The Rap Sheet

Issue No. 6 *February 2000*

NEWSLETTER TO THE CRIMINAL JUSTICE ACT PANEL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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I. CJA PANEL ATTORNEY RATES INCREASED

You should have received notice that the FY 2000 judiciary appropriations bill included funds to raise the CJA rates by $5.00 an hour, from $65 in-court/$45 out-of-court to $70 in-court/$50 out-of-court. ***The new hourly rates of $70 in-court and $50 out-of-court apply to all CJA work performed on or after January 1, 2000.***

Although the judiciary asked for funds to pay $75 an hour for both in-court and out-of-court work in all judicial districts, Congress approved only the partial increase. Given the urgent need for the higher rate, the Judicial Conference will renew its request for funding of the full increase in FY 2001.

II. MILEAGE RATES INCREASED

The mileage rate paid to panel attorneys and their experts was increased from 31 to 32.5 cents per mile for travel *on or after January 14, 2000*.

III. NEW CJA PAYMENT SYSTEM

On January 1, 2000, the judiciary implemented a new national CJA Payment System which changed the procedures used by the Court and CJA attorneys. Please note the following changes which affect CJA attorneys:

1. **All time spent on CJA work now MUST be reported in tenths of hours only.**

2. The CJA payment vouchers are no longer issued as carbon sets. Only one original will be generated, and it will be given to the appointed attorney along with worksheets for entering time and other CJA payment information.

It is very important that the Clerk of Court have accurate tax identification information for each CJA attorney. It is the responsibility of the CJA attorney to notify the Finance Section of the Clerk of Court's office of any change in tax identification information (Social Security number vs. Employer ID number). You may contact Jeff Deglmann in the Finance Section at (412) 208-7533 to report changes or corrections.

IV. HIRING OF EXPERTS

It has been brought to our attention that occasionally CJA Panel members pay an expert out-of-pocket and seek reimbursement on their Form CJA 20 appointment voucher as a miscellaneous expense. PLEASE NOTE THAT PANEL ATTORNEYS MAY NOT BE REIMBURSED FOR OUT-OF-POCKET EXPENDITURES FOR EXPERTS. Expert services may only be claimed by using a Form CJA 21. When hiring an expert for use in a CJA case, please use Form CJA 21 (Authorization and Payment for Expert and Other Services) which may be obtained through the Finance Section of the Clerk's Office. You should also adhere to the guidelines regarding judicial approval to hire an expert. The Federal Defender Office will supply you with a copy of those guidelines if you need them.

V. NATIONAL PANEL ATTORNEY REPRESENTATIVES CONFERENCE

The annual National Conference for Criminal Justice Act Panel Attorneys is scheduled for March 3-5, 2000, in Albuquerque, New Mexico. Sally Frick will attend as the Panel Attorney representative for the Western District of Pennsylvania, and Shelley Stark will attend as the Third Circuit Defender representative.

The Planning Committee for the Conference wants to learn the issues of concern to panel members and is asking for your input. Although all comments are welcomed, the focus will be on resources – what is available and what should be available to CJA attorneys (e.g., computer-assisted legal research, expert panels, publications, etc.), what tools and resources panel attorneys are currently using, and what tools and resources panel attorneys want.

If you have any requests or suggestions for the Planning Committee, please contact Shelley Stark (412/ 644-6565) ***by February 15, 2000***.

VI. TRAINING OPPORTUNITIES

(1) *"Winning Strategies for Defending Federal Criminal Cases"*

The Administrative Office of the United States Courts, in conjunction with the Federal Public and Community Defenders, will again present the "*Winning Strategies for Defender Federal Criminal Cases"* Seminar for CJA Panel Attorneys. The Seminar is presented in multiple locations each year. Following are the dates and locations for the 2000 Seminars:

May 18-20, 2000	Kansas City, Missouri
July 6-8, 2000	Boston, Massachusetts
September 21-23, 2000	San Antonio, Texas

Attached is a flyer, including an application form to complete and mail to the Defender Services Division of the Administrative Office. The Defender Services Division will provide the details to the applicants **who are accepted** for each seminar.

(2) *"Ninth Annual National Federal Sentencing Guidelines Seminar"*

The "Ninth Annual National Federal Sentencing Guidelines Seminar," sponsored by the Tampa Bay Chapter of the Federal Bar Association and the U.S. Sentencing Commission, in cooperation with the Criminal Justice Section of the American Bar Association, will be held at the Hilton Clearwater Beach Resort, Clearwater Beach, Florida, on May 3-5, 2000. For course and reservation information, contact Carol Weathersbee, Program Coordinator, at (813) 754-3031 or Karen McGarvey at (813) 229-1118.

