The Defense Never Rests

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2002 WINNING STRATEGIES SEMINAR HELD IN NEW ORLEANS

As you know, the 2002 Winning Strategies seminar was held recently in New Orleans. The seminar received rave reviews from our 30 CJA panel lawyers who attended. This seminar drew 240 Criminal Justice Act lawyers from around the country. In their evaluations, participants remarked at the program's substantive content, yet found it fun and entertaining. As the local host, our office asked Judge Jay Zainey to formally welcome the participants. His welcoming remarks were well-received as he has been a member of the Criminal Justice Act panel for the last twenty years and knew the secret handshake. This seminar presented an opportunity to hear some nationally renowned speakers.

A special note of gratitude is due Jones Walker for their hospitality and generosity in hosting a cocktail party for the participants. The white-collar section of Jones Walker together with the Office of the Federal Public Defender treated all registered participants to a cocktail party in the beautiful 52nd floor firm library. The party was well attended and presented a perfect opportunity for networking.

RECENT DEATH PENALTY DECISIONS

The number 102 may not speak loudly to you, but to the 3,700 inmates on death row, this number speaks of hope. It represents the number of death row inmates across 24 states who have been exonerated due to evidence of their innocence. Recognizing that 102 people have been exonerated since the death penalty was reinstated under *Gregg v. Georgia*[1] in 1976, the federal court system has recently issued four opinions that will reshape the administration of capital punishment.

First, on June 20, 2002, the Supreme Court ruled in *Atkins v. Virginia*[2] that the execution of mentally retarded capital offenders is unconstitutional. In light of "evolving standards of decency," the Court concluded that such punishment was excessive and prohibited under the Eighth Amendment. The federal statute, 18 U.S.C. §3596(c), has prohibited the execution of a mentally retarded person since 1988.

Second, on June 24, 2002, the Supreme Court in *Ring v. Arizona*[3] invalidated sentencing schemes under which judges, not juries, find aggravating factors that distinguish between a life or death sentence. This ruling affected nine states and 800 prisoners. Additionally, U.S. attorneys and district attorneys are scrambling to redraft indictments to include aggravating factors in order to comply with *Ring*. Still unknown is the impact this ruling will have on defendants previously sentenced to death based on a judge's finding of aggravating factors.

Third, on July 1, 2002, a federal judge in the Southern District of New York ruled the federal death penalty unconstitutional because it violates substantive and procedural due process. *United States v. Quinones*.[4] In the opinion, District Judge Rakoff said, "in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence."

And finally, on September 24, 2002, in *United States v. Fell*,[5] Vermont U.S. District Judge William K. Sessions III, found the Federal Death Penalty Act unconstitutional under *Ring*. (See article on page 4.)

The opinions of Judges Rakoff and Sessions echo some of the recent statements made by Supreme Court Justices O'Connor and Ginsberg. "If statistics are any indication, the system may well be allowing some innocent defendants to be executed," stated Justice O'Connor in a speech to the Minnesota Women Lawyers group on April 9, 2001. Justice Ginsberg has also questioned the fairness of the death penalty system.

Comments like this and the disturbing number of exonerations are a telling sign that gross flaws exist in the administration of capital punishment. As a result of the deficient system, the ABA has urged the President to impose a moratorium on the death penalty, at least nine states have introduced moratorium resolutions, and Congress is working on the Innocence Protection Act, a death penalty reform package.

Although the judicial and legislative branches are questioning the current status of capital punishment, President Bush and Attorney General Ashcroft have not indicated any intention to reform or back away from the death penalty. President Bush's November 13, 2001 order for military tribunals allows the immediate imposition of the death penalty without providing the defendant the right to an appeal or the right to a jury trial. Ashcroft continues to review all death penalty eligible cases, approving capital punishment in nearly 13 of 26 cases, even in states that outlaw the death penalty, and even when his prosecutors recommend life.[6]

If the system continues down its current path, the next time an inmate is put to death, we will have to question if that person could have been number 103.

ENDNOTES

1. *Gregg v. Georgia*, 428 U.S. 153 (1976).

2. *Atkins v. Virginia*, ___ U.S. ___, 122 S.Ct. 2242 (2002).

3. *Ring v. Arizona*, 536 U.S. ___, 122 S.Ct. 2428 (2002).

4. *United States v. Quinones,* 205 F.Supp.2d 256 (S.D.N.Y.2002).

