part of the First Step Act. This credit could be earned by eligible inmates through completion of approved programs or activities. The FSA credit could then be applied for toward earlier release to a reentry residence or home confinement. This past January the Department of Justice finally settled on a method for calculation of the FSA credit. Since that time many former clients have been reaching out because of an incorrect ineligibility determination, delay or error in calculation of FSA credit by the Bureau of Prisons. The National Sentencing Resource Counsel, Patricia Richardson recently addressed these concerns with the new BOP Director, Colette S. Peters. Ms. Richardson raised two areas of concern. The lack of wardens' exercise of discretion in eligibility determinations and the current *de facto* BOP policies which are contrary to the originating legislation.

First, the BOP is not using the "warden exception" in the Earned Time Credit regime to permit medium and high-risk people to transfer to early prerelease custody with warden approval. The FSA requires that BOP "shall apply" time credits to early release or transfer to prerelease custody for eligible people who are classified as minimum or low risk, but also provides a path to early prerelease custody for those categorized as medium or high risk if they obtain warden approval. This "warden exception" could remediate the PATTERN tools recognized bias and inflexibility, but it has not been used.

Second, the BOP's interpretation of the FSA appears inconsistent with the law and regulations. BOP has not promulgated a policy or program statement that explains how it will apply time credits. But BOP internally distributed an arguably flawed memo, via Trulincs, to incarcerated people and staff in September.

The memo announced a policy, backdated to January 15, 2020, that people are ineligible to earn time credits if they fail to complete a portion of the FSA needs assessment, the SPARC-13. The Standardized Prisoner Assessment for Reduction in Criminality (SPARC-13) assesses a person's needs and risks. BOP has had a low completion rate of the SPARC-13. Contributing factors may be the self-report components in a survey sent electronically via Trulincs that was part of the SPARC-13 and the invasive nature of the unexplained questionnaire. In addition, incarcerated individuals and staff, were inadequately educated about details of the needs assessment, confused on how needs are assessed, and ignorant as to the serious consequences for non-completion. BOP's retroactively refusing to award time credits based on non-completion is unfair. The policy also goes against the legislation's intent to incentivize participation in BOP programs through a rewards system to further decrease recidivism and prepare people for release.

The memo also created a new basis for ineligibility to earn time credits, disqualifying those who have detainers, unresolved pending charges, and/or unresolved immigration status issues. The FSA includes no such exclusion. Instead, 18 U.S.C. § 3624(d)(4)(C) requires that time credits "shall be applied" to time in early release or prerelease custody for every eligible person deemed minimum or low risk. The only exceptions to this mandate apply to people serving sentences for listed ineligible offenses (§ 3624(d)(4)(D)), and those who are already the subject of a final order of deportation (§ 3632(d)(4)(E)).

BOP's initial calculations were manually calculated in "batches," based on proximity to release date. In these calculations, BOP's lack of official guidance resulted in more favorable assumptions about programming and needs assessments for our clients. Then with the September memo the more restrictive rules arose about eligibility determinations and application of ETCs now clients who saw earlier releases cannot understand why they are not eligible or nor earning FSA credits.

In October BOP appears to have begun using its autocalculate system, which (for some) retroactively implemented the September memo's restrictive calculation and eligibility rules. As a result, many people lost credits they had already been awarded, and release and transfer dates were replaced with *later dates*. Other people reported much lower rewards of time credits than anticipated.

While we await a BOP response to our on-going objections, an understanding of common questions and possible resolutions may help you in addressing a client's questions.

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Earned Time Credits... *continued*

Common problems:

- **Release dates shifted later.** For those already in residential re-entry or withing two months of entering re-entry the initially calculated release date controls. The BOP will not use the automated recalculation. This can be good if a recalculation shifted the date back, but bad for those who had prior errors. Focus on challenge to the error for those pending release to re-entry centers through administrative process (see below). For those in re-entry it may be through a habeas petition.

- **Refusal to apply credit for people "not eligible for halfway house placement."** The FSA specifically defines who is "ineligible" for ETC: people who have been convicted of any crime included in 18 U.S.C. § 3632(d)(4)(D) or people who are "the subject of a final order of removal," *id.* at (d)(4)(E). In any other case, the BOP is exceeding the legislative definition subject to administrative challenge.

- **Other erroneous eligibility decisions**. BOP misinforming people about their eligibility for credit. Some unit managers who make the determination have not been properly trained. Check the list at 18 U.S.C. § 3632 (d)(4)(D) carefully to determine if BOP's determination is erroneous. If it is, have the client file a remedy and consider reaching out to Regional Counsel or the case manager to try to rectify the problem.

