



The Defense Never Rests

**A Newsletter for CJA Panel Attorneys
for the Eastern District of Louisiana**

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Local News

◆ On February 22, 1999, Karen Wells Roby was sworn in as a United States Magistrate Judge. Her chambers are located in Room B-437 and her courtroom is B-431 of the Hale Boggs Building. The telephone number is (504) 589-7615.

◆ Your Panel Representative, Herbert V. Larson, Jr., recently attended the National Conference of Panel Attorney Representatives where he was selected the Fifth Circuit representative to the Defender Services' Advisory Group. Congratulations Herb!

◆ On January 4, 1999, new requirements for filing briefs became effective. (5th Cir. R. 31.1) All briefs filed after January 4, 1999 must comply with the amended rule as stated: Where a party is represented by counsel and generates his or her brief on a computer, one computer readable disk copy of the brief must be filed with the clerk, and a second computer readable disk copy served on each party separately represented by counsel. The disk must contain nothing more than the brief. The disk's label must include the case name, docket number, identify the brief, i.e. appellant's brief, appellee's brief, etc., and specify the word

processing software and version used to prepare the brief. The brief must be on a 3½ inch disk. The certificate of service must indicate service in both paper and electronic form. The Fifth Circuit prefers, if available, the use of WordPerfect for Windows, 5.1 or greater, to insure compatibility with their systems.

◆ If you would like to write an article, make an announcement or recount a war story, please send your submission to the Office of the Federal Public Defender.

EFFORTS CONTINUE TO FUND THE \$75 HOURLY RATE FOR CJA PANEL ATTORNEYS NATIONWIDE

The federal judiciary has included in its FY 2000 Defender Services appropriation request funding to implement a \$75 hourly Criminal Justice Act (CJA) private "panel" attorney rate nationwide. If Congress approves the judiciary's request, the \$75 maximum hourly rate for in-court and out-of-court work in non-capital cases would take effect on April 1, 2000.

The issue of the \$75 rate was an important topic at the National Conference of Panel Attorney Representatives, held on March 6-7, 1999, in Arlington, Virginia. As might be expected, a resolution was passed at that conference endorsing the increase. Your panel attorney representative for the Eastern District of Louisiana is Herbert V. Larson, Jr., 528-9500 or hlnola@aol.com.

In his *1998 Year-End Report of the Federal Judiciary*, Chief Justice William H. Rehnquist urged Congress to give "very serious consideration" to the judiciary's request for funding to implement the \$75 rate in FY 2000. Justice Rehnquist observed that inflation has eroded the currently authorized hourly rates and that "[i]nadequate compensation for panel attorneys is seriously hampering the ability of judges to recruit attorneys to provide effective representation."

In 1986, Congress enacted legislation which authorized the Judicial Conference to increase the hourly rates paid to panel attorneys from \$60 in-court/\$40 out-of-court to \$75, and to make annual cost-of-living adjustments to the \$75 rate beginning in 1990. Although the Judicial Conference has approved the \$75 rate for in-court and out-of-court work in 93 of the 94 judicial districts, most districts have received only one \$5 per hour increase to the \$60/\$40 rates set by statute in 1984, over 14 years ago. Congress has appropriated funds sufficient to pay higher rates up to \$75 in only 16 districts, which were the first to apply for alternative CJA hourly rates. The \$75

rate is substantially lower than the \$104 per hour rate which would be authorized in 1999 if the annual federal pay increases, approved by the Judicial Conference for CJA rates, were applied.

There is widespread support in the federal criminal justice system for the \$75 hourly rate, from judges, the Department of Justice, private bar associations, and federal defenders. The Federal Judges Association, in endorsing the rate, stated that the current hourly rates are "significantly compromising the ability of the court to recruit and retain attorneys under the Criminal Justice Act." The Federal Magistrate Judges Association endorsed the rate as "imperative...to assure that the courts can appoint qualified and experienced counsel." The Department of Justice also has indicated its support for the \$75 rate.

At its August 1998 meeting, the ABA's House of Delegates unanimously approved a resolution (adopted by the ABA's Criminal Justice Section in March 1998) urging Congress to fund the CJA at a level sufficient to support implementation of the \$75 rate and annual cost-of-living increases for CJA panel attorneys, and urging the Judicial Conference to make every effort to obtain this funding. The NACDL, National Legal Aid and Defender Association, and Association of Federal Defenders likewise have passed resolutions in support of the \$75 rate and cost-of-living adjustments.

Attorney General Janet Reno, at the National Symposium on Indigent Defense held in Washington on February 25, 1999, repeated her support for well-funded indigent defense. She reported that the Department of Justice has called on Congress to appropriate the funds necessary to pay the \$75 rate.

The April 1999 issue of the NACDL magazine, *The Champion*, includes extensive reporting on efforts from all fronts to persuade Congress to fund the \$75 rate.

TWO IMPORTANT SUPREME COURT DECISIONS ISSUED

By John H. Craft

The United States Supreme Court issued two very important decisions on April 5, 1999, both of which will have great impact on criminal cases.