(3) "Federal Sentencing in Financial Crimes Cases"

The Association of Federal Defense Attorneys is sponsoring "Federal Sentencing in Financial Crimes Cases," to be held February 25, 2000, in Las Vegas, Nevada, and March 24, 2000, in Atlanta, Georgia. Attached is the Seminar announcement which also contains the Registration Form.

VII. *MY LITTLE RED RULES BOOK, 2000 EDITION*

Enclosed is your personal copy of *My Little Red Rules Book, 2000 Edition*, which is published annually by the Federal Defenders of Eastern Washington and Idaho, and distributed to Panel Members, courtesy of the Federal Public Defender's Office for the Western District of Pennsylvania. Additional copies of *My Little Red Rules Book* are available through the Federal Defenders of Eastern Washington and Idaho, at a cost of $5 each.

VIII. *THE DEFENDER'S ADVOCATE*

Enclosed is the Fall 1999 issue of *The Defender's Advocate*, which is published by the Federal Defender Training Group, Washington, D.C., and distributed to Federal Defenders and Panel Members.

IX. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Federal Rules of Criminal Procedure were amended, effective December 1, 1999. Attached is a summary of the relevant amendments, which appeared in the Criminal Law Reporter.

X. REVERSIBLE ERRORS COMPILATION

The Federal Public Defender Office for the Districts of Northern New York and Vermont recently published *"Reversible Errors (1995-1999),"* a comprehensive compilation of the reversals by Circuit Courts or the United States Supreme Court. A copy is enclosed.

XI. CASE NOTES

Recent Third Circuit Slip Opinions. Enclosed is a summary of recent Third Circuit Opinions on criminal law.

XII. STAFF NEWS.

Thomas W. Patton, Esq., recently joined our staff as an Assistant Federal Public Defender. Tom is stationed in our Erie office and replaces **Khadija Diggs**, who resigned last October. Tom was an Assistant Federal Public Defender in the Central District of Illinois for four years, and a Law Clerk to United States District Judge Richard Mills, also in the Central District of Illinois, for two years. Welcome, Tom.

Congratulations to Assistant Federal Public Defender **Markéta Sims** and husband, John Duffy, on the birth of their first child, Franklin Sims Duffy, on December 18, 1999.

Lisa Freeland, Esq., our Research and Writing Specialist, was appointed temporary Assistant Federal Public Defender during Markéta's maternity leave.

Enclosures:

Criminal Justice Act Seminar Announcement and Application
Federal Sentencing Seminar Announcement and Application
My Little Red Rules Book, 2000 Edition
The Defender's Advocate, Fall 1999 Issue
Summary of changes to Federal Rules of Criminal Procedure, eff. 12/1/99
Reversible Errors (1995-1999), published by the FPDO, Districts of Northern New York and Vermont
Summary of recent Third Circuit Opinions on Criminal Law

RECENT THIRD CIRCUIT OPINIONS ON CRIMINAL LAW
(March 1999 through April 1999)

By Karen Sirianni Gerlach, AFPD

673. United States v. Graham, No. 98-1556 (E.D. Pa. 3/5/99) - Section 2L1.2 of the sentencing guidelines applies to the offense of reentering the country after deportation. Paragraph (b)(1) of that guideline imposes a 16-level increase where the defendant was deported after committing an aggravated felony. The aggravated felony definition of 8 U.S.C. § 1101(a)(43) is incorporated by U.S.S.G. § 2L1.2, and used for purposes of imposing this enhancement in paragraph (b)(1). Section 1101(a)(43)(G) defines an aggravated felony as "a theft offense ... for which the term of imprisonment at least one year" (sic). Thus, the issue on appeal was whether Mr. Graham's prior conviction in New York for petit larceny could be classified as an aggravated felony under this definition, despite the fact that under New York law it is a Class A misdemeanor that carries a maximum sentence of one year.

The Third Circuit held that petit larceny clearly amounted to an aggravated felony under the definition in 18 U.S.C. § 1101(a)(43)(G), and therefore AFFIRMED the district court's imposition of the sentence enhancement. The Third Circuit noted, however, that it reached this holding with "misgivings," and that the legislation in question was carelessly drafted with the result that it "broke[] the historic line of division between felonies and misdemeanors." (Becker, Scirica and Rosenn, C.J.; opinion by Becker.) **169 F.3d 787**.