5. *United States v. Fell*, No. 2:01-CR-12-01, 2002 WL 31113946 (D.Vt. Sept. 24, 2002).

6. On local note, in August, 2002, Ashcroft certified the capital prosecution of Johnny Davis, but declined authorization on Richard Porter.

RECENT SUPREME COURT DECISIONS ADDRESSING *APPRENDI* ISSUES

The Supreme Court decided three cases at the end of last term addressing *Apprendi* issues. As you recall, the Court held in *Apprendi v. New Jersey*[1] that any fact increasing the sentence to which the defendant was exposed above the statutory maximum (other than recidivism) must be submitted to a jury and proven beyond a reasonable doubt. In federal prosecutions, such facts also must be alleged in the indictment. *Jones v. United States.*[2]

The three new cases are *United States v. Cotton;*[3] *Harris v. United States;*[4] and *Ring v. Arizona.*[5] *Cotton* concerned *Apprendi* error that was not preserved below. The Supreme Court held that *Apprendi* error was not jurisdictional and therefore was subject to plain error review. Applying plain error analysis, the Court affirmed an enhanced sentence on the fourth prong: failing to correct the error would not affect the "fairness, integrity, or public reputation of judicial proceedings" because the evidence amply supported the enhancement.

Notably, the Court left open the third prong of the plain error analysis: whether the error was harmless. It thereby did not resolve the question whether properly preserved *Apprendi* error was structural and hence automatically reversible without harmless error scrutiny. The Court's decision in *Neder v. United States*[6] implies a negative answer to that question with regard to failure to submit the matter to the jury for a finding beyond a reasonable doubt. But still open is the question whether failure to allege *Apprendi* facts in the indictment is structural error. The Fifth Circuit recently held it was not, but a petition for certiorari is imminent. *United States v. Baptiste*, No. 99-31027 (Oct. 2, 2002).

Harris v. United States raised the question whether facts that trigger a mandatory minimum sentence are offense elements which, like facts increasing the statutory maximum punishment, must be alleged in the indictment, submitted to a jury and proven beyond a reasonable doubt. The Court previously answered this question in the negative in *McMillan v. Pennsylvania,*[7] but the *Harris* defendant argued that *McMillan* did not survive *Apprendi*. By a narrow margin, the Court reaffirmed *McMillan* and held that facts triggering mandatory minimums were sentencing factors, not offense elements. A majority decided the case on the basis of statutory interpretation; only a plurality agreed that *Apprendi* did not overrule *McMillan*. The plurality reasoned that mandatory minimums do not increase the maximum sentence to which a defendant is exposed. Chances for changing that result in the near future are dim because Justice Scalia, an *Apprendi* champion, switched sides.

Harris was important both in the immediate and long term. Many of our clients face outrageously harsh mandatory minimums. And in the long term, legislatures can use mandatory minimums to circumvent *Apprendi* by rewriting criminal statutes. For example, a legislature could establish one offense called homicide with a broad sentencing range, and then use mandatory minimums to establish the grades of the offense. Scalia's stance in *Harris* suggests that a majority on the Court does not intend to extend *Apprendi* in a way that would circumscribe the options of state legislatures or Congress.

Ring v. Arizona invalidated the Arizona capital sentencing scheme, overruling *Walton v. Arizona*[8] in the process. The Arizona statute provided that a defendant convicted of first degree murder was not eligible for the death penalty unless a judge found an aggravating factor by a preponderance of the evidence. The Supreme Court reasoned that the aggravating factor exposed the defendant to a sentence – death – for which he was not otherwise eligible and therefore *Apprendi* required that it be submitted to a jury and proven beyond a reasonable doubt. This means that in federal cases, the statutory aggravator must be alleged in the indictment. Double jeopardy considerations may require life sentences for capital defendants convicted under pre-*Ring* indictments.

For practitioners trying to take full advantage of *Apprendi,* we suggest two questions. First, ask what constitutional benefits accrue when a fact is moved out of the "sentencing factors" category and into the category of "elements of the offense." We know about indictment, submission to a jury, and proof beyond a reasonable doubt. How about Confrontation Clause rights, which preclude use of hearsay unless within a firmly rooted exception? Is there a *mens rea* requirement for each element of the offense, such that the government must prove that the defendant knew the nature and quantity of the drugs hidden in the car that he was driving?

