Newsletter of the

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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Cecelia Klingele to Discuss Why Appellate Courts Fail to Deliver What Trial Courts Need at Thursday, June 16 Annual Meeting Luncheon

By Lynn Stathas, Vice President/President-Elect

As a former law clerk for U.S. Supreme Court Justice John Paul Stevens, for the Honorable Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit, and for the Honorable Barbara B. Crabb of the U.S. District Court for the Western District of Wisconsin, Cecelia Klingele is uniquely qualified to discuss why appellate courts fail to deliver what trial courts need. And that is precisely what she will do when she delivers the keynote address at the Western District Bar Association's Nineteenth Annual Luncheon meeting next month.

Klingele, a Wisconsin native, received her J.D. *magna cum laude* from the University of Wisconsin Law School in 2005. After completing her clerkship with the U.S. Supreme Court she returned to her *alma mater* where, as an Assistant Professor, she now teaches criminal law, criminal procedure, and a seminar on sentencing and corrections. Klingele is the co-chair of the American Bar Association's Criminal Justice Section's Academics Committee, the Community Liaison for the Children's Justice Project, and the Founder and President of the Law School Family Association, which serves needs of students raising families.

Klingele's keynote presentation, *"Good Intentions and Misguided Assumptions: Why Appellate Courts Fail to Deliver What Trial Courts Need"* will be delivered during the Bar Association's Annual Luncheon meeting at Noon on **Thursday, June 16** at The Concourse Hotel in Madison.

The day will begin with the annual business meeting of the Bar Association's Officers and Directors, followed by the annual meeting of the Bar Association's Pro Bono Fund. After the Noon luncheon and Klingele's address, the Bar Association will host its annual Continuing Legal Education program at the U.S. District Courthouse where the Clerk of Court will report on Court statistics and other important information from the Clerk's Office. The CLE Program will also address ERISA litigation, and offer updates on developments in civil and criminal law from attorneys practicing in the offices of the U.S. Attorney, the Federal Public Defender, and the Wisconsin Attorney General. The CLE Program will conclude with the Judges' panel discussion and question and answer session, after which the Bar Association will sponsor a reception at the Courthouse, providing hors d'oeuvres, beverages and an opportunity to engage with other members of the Bar Association.

Registration materials are included in this newsletter, and are also available online at www.wdbar.org.

(Continued on following page)

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WDBA

MISSION STATEMENT

It is the mission of the Western District of Wisconsin Bar Association to promote the just, speedy, respectful and efficient determination of every action filed in the District Court: by acting as an effective liaison among the District Court, federal practitioners, litigants and the public; by encouraging, fostering and supporting educational opportunities that improve the practice of law in this District; and by serving the needs of the District Court, federal practitioners, litigants and the public.

President's Corner

By Andrew Clarkowski

Introducing the Mentor Program

Careful readers of this column—let's be honest, this is a group that is likely limited to my able legal assistant—may have noticed that my two prior President's columns focused on past issues (the history of the appointment process) and present issues (the state of our organization). Whether due to a foolish consistency on my part, or—again to be honest—a happy coincidence, my last column will focus on an issue of the future of our organization and the bar.

I have been blessed in my life by having strong mentors in both life and the law. There is no substitute for a voice of more experience. I had a friend from Cameroon who shared an African proverb with me: "You should listen to elders, because the shoulder never grows higher than the head." Mentoring is especially invaluable in federal law practice, and particularly so in this District. With relatively few local rules to turn to, much of the practice simply has to be learned from those that do it. While many of us have mentors in our firms, that opportunity is not available to everyone. There is also some value in having a contact outside of your firm.

Accordingly, one of the goals of my tenure, as I announced at last year's annual meeting, was to establish a mentorship program to allow younger attorneys to get a mentor in the District who could advise them both on federal practice issues as well as the practice of law generally, or even on life issues. At a recent meeting of our Board of Directors, we approved such a program. We will be formally announcing this program at our upcoming annual meeting, but I wanted to provide a brief preview here. I note that the Dane County Bar Association has been operating a wonderful and successful mentorship program for several years. Theirs is a fairly intensive program that involves regular seminars for mentors and mentees. It's a fantastic program and I would encourage anyone to participate in it. We are not intending to compete with that program in any way. Our program will be more focused on federal practice issues, and participants will be allowed to schedule as much or as little interaction as they decide is appropriate. Frankly, just having someone to call, or to bounce ideas off of, will be a great asset for many young practitioners, although I expect most mentor/mentee relationships will go well beyond that.