674. United States v. Morelli, Nos. 96-5144 and 96-5389 (D. N.J. 3/9/99) - The defendants were convicted for their part in the embezzlement of excise taxes from fuel sales; the criminal behavior included a number of wire transfers.

This appeal challenged the interpretation of the federal money laundering statute, 18 U.S.C. § 1956. The specific argument was that the money did not become the proceeds of fraud until after it should have been collected for the government, but was not. Thus, because the government proved only that specific transfers had occurred before the point when the taxes should have been collected for transmittal to the government, the government failed to prove that money laundering occurred. The Third Circuit rejected this argument, reasoning that the money became the proceeds of fraud as soon as it entered the hands of members of the scheme.

Alternatively, it was argued that the money was not the proceeds of wire fraud because the money came into the possession of the scheme as a result of tax fraud, before any of the wirings involving the money occurred. The Third Circuit found that the money within each series of transactions was the proceeds of wire fraud because the fraud from which it resulted was promoted by the wire transfers within the preceding series of transactions. Because the Third Circuit found that the government proved wire fraud, it rejected the argument that sentencing under the money laundering guideline, U.S.S.G. § 2S1.1, was improper.

This appeal also raised an argument of ineffective assistance of counsel based upon a possible conflict of interest. Defense counsel represented one of the defendants, as well as an individual whose statements were introduced at trial as hearsay evidence against him. The defendant argued that his lawyer's conduct was deficient since he faced an actual conflict of interest to the extent that his ability to impeach the witness' hearsay statements conflicted with his duties to the witness as his attorney. The district court rejected this claim because it found that

impeachment of the witness was not a "plausible alternative defense strategy." The Third Circuit agreed with the district court's conclusion, and also found that impeachment would not have adversely affected the witness' interests.

It was also argued that the conviction should be reversed on a potential conflict of interest theory, because the prosecutor and defense counsel violated the defendant's constitutional rights by knowing of the conflict, but failing to bring it to the attention of the district court. The Third Circuit rejected this argument on the grounds that a reversal could be granted only if the district court was or should have been aware of the conflict of interest, but failed to address it.

AFFIRMED. (Becker and Scirica, C.J., Kelly, D.J.; opinion by Becker.) **169 F.3d 798.**

675. United States v. Stansfield, No. 98-7233 (M.D. Pa. 3/16/99) - The defendant was charged in a multi-count indictment with mail fraud, using fire to commit mail fraud, arson, money laundering and tampering with a witness. The jury convicted the defendant of some of the counts, but deadlocked on others. The government moved to dismiss the deadlocked counts without prejudice to the refiling of the charges in the event that any court ordered a new trial on the counts of conviction. Defense counsel consented to the motion, and the district court granted it. On appeal, the United States Court of Appeals for the Third Circuit affirmed the convictions on all counts except for the witness tampering count; the Court reversed that count and remanded for a new trial. (See 101 F.2d 909.) On remand, the government gave notice that it intended to retry the defendant on the remanded witness tampering count, and on the deadlocked counts that the district court had previously dismissed. In this his second appeal to the Third Circuit, the defendant challenged, *inter alia*, whether he could be retried on the deadlocked counts, without resubmission of them to a grand jury. The defendant further argued that retrial on one of the deadlocked counts was barred by the statute of limitations, and that retrial of the other deadlocked counts was barred by the Speedy Trial Act. The Third Circuit found that the general federal statute of limitations applied, and thus dismissed the count for which the statute of limitations had run. However, the Court found that the other deadlocked counts were properly reinstated. AFFIRMED in part and REVERSED in part. (Becker, Scirica and Rosenn, C.J.; opinion by Rosenn.) **171 F.3d 806.**

676. United States v. Crandon, No. 98-5161 (D. N.J. 3/18/99) - The defendant pled guilty to one count of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). On appeal, he raised three arguments.

First, he argued that the district court erred when it ordered him to pay restitution for the psychiatric medical expenses of his victim. More specifically he argued that his conduct was not the proximate cause of the victim's losses; that even if it was, it was only part of the cause, and that he should therefore only have to pay part of the costs; and that based upon his economic circumstances which did not allow for payment, he should have been ordered to pay only nominal periodic payments. The Third Circuit rejected these arguments, and affirmed the order of restitution.