Examples of recurring basis for ineligibility:

Past convictions: the FSA's exclusion for past offenses (criminal history) § 3632(d)(4)(D)(li) is narrow, requiring 1) that the instant offense is a "serious violent felony" (as defined in 18 U.S.C. § 3559(c)(2)(F)) AND 2) that the person previously served more than a year for one of ten specifically listed federal or state offenses.

Death or serious bodily injury resulting: the statute of conviction controls this determination not the facts included in the PSI. Under section (d)(4)(D)(lviii), people convicted of the "death or serious bodily injury" penalty enhancement are ineligible. *See Lallave v. Martinez*, *et al.*, No. 22-CV-4136 (NGG), 2022 WL 7578794, at *10 (E.D.N.Y. Oct. 13, 2022)

***Conspiracy*:** the use by BOP of a conspiracy under 21 U.S.C. § 846 which reference to an ineligibile substantive offense. Conspiracy under § 846 are not an ineligible offense. *See e.g., Noe v. True*, 2022 WL 5080196 (10th Cir. Oct. 5, 2022) the Tenth Circuit explained that this is improper and refused BOP's attempt to treat a conspiracy conviction as a conviction for a substantive offense.

Challenging BOP & the administrative process:

- If a client thinks BOP is violating the Earned Time Credit provisions of the First Step Act at 18 U.S.C. §§ 3624(g), 3631 et seq.) or the related regulations either through eligibility or awarding of credit advise your client to file an administrative remedy (usually referred to as a BP8), which includes a request for legal review. This informal remedy is a prerequisite to the BP9-11 administrative processes required to exhaust administrative remedies. The legal review of some ETC issues, may lead to resolution. If not, after fully exhausting the administrative appeals, the client may be forced to file a habeas petition under 28 U.S.C. §2241. *See e.g., Stewart v. Snider*, No. 1:22-CV-294-MHH-JHE, 2022 WL 2019965 (N.D. Ala. 2022)

- Moving forward be sure a client does not have unresolved cases and detainers in their PSR and address them before this becomes an issue. You can also work to resolve them post-sentence, and make sure to notify BOP when you have.

Client Contact: *Increased Opportunities through Video*

Presently the Northern District of New York has opened-up enhanced videoconference services for the CJA panel at .Broome and Clinton County Correctional Facilities. Below are the Terms of Use, Cautions, User Agreement and Instructions:

Terms of Use – Attorney-Client Meeting for Broome and Clinton County Correctional Facilities

WARNING: By clicking on "Book" when scheduling through the Attorney-Client Meeting Calendar you agree to the below Terms and Conditions. Failure to comply with the following Terms and Conditions will result in the termination of the video conference and a possible ban from utilizing this service. The Terms and Conditions of the Use Agreement (the "Agreement") are legally binding between you and the Court. This Agreement applies to all Users of this Site or Service. If you choose to use the Site and Service, you will be agreeing to abide by all of the Terms and Conditions of the Agreement. The Court may change, add or remove portions of this Agreement at any time, but if it does so, it will post such changes on the Site.

The US Courts - New York Northern District ("NYND" or the "Court") provides attorneys a service on the web page https://www.nynd.uscourts.gov/attorneyclient-meeting-calendar with a platform for participation in and access to internet-based video conferencing (Microsoft Teams) with a represented client from a correctional facility, and other features, functions or services on the Site (collectively, the "Service").

USE AGREEMENT

System Requirements:

The attorney must have a compatible device, Internet access (fees may apply), and certain applications or software (which may require updates from time to time). The attorney's ability to use this service may be affected by the attorney's hardware, software and internet access. High speed internet access is recommended. The Court uses the Microsoft Teams platform. It offers a free application for devices like iPads/iPhones/Androids and Tablets. It also offers free web connectivity over a browser via Microsoft Edge, Google Chrome, or Mozilla Firefox. Please note that Internet Explorer or Safari are not compatible with Microsoft Teams. Full compatibility details can be found here https://docs.microsoft.com/en-us/microsoftteams/limits-specifications-teams#browsers. Below are links for free application downloads to Apple & Android devices:
Apple Store Microsoft Teams App - https://apps.apple.com/us/app/microsoft-teams/id1113153706
Android/Google Play Microsoft Teams App - https://play.google.com/store/apps/details?id=com.microsoft.teams&hl=en_US

Services:

- The Court will make available on the Court's website the Microsoft Bookings platform for the attorney to schedule or modify a video appointment with a represented client from a correctional facility
- The Court will schedule the meeting via Microsoft Teams with the attorney on the scheduled date and time in a video conference, and the attorney will be required to have access to Microsoft Teams or another platform compatible with Teams.
- Attorneys agree that use of the remote kiosk shall be for attorney/client meetings.
- If an attorney seeks to have a service provider included in a remote meeting, they shall request permission at time of scheduling such meeting. (See additional questions in Microsoft Bookings form) Approval from the Court for a service provider call must be established prior to the scheduled meeting.
- In the event an attorney is unable to make a scheduled meeting they must notify the Court or reschedule utilizing Microsoft Bookings at a minimum of **one hour prior to event**. Repeated late or non-arrivals will be noted and can be subject to a bar and discontinued use of this service.

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Client Contact: *continued*

Prohibited Uses:

- The attorney may not perform any activity which is or may be, directly or indirectly, unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful or racially, ethnically or otherwise objectionable in violation of 47 U.S.C. §230.
- The attorney may not record any video conference call without the express consent of the Court.
- The attorney may not perform any activity which will or may breach a third party right.
- The attorney may not engage in commercial activities, including but not limited to offering for sale any products or services, soliciting for advertisers or sponsors or selling, licensing or granting public access to any information offered on the site. Without limiting the generality of the foregoing, attorneys with automated programs may visit the site, but are specifically prohibited from resending or redirecting information without the prior written permission of the Court.

Termination:

- The Court may terminate a video conference at any time for a breach of these terms and conditions, and if an attorney continues to violate these terms and conditions or schedules appointments frivolously, the Court reserves the right to bar an attorney from using this service.
- The Court may change, suspend, or discontinue any aspect of the Service at any time, including the availability of any Service feature or content.
- The Court may also impose time limits on certain features and services or restrict your access to parts or all the Service without notice or liability.
- The Court may also impose limits on the number of meeting one attorney may schedule per week through this service.

No warranties:

- The Court shall use Microsoft Bookings platform for the scheduling of video conferences and Microsoft Teams for the participation of video conferences, and is therefore, reliant upon the programs being operational through Microsoft. If Microsoft Bookings or Microsoft Teams is not available due to technical difficulties, the Court shall not be held liable for any missed appointment due to circumstances beyond this Court's control. The Court will make every attempt to contact the attorney via the telephone number or email provided at the time of booking to advise of the unavailability of Teams.
- If the attorney's internet access or software capability is insufficient, the Court shall not be held liable for any static or failure to connect issues.

Continuing Agreement:

- When using the Court services, the attorney and the Court may be subject to any additional terms, guidelines, or rules applicable to such services, which shall be posted from time to time. All such additional terms, guidelines and rules are hereby incorporated by reference into this Agreement.
- Unless explicitly stated otherwise, any new features that augment or enhance the current Service, including the release of new services, shall be subject to this Agreement.

Federal Court Bar Association
Northern District of New York

Notice of Continuing Legal Education Program

In partnership with the Office of the Federal Public Defender for the Northern District of New York, the NDNY FCBA presents:

Federal Criminal Defense Update 2022

Trending Topics and the Continuing Evolution of Our Federal Defense Practice

Wednesday, December 14, 2022 - 8:30 am to 3:20 pm

Albany Capital Center, 55 Eagle Street, Albany NY

Click Here to Register
Registration Deadline: December 5, 2022

Program description: This program is specifically designed to help panel attorneys navigate the choppy waters of federal criminal defense practices. We will cover deciding when to cooperate, execute plea agreements, challenging offers of proof and using expert services, and everything in between.

Moderator & Speaker: Lisa Peebles, Federal Public Defender
Speakers: Randi Bianco, Esq., Supervising AFPD; Courtenay McKeon, Esq, AFPD; Molly Corbett, Esq. AFPD; Rodney Personius, Esq., Paul Evangelista, Esq., 1st Assistant Defender

Agenda

8:30 – 9:30 am: Registration & Continental Breakfast
9:30 – 10:20 am: To Cooperate or Not, That is the Question – Randi Bianco, Esq.
10:20 to 11:10 am: – 2nd Circuit Update – Courtenay McKeon
11:10 am to 12:00 pm: – Supreme Court Update – Molly Corbett
12:00 – 1:15 pm: Lunch (Provided)
1:15 to 2:30 pm: How to Make Applications for Expert Services/When Should You Use Service Providers – Rodney Personius, Esq. & Lisa Peebles, Esq.
2:30 – 3:20 pm: Immigration Trends & Prosecutions: How to Defend – Paul Evangelista, Esq.
3:20 – 3:30 pm Question and Answer

"Federal Criminal Defense Update 2022" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **5.5 credits in Skills.** This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded. This program is complementary to all CJA Panel Attorneys & NDNY Federal Court Bar Association Members.