We have used the Dane County Bar Association's (with their permission, for which I am very grateful) mentorship program procedures as a model and created a more scaled-backed program. In a nutshell, our program will pair attorneys in their first five years of practice with more experienced attorneys. Mentorships will be provided on an ongoing basis, so participants will not have to wait for the beginning of a new program year to start the mentor/mentee relationship. We will be providing information at the annual meeting as to how you can participate, and going forward we will have program information on our website, www.wdbar.org. I encourage everyone's participation. As for myself, I have a debt to repay to my own mentors, and look forward to being able to pass on what I can, and to help match up mentors with mentees. We are lucky to have a good bar. Mentoring will help assure a good future.

I am very pleased that we were able to get a useful mentorship program in place this year; it was a goal I had set for myself this year. Another goal was to write President's columns that would fail to excite any comment or controversy whatsoever. That goal also appears to have every likelihood of success. I thank all the members for the opportunity to serve as your President during this past year. I leave you in the capable hands of Lynn Stathas, whose organizational skills are shown by the annual meeting she has put together. I'll see you there.

Western District of Wisconsin Bar Association

AGENDA
ANNUAL MEETING AND CLE PROGRAM
THURSDAY, JUNE 16, 2011

11:00 a.m. **Annual Business Meeting of the Officers and Directors of the Bar Association, followed by the Annual Meeting of the Officers and Directors of the Pro Bono Fund –** U.S. District Courthouse, Room 250

12:00 noon **Nineteenth Annual WDBA Luncheon** - The Concourse Hotel, 1 West Dayton Street, Madison, WI (Registration from 11:30 – 12:00)
Keynote Speaker: Cecelia Klingele
"Good Intentions and Misguided Assumptions: Why Appellate Courts Fail to Deliver What Trial Courts Need"

CLE Program and Judges' Panel – U.S. District Courthouse, Room 250

2:00-2:25 p.m. **State of the Court Report**
Peter Oppeneer, Clerk of Court

2:25-2:50 p.m. **ERISA Litigation**
Todd Smith, Godfrey & Kahn, S.C.

2:50-3:00 p.m. Break

3:00-3:25 p.m. **Civil Law Update**
Richard Briles Moriarty, Wisconsin Department of Justice

3:25-3:50 p.m. **Criminal Law Update**
Timothy O'Shea, United States Attorney's Office
Michael Lieberman, Federal Defender Services of Wisconsin, Inc.

3:50-4:00 p.m. Break

4:00-4:30 p.m. **Judges' Panel and Discussion**

4:30 p.m. **Reception** (beverages and hors d'oeuvres)

Restoring Fairness?

*By **Michael W. Lieberman**, Supervisory Associate Federal Defender,*
Federal Defender Services of Wisconsin, Inc.
and
***Julie K. Linnen**, JD 2011 / UW Law School*

Drug use is a serious problem in America and we need tough legislation to combat it. But in addition to being tough, our drug laws must be smart and fair.

Senator Richard Durbin (D-Ill.), the primary sponsor of the 2010 bill to equalize powder and cocaine sentences.

On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010,[1] ("FSA"), with the intent to "restore fairness to Federal cocaine sentencing."[2] It became effective that same day. The FSA amended the penalty provisions of 21 U.S.C. § 841 to incorporate an 18-to-1 ratio of crack to powder cocaine rather than the 100-to-1 ratio that existed under prior law. Under the FSA, 28 grams of crack or 500 grams of powder cocaine trigger a 5-year mandatory minimum sentence and 280 grams of crack or 5 kilograms of powder cocaine trigger a 10-year mandatory minimum. In addition, the FSA repealed the separate statutory penalty range of five to 20 years of imprisonment for first-time simple possession of more than five grams of crack cocaine.

Although a step in the right direction for crack cocaine sentencing, the FSA is an imperfect remedy. As noted by the Seventh Circuit in *United States v. Fisher,* "[t]he Fair Sentencing Act of 2010 (FSA) might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010 (NQFSA) would be a bit more descriptive."[3]

In order to better understand the current state of crack cocaine sentencing, it is necessary to explore its history. By the mid-1980's, the *War on Drugs* was in full swing. Incarceration rates were rising. Congress had just passed the Sentencing Reform Act, which abolished parole and tasked the newly-created United States Sentencing Commission (USSC) with promulgating mandatory federal guidelines for courts to follow when imposing sentences.