Second, the defendant argued that the district court erred when it included as a special condition of his supervised release a restriction on his computer use. The defendant argued that this condition unnecessarily infringed upon his liberty interests and bore no logical relation to his offense. The Third Circuit rejected this argument, reasoning that the condition reasonably related to the defendant's criminal activities, and would deter him from engaging in further criminal

conduct and would also protect the public.

Third, the defendant challenged the district court's application of the cross-reference set forth in U.S.S.G. § 2G2.2(c)(1). The cross-reference, which applies where the offense involved "causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct," increased the defendant's offense level by eight points. The defendant argued that the district court erred in applying the cross-reference, because in doing so it refused to consider his state of mind. The district court agreed, and found that the district court should have made some inquiry into the defendant's purpose, motivation or intent before applying the cross-reference. The Court thus vacated the sentence and remanded for resentencing.

AFFIRMED in part, and VACATED and REMANDED in part. (Stapleton, Lewis and Magill, C.J.; opinion by Lewis.) **173 F.3d 122.**

677. United States v. Pelullo, No. 98-1527 (E.D. Pa. 3/18/99) - The defendant was convicted of wire fraud and civil RICO violations. This was the defendant's fourth appeal in the Third Circuit, following his fourth trial in the district court. The third appeal resulted in a remand for the district court to determine whether the defendant would have testified at his first trial regardless of the government's **Brady** violations which were identified in the second and third appeals. In remanding, the Third Circuit did not decide the quantum of the government's burden of proving that fact. The district court concluded that the burden was a preponderance of the evidence, and went on to find by clear and convincing evidence that the government's **Brady** violation did not cause the defendant to testify.

In this fourth appeal, the Third Circuit addressed two issues: first, whether the district court applied the correct standard of proof, and second, if the district court did apply the correct standard, whether it erred in concluding that the government successfully met its burden. The Third Circuit concluded that the district court correctly found that the standard of proof is preponderance of the evidence, and that the government met this standard. AFFIRMED. (Becker, Scirica and Rosenn, C.J.; opinion by Becker.) **173 F.3d 131.**

678. Matteo v. Superintendent, SCI Albion, No. 96-2115 (E.D. Pa. 3/24/99) - This was an appeal from the district court's denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The petitioner sought relief from his state court convictions for first degree murder, robbery, theft, and possession of marijuana. Specifically, the petitioner argued that the Commonwealth of Pennsylvania violated his Sixth Amendment right to counsel by using incriminating statements he made in two telephone conversations from prison to an outside informant.

In reviewing this case, the Third Circuit, sitting en banc, had to first interpret the standard of review provision incorporated into 28 U.S.C. § 2254(d) by the 1996 amendments. The Court held that the revised statute mandates a two-part inquiry. First, the federal court must inquire whether the state court's decision was "contrary to" clearly established federal law, as determined by the Supreme Court of the United States. Second, if the state court decision was not "contrary to" federal law, the federal court must evaluate whether the state court judgment rests upon an objectively "unreasonable application of" clearly established Supreme Court jurisprudence.

Applying this analysis, the Third Circuit found that there was no denial of the petitioner's

Sixth Amendment right to counsel, and affirmed the dismissal of the habeas corpus petition. AFFIRMED. (En Banc Court; opinion by Scirica; concurrence by Becker; concurrence by Stapleton; concurrence by McKee, with whom Sloviter and Roth join; concurrence by Rendell.) **171 F.3d 877.**

679. McCandless v. Vaughn, No. 97-1585 (E.D. Pa. 3/30/99) -

This was an appeal from the denial of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner alleged that his conviction for murder and related charges in the Pennsylvania Court of Common Pleas violated his federal constitutional and statutory rights. The petitioner raised four specific claims for relief.

First, he argued that the admission of a prosecution witness' double hearsay testimony violated his Sixth Amendment right to confrontation. Second, he argued that the testimony of an official from the district attorney's office regarding the "corroboration" condition of the cooperation agreement between that office and the prosecution's key witness amounted to improper prosecutorial vouching and deprived him of due process. Third, the petitioner argued that the trial court lacked jurisdiction to try him because Pennsylvania extradited him from New Jersey in violation of the Interstate Agreement on Detainers Act. Fourth, the petitioner argued that admission of the preliminary hearing testimony for the prosecution's key witness violated his Sixth Amendment right to confrontation.