The NDNY Federal Court Bar Association 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.
Questions? Contact Tina Chericoni Versaci at tversaci@ndnyfcba.org

Training & Resources

Join FD.org Please apply for access to www.fd.org by filling out online application at: https://www.fd.org/request-access. The site has numerous training resources from the Training Division of the Defender Services Office.

Additional Upcoming Training:

Federal Defender Services Training Division
Registration and event description available at: https://www.fd.org/training-events

December 6, 2022 2:00 pm - 3:15 pm (EST)
Hello, Goodbye, & Everything In Between: Communicating Ethically and Effectively with Our Client's Loved Ones and Community Supporters

December 6 - 9, 2022
The Andrea Taylor Sentencing Advocacy Workshop - Virtual Program

December 8, 2022 1:00 pm - 2:15 PM (EST)
Appellate Series Session 3: Tips and Strategies for Approaching, Preparing and Writing an Opening Brief

December 14 , 2022 1:00 pm - 2:15 pm (EST)
Webinar: What Defense Attorneys Should Know About the Current JSIN Tool

2023
January 26 - 28
Trial Skills Workshop: Bail Boot Camp
Houston, Texas
April 20 - 22

IN-PERSON - Trial Skills Workshop / Crimes Decoded: Emerging Digital Litigation Technology Strategies
San Francisco, CA

NY State Association of Criminal Defense Lawyers
Federal Fridays- Registration and event description available at: https://nysacdl.org/events/event_list.asp
NYSACDL Fed Fridays –

December 16, 2022-1:00 p.m.-2:00 p.m.
Preparing a Target to Testify Before A Federal Grand Jury Without Immunity

RESOURCES:

On-line:
Defender Services: www.fd.org
Second Circuit decisions: https://blog.federaldefendersny.org/
United States Sentencing Commission: www.ussc.gov
-Interactive Data and Sentencing Statistics
https://isb.ussc.gov/index.html.
-Annual, Specific Subject and Congressional Reports
-Sentence and Offender Statistics
-*NDNY FPD :* https://nyn.fd.org/

In Person:
Molly K. Corbett, 518-436-1850 x107 or molly_corbett@fd.org

Judge's Corner

Hon. Brenda K. Sannes, Chief Judge
United States District Court for the Northern District of New York

CALL FOR CJA PANEL MEMBERS IN NDNY

By: Hon. Andrew T. Baxter and Daniel J. Stewart,
Co-Chairs of the NDNY CJA Committee

The Board of Judges of the U.S. District Court for the Northern District of New York ("NDNY") is actively soliciting applicants to join our Criminal Justice Act ("CJA") panel, which provides representation for indigent federal criminal defendants in the NDNY. The NDNY has no local CJA attorneys in Utica and one local CJA attorney in Binghamton, and needs additional local CJA attorneys in Syracuse and Plattsburgh.

Any attorney admitted to the NDNY (i.e., with a NDNY Bar Roll #) may apply to become a CJA Panel attorney using the automated application process on our public website–https://www.nynd.uscourts.gov/cja-attorney-application. Once an application is submitted, it will be routed to our CJA Committee for review and recommendation to the Board of Judges, which will consider the application at their next quarterly meeting.

The Board of Judges will be particularly receptive to applications from experienced state-court criminal practitioners who have taken advantage of the NDNY Federal Public Defender's Office's ("FPD") video training series, which provides an overview of how to handle a federal criminal case from beginning to end. Anyone seeking to access this training series (which consists of 12 40-minute videos), may contact Matt Clute at the FPD's Office in Syracuse (matt_clute@fd.org) for the box.com password.

More information about the CJA panel, including a link on how to apply to become a member of the NDNY bar, and details about CJA compensation rates, may also be found at our public website–https://www.nynd.uscourts.gov/criminal-justice-act. Finally, the FPD's Offices in Syracuse (315-701-0080) and Albany (518-436-1850) are available to answer any questions about service on the CJA panel, and to link less experienced attorney who want to learn more about federal criminal practice with mentors.

Article Submissions & Letters to the Editor

Molly K. Corbett, *Editor-in-Chief*

If you would like to have an article or letter featured in our next edition of Arresting Developments, please write us at: Office of the Federal Public Defender, 54 State St., Suite 310, Albany, NY 12207, or send an email to molly_corbett@fd.org