Second, ask what else can be moved out of sentencing factor category and reclassified as an element of the offense. Legislatures have discretion about which category to put the fact in, but their discretion is subject to constitutional limits. We know that the jury trial guarantee and the due process clause require that facts increasing the statutory maximum be elements of the offense, but not facts triggering a mandatory minimum. What about recidivism, an exception to *Apprendi*? In *Almendarez-Torres v. United States,*[9] a 5-4 majority held that recidivism was a sentencing factor, but the majority has since lost Justice Thomas's vote. Be sure to preserve the error.

ENDNOTES

1. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2. *Jones v. United States*, 526 U.S. 227 (1999).

3. *United States v. Cotton*, ___ U.S. ___, 122 S. Ct. 1782 (2002).

4. *Harris v. United States*, ___ U.S. ___, 122 S. Ct. 2406 (2002).

5. *Ring v. Arizona*, 536 U.S. ___, 122 S. Ct. 2428 (2002).

6. *Neder v. United States*, 527 U.S. 1 (1999).

7. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

8. *Walton v. Arizona*, 497 U.S. 639 (1990).

9. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

CONFRONTATION CLAUSE & RULES OF EVIDENCE APPLY EVEN IN CAPITAL SENTENCING PHASE

A federal district court recently invalidated the Federal Death Penalty statute on the ground that its use of relaxed evidentiary standards during the sentencing hearing contravenes *Ring v. Arizona,* 536 U.S. ___, 122 S. Ct. 2428 (2002)*; United States v. Donald Fell*, No. 2:01-CR-12-01, 2002 WL 31113946 (D. Vt. Sept. 24, 2002). The statute provides that sentencing phase information is admissible "regardless of its admissibility under the rules governing admission of evidence at criminal trials. . . ." 18 U.S.C. § 3593(c). Sentencing phase information, however, includes proof of factors necessary to make a defendant who has been convicted of a capital crime eligible for the death penalty: mental state and statutory aggravators. Under *Ring*, factors that make the defendant eligible for the death penalty are elements of the offense. Therefore, the district court reasoned in *Fell*, the protections of the Confrontation Clause in particular, and the Federal Rules of Evidence in general, apply. "[R]ecognition that the death-eligibility factors are the functional equivalents of elements of the capital offense necessitates recognition that the fundamental rights of confrontation and cross-examination and an evidentiary standard consistent with the adversarial nature of the proceeding must be afforded in the death-eligibility determination." The court concluded that it was not free to rewrite Congress's explicit provision to the contrary in §3593(c) and consequently invalidated the statute.

WRITS TO THE UNITED STATES SUPREME COURT ON APPOINTED CASES

If you plan to file for a writ of certiorari in the United States Supreme Court on a CJA case, please contact our office. As you all know, we have "been there and done that." There are tricks of the trade regarding printing and the cost of filing writs, but the printers may not necessarily tell you. So, to avoid spending money which the Circuit may not find a reasonable reimbursable expense, talk to us first!

ATTORNEY CONFERENCE CENTER CELEBRATES 10TH ANNIVERSARY

by Don K. Haycraft
President of the New Orleans Chapter
of the Federal Bar Association

The New Orleans FBA Chapter is proud to announce that the Michaelle Pitard Wynne Attorney Conference Center celebrates its 10th year of service on November 10, 2002. The facility is a collective effort of the United States District Court for the Eastern District of Louisiana and the New Orleans FBA Chapter, and is operated by the Chapter for the benefit of all attorneys having business at the Court.

A brief bit of history: The Conference Center opened for business on November 10, 1992, with Chief Judge Morey L. Sear and Chapter President Frank E. Lamonthe, III, presiding over the opening ceremonies. Another significant moment in its history was the renaming and dedication of the Conference Center in memory of Magistrate Judge Michaelle Pitard Wynne. This formal ceremony occurred on August 16, 1994. Again, Chief Judge Sear presided over the dedication, with Chapter Board member Michael McGlone and Magistrate Judge Alma Chasez providing remembrances of the beloved Magistrate Judge. The Conference Center, just down the hall from Magistrate Judge Wynne's former chambers and courtroom, provides a continuing reminder of Magistrate Judge Wynne's significant contributions to the judiciary, her service to the members of the bar, as well as to the community. As the dedication plaque in the Conference Center reads, "Throughout the time we were privileged to know her she always demonstrated those endearing qualities that showered good will on all who passed her way."