Lawmakers were fearful that crack cocaine was becoming a nationwide epidemic. In an effort to curb drug use in America, and specifically crack cocaine use, Congress passed the Anti-Drug Abuse Act of 1986.[4] The 1986 Act set forth the basic framework of statutory penalties applicable to federal drug trafficking

1 Pub. L. No. 111-22, 124 Stat. 2372 (2010)

2 *Id.* (Preamble).

3 *United States v. Fisher*, 635 F.3d 336, 338 (7th Cir. 2011).

4 Pub. L. No. 99B570, 100 Stat. 3207 (1986) ("the1986 Act").

offenses, establishing distinct statutory ranges for crack cocaine and powder cocaine, punishing crack at a ratio of 100-to-1 with relation to powder cocaine.[5] Under the 1986 Act it took 100 times more powder cocaine than crack cocaine to trigger the same statutory mandatory minimum penalty. The following table compares the statutory penalty ranges for first-time offenders under the 1986 Act:

Statutory Range	Crack Cocaine Quantity	Powder Cocaine Quantity
0-20 years	Less than 5 grams	Less than 500 grams
5-40 years	At least 5 but less than 50 grams	At least 500 but less than 5,000 grams
10 years - life	50 or more grams	5,000 or more grams

In response to the 1986 Act, the Sentencing Commission incorporated the mandatory minimum sentences into the Federal Sentencing Guidelines and set corresponding guideline sentencing ranges for all drug quantities.[6] The Sentencing Commission used the same 100-to-1 drug quantity ratio employed by Congress in fashioning guidelines for quantities of powder and crack cocaine falling above or below mandatory minimum threshold quantities.[7]

Widespread Criticism of the Crack Cocaine Sentencing Scheme

Rather than basing the crack/powder sentencing scheme on empirical data or scientific evidence, Congress and the Sentencing Commission instead relied on unsubstantiated claims about the dangers associated with crack cocaine to justify the harsh penalties.[8] In fact, the Commission itself later confirmed that "the 100-to-1 ratio rested on assumptions about 'the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.'"[9]

5 The Anti-Drug Abuse Act of 1988 also established a mandatory minimum penalty for simple possession of crack cocaine. Pub. L. No. 100B690, 102 Stat. 4181 (1988).

6 United States Sentencing Guidelines § 2D1.1.

7 See generally United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy, Chapter 7 (February 1995).

8 See, e.g., United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 122 (1995); See, e.g., Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Public Hearing Before the United States Sentencing Commission, Mandatory Minimum Sentencing Provisions Under Federal Law, at 4, 26 (May 27, 2010); Statement of Julia O'Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Public Hearing Before The United States Sentencing Commission, The Sentencing Reform Act of 1984: 25 Years Later, Austin, Texas, at 14-15 (Nov.19, 2009).

9 Kimbrough v. United States, 552 U.S. 85, 97-98 (2007), citing United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf (ratio Congress embedded in the statute far "overstate[s]" both "the relative harmfulness" of crack cocaine, and the "seriousness of most crack cocaine offenses").

Clear racial disparities in sentencing emerged. In 1995, the Sentencing Commission reported to Congress that more than 80 percent of crack offenders are minorities and because crack offenders received such lengthy sentences, the significant difference in penalties has a disparate racial impact.[10]

In 1995, the Sentencing Commission began issuing reports to Congress on the crack/powder ratio. In each report, the Sentencing Commission expressed concerns over the racial disparities arising as a result of the 100-to-1 ratio, and urged Congress to rectify those disparities.

In 2007, the Supreme Court joined in criticizing the crack/powder ratio. In *Kimbrough v. United States*, 552 U.S. 85 (2007), the Court held that a sentencing judge may refuse to impose a sentence based on the crack Guidelines if the judge believed the 100-to-1 disparity was unreasonable. However, while judges could disagree with the sentencing guidelines, they were bound by the statutory mandatory minimums.[11] Because judges were compelled by statute to impose statutory minimum sentences, sentencing disparities remained pervasive.