- Police officers can search a passenger's personal property, including her purse, when searching a car.

Wyoming v. Houghton, --- S.Ct. ---- No. 98-184 (1999 WL 181177 (U.S.Wyo.)) April 5, 1999

Police officers stopped an automobile because they had probable cause to believe that the driver had just conducted a drug transaction. While searching the car, the officers also searched the purse belonging to a passenger in the car. The officers did not have probable cause to believe that she had also been involved in the drug deal. Drug paraphernalia was found in the purse.

The Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search; but, if the officer knows or should know that a container belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection.

The United States Supreme Court reversed, holding that when police officers are searching an automobile with probable cause to search but under the automobile exception to the warrant requirement, the scope of search extends to the contents of personal belongings of passengers within the vehicle so long as the object sought might reasonably be found there.

Scalia wrote the opinion. Rehnquist,

O'Connor, Kennedy, Thomas and Breyer joined. Breyer also wrote a concurrence. Stevens wrote a dissent and was joined by Souter and Ginsburg.

Existing law would not allow looking in the clothing of the passengers within the automobile without probable cause to believe that the passengers were engaged in the criminal activity. Are purses less private than pockets? The Court wrestles with the issue of whether the gender of the owner of the object is relevant to balancing the governmental interest against the intrusion. Breyer in his concurrence says that a purse is more like clothing than a suitcase because of the close personal relationship between purse and owner pointing out that women "wear" purses. It is important to him that the purse was not being held by its owner at the time of the stop and was not even near her in the automobile.

The dissent argues that there is a distinction between passenger and driver and that there needs to be probable cause to believe that the passenger is involved in the crime or that the object of the search might have been hidden in the purse or on the property of the passenger before the scope of the search can be extended to either the person of the passenger or the purse. The dissent treats a purse as an extension of the clothing.

The majority opinion shows Scalia's usual historical perspective and tells you everything you need to know about automobile searches.

BOTTOM LINE – The scope of search under the automobile exception is now virtually unlimited.

- A defendant can remain silent at sentencing even after a plea of guilty.

Mitchell v. United States, --- S.Ct. ---- No. 97-7541 (1999 WL 181164 (U.S.)) April 5, 1999

Mitchell entered a plea of guilty to conspiracy to distribute cocaine. At her sentencing hearing, three co-defendants testified that she had sold 1½ to 2 ounces of cocaine twice a week for 1½ years, and another person testified that Mitchell had sold her two ounces of cocaine.

Mitchell put on no evidence and argued that the only reliable evidence showed that she had sold only two ounces of cocaine. The District Court ruled that as a consequence of her guilty plea, she had no right to remain silent about her crime's details; found that the co-defendants' testimony put her over the 5-kilogram threshold, thus mandating the 10-year minimum; and noted that her failure to testify was a factor in persuading the court to rely on the co-defendants' testimony. The Third Circuit affirmed.

The Supreme Court reversed, holding that: (1) neither defendant's guilty plea nor her statements at plea colloquy functioned as a waiver of her right to remain silent at sentencing, and (2) sentencing court could not draw adverse inference from defendant's silence in determining facts relating to circumstances and details of the crime. The Court distinguishes sentencing after a guilty plea from the general rule that someone cannot testify as to a point and then later remain silent as to that point.

Justice Kennedy wrote the majority opinion. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas joined.

BOTTOM LINE – A defendant who has entered a plea of guilty does not have to divulge anything with regard to sentencing. Exercising the right to remain silent at sentencing cannot be used against the defendant in any way.

**AT THE COMMISSION:
SENTENCING COMMISSION NEWS
AMENDMENTS PROPOSED FOR 1999
DESPITE NO COMMISSIONERS**

By Thomas W. Hutchinson

The Sentencing Commission ceased to be able to function as a rule-making body on November 1, 1998. As of that date, the Commission had no members. There had been only four members for some time, but the terms of three of them expired on October 21, 1998, when the 105th Congress adjourned sine die. The term of the fourth member, Judge Richard P. Conaboy, the Commission's Chair, ended on October 31, 1998, due to his resignation. Efforts near the end of the 105th Congress to work out a slate of appointees who could be confirmed by the Senate before adjournment were unsuccessful. The Commission will be able to resume its rule-making function when at least four Commissioners take office.

As one of its last acts, the Commission voted to publish for public comment three proposed amendments. Whether the Commission will be able to act on any of the proposals will depend upon when new Commissioners take office. To take effect on November 1, 1999, any changes to the guidelines must be transmitted to Congress by May 1, 1999.

The first proposed amendment published by the Commission would make permanent an emergency amendment to the fraud guideline implementing enhancements for use of mass-marketing and sophisticated means. See U.S.S.G. App. C, am. 587. The amendment will expire November 1, 1999 unless re-promulgated as a non-emergency amendment. The second proposed amendment represents an "economic crime package" that the Commission has developed over several years. The proposal, which among other things would consolidate the theft and fraud guidelines and define the term "loss" more comprehensively, generally would bring about

higher offense levels. The third proposed amendment published by the Commission would amend the probation and supervised release guidelines (§§ 5B1.3, 5D1.3) to incorporate new mandatory conditions enacted as part of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998. Pub. L. 105-199, § 115, 111 Stat. 2440, 2465.