The Third Circuit concluded that the first and second claims were procedurally defaulted, and that the third claim was without merit. However, the Court concluded that the prosecution did not fulfill its duty to protect the petitioner's constitutional right to confront the key witness against him. The Court thus reversed on the basis of the fourth issue, and remanded with instructions that the district court order the petitioner's release unless he was retried and convicted within a reasonable time. REVERSED. (Stapleton and Roth, C.J., Hoeveler, D.J.; opinion by Stapleton.) **172 F.3d 255.**

680. United States v. Dorsey, No. 98-7335 (M.D. Pa. 4/6/99) - The defendant pled guilty to bank robbery and was sentenced as a career offender under U.S.S.G. § 4B1.1 based upon prior convictions for aggravated and simple assault. On appeal, the defendant challenged the sentence on the ground that a Pennsylvania simple assault is not a "crime of violence" for purposes of the career offender guideline.

According to U.S.S.G. § 4B1.2(a), a "crime of violence" includes an offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; or (2) "...involves conduct that presents a serious potential risk of physical injury to another." Under 18 Pa. C.S.A. § 2701(a), a person is guilty of simple assault if he "(1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another; (2) negligently causes bodily injury to another with a deadly weapon; or (3) attempts by physical menace to put another in fear of imminent serious bodily injury."

The Third Circuit found that the defendant's prior convictions for simple assault were "crime[s] of violence" for purposes of § 4B1.1. The Court reasoned that because all three parts of Pennsylvania's definition of simple assault necessarily involve "conduct that presents a serious potential risk of physical injury," that a conviction under the simple assault statute is one for a "crime of violence." AFFIRMED. (Greenberg, Alito and Godbold, C.J.; opinion by Godbold.)

681. United States v. Dispoz-O-Plastics, Inc. Nos. 98-1135 and 98-1136 (E.D. Pa. 4/8/99) - The defendants were convicted of conspiracy to fix prices in the plastic cutlery industry in violation of 15 U.S.C. § 1. On appeal, the defendants raised three issues: (1) the district court erred in admitting evidence that government witnesses had been convicted of conspiracy to fix prices; (2) the district court erred in finding that the government's vouching for its witnesses, by referring to extra-record prosecutorial policy, amounted to harmless error; and (3) the district court should have declared a mistrial because the government vouched for its witnesses when it said they had no motive to lie about whether they conspired to fix prices.

The Third Circuit rejected the first and third arguments, and thus affirmed with regard to those issues. However, the Third Circuit found that the prosecutor's extra-record comment about prosecutorial policy constituted reversible error, and thus reversed on the basis of the second issue. AFFIRMED in part, and REVERSED and REMANDED for a new trial in part. (Stapleton and Roth, C.J., Longobardi, D.J.; opinion by Roth.) **172 F.3d 275.**

682. United States v. Mastrangelo, No. 98-1469 (E.D. Pa. 4/9/99) - The defendant was charged with one count of conspiracy to manufacture methamphetamine and one count of attempt to manufacture methamphetamine. The jury convicted him of the conspiracy charge and acquitted him of the other charge.

On appeal, the Third Circuit rejected the defendant's challenges to the sufficiency of the evidence and to the admission of evidence under Federal Rule of Evidence 404(b). However, the Court agreed with the defendant on his claim of prosecutorial misconduct. The facts surrounding the claim of prosecutorial misconduct were as follows.

The defendant entered into a stipulation that he "had the chemical background to know the ingredients and equipment necessary to make methamphetamine." In its closing argument, the government mischaracterized the stipulation, stating that the defendant had stipulated to knowing how to make methamphetamine. The government also stated in its closing statement that there was no evidence that anyone else in the conspiracy had such knowledge.

The Third Circuit found that the evidence of guilt in this case was not overwhelming, and that the stipulation was crucial. The Court thus held that the government's repeated misrepresentations of the stipulation, combined with the faulty curative instruction, were not harmless. Because the Court did not possess a "sure conviction" that the errors regarding the stipulation did not prejudice the defendant, and could not be sure that the errors did not have significant effect on the jury's decision, the Court reversed the order of the district court denying defendant's motion for acquittal or for new trial and remanded for a new trial. REVERSED and REMANDED. (Sloviter and Cowen, C.J., Rodriguez, D.J.; opinion by Sloviter.) **172 F.3d 288.**

683. United States v. Paster, No. 98-7270 (M.D. Pa. 4/19/99) - This was a case involving murder on a federal reservation. The defendant pled guilty to second degree murder, and on appeal, raised four challenges to his sentence.

First, the defendant challenged the district court's denial of his request for a downward departure under U.S.S.G. § 5K2.10 based upon the victim's provocative conduct. The third Circuit rejected this argument on the grounds that the defendant's response was grossly disproportionate to any provocation by the victim.