The Fair Sentencing Act of 2010

On August 3, 2010, President Obama signed the Fair Sentencing Act of 2010 into law. It became effective that day.

The Fair Sentencing Act of 2010 was introduced by Senator Richard Durbin (D-Ill.) and passed unanimously in both the House and Senate.[12] The sponsors of the Act supported its passage by pointing out that the prior crack/powder disparity lacked a pharmacological basis. In hearings leading up to the passage of the FSA, members of Congress noted repeatedly that it is largely African-Americans and Latinos who are impacted by higher crack cocaine minimum

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http://www.ussc.gov/r_congress/ cocaine2007.pdf (ratio Congress embedded in the statute far "overstate[s]" both "the relative harmfulness" of crack cocaine, and the "seriousness of most crack cocaine offenses").

10 *See, e.g.*, Rep. Robert C. (Bobby) Scott, July 28, 2010 Press Statement ("differences in penalties for crack and powder cocaine also have a disparate racial impact"); 155 Cong. Rec. S10592 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy) ("the criminal justice system has unfair and biased cocaine penalties that undermine the Constitution's promise of equal treatment for all Americans").

11 By way of example, if a defendant with no prior record pled guilty to distributing 51 grams of crack, the pre-2010 Guidelines would have called for a sentencing range of 70-87 months in prison. The statutory mandatory minimum that the judge would be required to follow, however, would have called for a sentence of no less than 120 months. By comparison, if the same defendant had distributed 51 grams of powder cocaine, the Guideline range would be 12 to 18 months with no required mandatory minimum.

12 *See* 156 Cong. Rec. S1680-81 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin).

sentences. They recognized that the 100-to-1 ratio violated Equal Protection principles.

The FSA's Practical Effects

The FSA will impact approximately 3,000 crack offenders sentenced in federal courts each year and will significantly reduce sentences for crack offenders. The Congressional Budget Office has estimated that passage of the FSA will save over 1,500 prison beds and reduce spending for the federal prison system totaling $42 million over the 2011-2015 period.

Will it be Retroactive?

The question now is whether the FSA will be applied retroactively, and if so, how? The FSA is silent on the issue of retroactivity. As a result, the Act's application to pending cases with offenses committed before August 3, 2010, has become a question for the courts.

To date, all circuits, including the Seventh Circuit in *United States v. Bell*,[13] have concluded that the general Federal Savings Statute, 1 U.S.C. § 109, bars retroactive application when the defendant was sentenced *prior* to enactment of the FSA.[14]

With its recent decision in *United States v. Fisher*,[15] the Seventh Circuit was the first of the appellate courts to weigh in on the FSA's applicability to defendants whose conduct occurred prior to the Act's passage, but who were not sentenced until after its passage. One of the *Fisher* defendants, Dorsey, was sentenced on September 10, 2010, approximately one month after passage of the FSA. Despite the court's "sympathy," the Seventh Circuit was unwilling to deviate from its holding in *Bell* to allow for retroactive application of the FSA to defendants whose conduct predated the FSA's passage, but who are sentenced after its enactment. The Seventh Circuit affirmed that the relevant date for determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing.

The Seventh Circuit stated it is ultimately a matter for Congress whether the FSA should be amended to more closely resemble its name:

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13 *United States v. Bell,* 624 F.3d 803 (7th Cir. 2010).

14 *See United States v. Glover,* 2010 WL 4250060, *2 (2d Cir. October 27, 2010) (unpublished); *United States v. Carradine,* 621 F.3d 575, 580 (6th Cir. 2010); *United States v. Brewer,* 624 F.3d 900, 900 n. 7 (8th Cir. 2010); *United States v. Lewis,* 625 F.3d 1224, 1228 (10th Cir. 2010); *United States v. Gomes,* 621 F.3d 1343, 1346 (11th Cir. 2010).

15 *Fisher,* 653 F.3d at 339.

> We have sympathy for the two defendants here, who lost on a temporal roll of the cosmic dice and were sentenced under a structure which has now been recognized as unfair. However, "[p]unishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds."[16]

For now, it appears that only defendants who are charged with offenses that occurred after August 3, 2010 will benefit from the FSA. Those defendants who committed offenses prior to August 3 will remain subject to the higher penalties provided for by the pervious version of the statute.

[16] *Id.* at 340, *citing Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 664 (1974).

Western District News

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