The Commission also published issues for comment on four topics. The topics are (1) whether § 2C1.4 (payment or receipt of unauthorized compensation) should be amended because Congress increased the statutory maximum from one year to five years for one of the offenses covered by that guideline; (2) whether, and how, to amend the fraud guideline to comply with a congressional directive to provide an appropriate penalty for offenses involving the cloning of wireless telephones; (3) whether § 2M5.1 (evasion of export controls) and § M5.2 (exportation of arms, munitions, or military equipment or services without required validated export license) provide adequate punishment for import and export of nuclear, biological, and chemical weapons materials; and (4) whether, and how, to amend the tax guidelines in response to two newly-enacted offenses (26 U.S.C. §§ 7213A, 7217) and to an amendment to an existing offense (26 U.S.C. § 7213) concerning disclosure of tax return information.

The text of the proposed amendments and issues for comments is available through several sources: on the Sentencing Commission's web site, www.ussc.gov/fedreg/nov98frg.htm; on Westlaw, 1998 WL 817591; in the Federal Register, 63 Fed. Reg. 65,980 (1998); and in the Criminal Law Reporter, 64 Crim. L. Rep. 190 (1998). If you have questions or comments about the proposals, please call the Federal Defender Training Group at (800) 788-9908.

EFFORTS UNDERWAY TO IMPROVE COMMUNICATIONS WITH CJA PANEL ATTORNEYS

The Office of the Federal Public Defender and the CJA Panel Representative for the Eastern District of Louisiana are committed to improving the level of communication among and between CJA panel attorneys and our respective offices. In order to facilitate this communication, it is important that we obtain the e-mail address of each CJA panel attorney who has one. Please let Magi Strickland in our office know your e-mail address as soon as possible.

The e-mail address of Virginia Schlueter is fpdedla@communique.net. The e-mail address for the Eastern District CJA Panel Representative, Herbert V. Larson, Jr., is hlnola@aol.com.

Other important e-mail addresses are Federal Defender Training Group Director Barbara O'Connor at Barbara.O'Connor@fd.org; National Systems Support Analyst Jeff Flax at Jeff@jflax.com.

Useful web pages include:

Jeff Flax's home page -
<http://www.jflax.com/~jflax>

ABA Criminal Justice Section -
<http://www.abanet.org/crimjust/home.html>

Bureau of Prisons -
<http://www.bop.gov>

Fifth Circuit Court of Appeals -
<http://www.ca5.uscourts.gov>

**FEDERAL DEFENDER TRAINING
GROUP ESTABLISHED TO PROVIDE
MORE SUPPORT AND SERVICES
TO PANEL ATTORNEYS**

The Federal Defender Training Group (FDTG) is established by the Defender Services Committee of the Judicial Conference of the United States to provide services and support to CJA panel attorneys *free of charge*. The FDTG provides advice and research assistance via their "hotline" at (800) 788-9908. Also, FDTG plans training programs for CJA panel attorneys. Please see the attached registration forms.

**UNITED STATES SENTENCING
COMMISSION HAS A NEW
TELEPHONE NUMBER**

The United States Sentencing Commission's telephone service, U.S.S.C. Helpline, provides information to judges and their staffs, probation officers and prosecuting and defense attorneys on guideline application, pending amendments, and related sentencing matters. Please note their new telephone number: (202) 502-4545. You can also visit their website at www.ussc.gov for up to date publications, legislative developments and training opportunities.

**UPCOMING OPPORTUNITIES
FOR CRIMINAL CLE**

- Fourth Annual
CJA Panel Training Seminar***
May 6-7, 1999, New Iberia, La.
Sponsored by the
Federal Public Defender
Middle & Western District of La.
For information call (318) 262-6336

- Appellate Defender Seminar***
May 7, 1999, Lafayette, La.
Sponsored by the
Louisiana Appellate Project
For information call (504) 892-1707

- Winning Strategies for Defending
Federal Criminal Cases***
June 3-5, 1999, Savannah, Georgia
August 12-14, 1999, Portland, Oregon
Sponsored by the
Federal Defender Training Group
For information call (800) 788-9908

- National Seminar on Mental Illness
and the Criminal Law***
June 24-27, 1999, Washington, DC
Sponsored by the
Federal Defender Training Group
For information call (800) 788-9908.

- Death Penalty Seminar***
September 17-18, 1999 Baton Rouge, La.
Sponsored by the LACDL
For information call (225) 387-3261

- Second Annual
CJA Panel Training Seminar***
November 4-5, 1999, New Orleans, La.
Sponsored by the
Federal Public Defender
Eastern District of La.
For information call (504) 589-2468