Second, the defendant challenged the district court's denial of a downward departure on the basis of aberrant behavior. The Third Circuit also rejected this argument, reasoning that a downward departure for aberrant behavior requires a single act that was spontaneous and thoughtless, and involved no advance planning. Here, however, the defendant had ample time in the minutes preceding the murder to think about the act he was about to commit. Third, the defendant challenged the district court's denial of his request under U.S.S.G. § 3E1.1(b) for an additional one-level downward adjustment for acceptance of responsibility. The district court denied the additional point on the grounds that the defendant's decision to plead guilty after the jury was selected did not constitute timely notification as required by U.S.S.G. § 3E1.1(b)(2). The Third Circuit found that § 3E1.1(b) allows the additional point to be rewarded if the defendant timely notifies the authorities of his intention to plead guilty, **or** timely provides complete information to the government regarding his own involvement in the offense. Thus, because the guideline requires that only one of these steps have been taken, and because the defendant provided timely and complete information regarding his involvement in the offense, he was entitled to the additional point. The Court therefore reversed and remanded for the defendant to be resentenced to reflect the additional one-level reduction for acceptance of responsibility.

Fourth, the defendant challenged the imposition of a nine-level upward departure under U.S.S.G. § 5K2.8 for "extreme conduct." The Third Circuit found that the district court had sufficient basis upon which to enhance the defendant's sentence for extreme conduct. However, the Court remanded with regard to this issue, with instructions that the district court reconsider it in light of relevant case law and in light of the proportionality concerns raised by the coincidence of the second degree murder sentence that the defendant received and the prescribed sentence for first degree murder.

AFFIRMED in part and REVERSED and REMANDED in part. (Sloviter and Cowen, C.J., Oberdorfer, D.J.; opinion by Oberdorfer; concurrence by Sloviter; concurrence/dissent by Cowen.) **173 F.3d 206.**

684. United States v. Bradley, Nos. 97-5462 and 97-5464 (D. N.J. 4/19/99) - This appeal raised several issues. The Court's opinion focused on the following three issues. First, the defendants argued that the district court abused its discretion when it allowed the government to impeach a witness by adducing evidence that cash was recovered from her attic, and implying that the money was somehow connected to one of the defendants. The court of appeals ruled that the admission of this evidence was not an abuse of discretion under Federal Rule of Evidence 403. Second, the defendants argued that it was improper for the district court to dismiss a juror for sleeping, without first conducting a voir dire of her. The court of appeals found no error in this regard. Third, the defendants challenged the district court's jury instruction regarding the Hobbs Act. The Court of Appeals found no error in the instruction. AFFIRMED. (Greenberg, Roth and Lourie, C.J.; opinion by Greenberg.) **173 F.3d 225.**

685. United States v. Duffus, No. 98-1548 (E.D. Pa. 4/20/99) - The defendant filed a § 2255 motion six years after his conviction. The motion was deemed to be timely based upon the one-year grace period which followed the amendments to the Antiterrorism and Effective Death Penalty Act of 1996. That grace period allowed defendants to file § 2255 motions up until April 24, 1997; the defendant filed his § 2255 motion on April 23, 1997. On October 28, 1997, more than six months after the defendant filed his § 2255 motion, and five years after his conviction had been affirmed on direct appeal, the defendant moved to amend his motion. The district court denied the defendant's motion to amend, and on appeal the Third Circuit upheld that denial.

The Third Circuit noted that the defendant took advantage of the one-year grace period, and that absent the grace period, his motion would have been out-of-time. The Court reasoned that to have allowed the amendment "would have frustrated the intent of Congress that claims under 28 U.S.C. § 2255 be advanced within one year after a judgment of conviction becomes final." The Court also reasoned that "[a] prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period." AFFIRMED. (Greenberg, Roth and Rosenn, C.J.; opinion by Greenberg.) **174 F.3d 333.**

686. Cabrera v. Barbo, No. 98-6090 (D. N.J. 4/30/99) - This was an appeal from the denial of relief on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The petition raised issues of ineffective assistance of counsel. The Third Circuit held that federal habeas corpus review of the petitioner's claims was barred. The Court reasoned that the state court rejected those claims based on an independent and adequate state basis, and that the state courts rejected the claims on the basis of state court procedural default. (Greenberg and Roth, C.J., Pollak, D.J.; opinion by Greenberg.) **175 F.3d 307.**