For those who have not made use of the Conference Center, it can be reached from the third floor of the Courthouse. It provides lounge and conference room facilities, snacks and refreshments, access to telephone, fax, and secretarial assistance, so that the attorney at court is provided his or her "office away from home." Three conference rooms equipped with secure telephone lines are available for use for witness rooms, mediations, depositions, meetings, etc. FBA members have access to these conference rooms at the reduced rate of $20/day or $5/hour, while non-members may rent a room for $35/day or $10/hour.

Those who have made use of the facilities know Inge Hamidjaja and her winning smile and congenial personality. Inge has staffed the Conference Center almost from the beginning. She has been joined recently in a job-sharing arrangement by Karen McDevitt. Please stop by and say hello to Inge and Karen and enjoy the comfort and convenience of this unique facility.

SAFETY VALVE NEWS

Effective November 1, 2001, Guideline Sections 5C1.2 and 2D1.1(b)(6) were amended to allow greater access to the safety valve in drug cases. Under Section 2D1.1(b)(6), a two-level reduction is allowed if the person meets the criteria from 5C1.2. The requirement of a minimum offense level of 26 has been eliminated. Thus, if a person is charged with a drug offense (Title 21 USC 841 et seq.), and meets the criteria of 5C1.2 (safety valve), then a two-level reduction under 2D1.1(b)(6) is appropriate , regardless of offense level. The Sentencing Commission, in Amendment 624, specifically indicated that this change expands the eligibility of the two-level reduction to provide lesser punishment for first time, nonviolent offenders. Thus, it appears that the two-level reduction can now apply in a 0-20 year drug offense (i.e. one without a mandatory minimum).

But, in no event may the offense level fall below 17 for a person facing a five year mandatory minimum. 5C1.2(b) after all reductions for acceptance, lesser role, and safety valve, there is a minimum offense level of 17, if the charge carries a five year mandatory minimum

U.S. SENTENCING COMMISSION URGES CHANGES IN FEDERAL COCAINE SENTENCING POLICY[1]

The chair of the U.S. Sentencing Commission, Judge Diana E. Murphy (8th Cir.) appeared before the Senate Judiciary Subcommittee on Crime and Drugs last month to outline the Commission's recommendations on cocaine sentencing. The Commission has released a 112-page report advocating a reassessment of federal cocaine penalties. The report, entitled Cocaine and Federal Sentencing Policy, is available online at www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

In her testimony, Murphy asked Congress to modify federal drug laws to target the most dangerous offenders for greater punishment while also addressing the wide disparity in treatment between crack and powder cocaine. Current laws treat trafficking and possession of crack significantly more severely than powder cocaine. The Commission's extensive review of literature on such issues as the addictiveness of cocaine; its own study of federal cocaine offenders; a survey of state sentencing policies, public comment on current policy; and testimony at hearings from the medical and scientific communities, and federal and local law enforcement officials, have caused the Commission to conclude that the cocaine penalty structure can be improved significantly.

"[T]he Commission unanimously agreed that at this time we can best facilitate congressional consideration of the proposed statutory and guideline changes," said Murphy, "by submitting recommendations to Congress first, then working with Congress to implement appropriate modifications to the penalty structure."

The Commission recommends that Congress adopt the following three-pronged approach to revise federal cocaine sentencing policy:

(1) Increase the five-year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams, and the 10-year threshold quantity to at least 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine).

(2) Direct the Commission to provide appropriate sentencing enhancements in the primary drug trafficking guideline, USSG §§2D1.1, to account for certain aggravating conduct.

(3) Maintain the mandatory minimum penalties for powder cocaine offenses at their current levels, with the understanding that the proposed guideline sentencing enhancements would apply to powder cocaine offenses.

DELAYS IN SENTENCING

As you may know, the U.S. Probation Office requires 90 days to conduct its presentence investigation and to prepare its report for the Court. In cases where the guidelines likely will be 0-6 months, that means our clients serve their sentence before sentencing and the possibility of probation becomes moot. This matter has been the subject of several discussions between Chief Probation Officer Jill Benoit and Federal Public Defender Virginia Schlueter. The Probation Office says that the problem is coordinating schedules with defense counsel in setting a date for the presentence interview.

We have two suggestions. The Probation Office has indicated that it may be willing to expedite the process in 0-6 month cases if defense counsel so requests before rearraignment. So if you foresee a 0-6 month guideline range, contact Deputy Chief Probation Officer Charlotte Cocchiara prior to the rearraignment to arrange for an expedited PSR. Also, at the rearraignment, we recommend that you tell the probation officer that you wish to be present at the presentence investigation interview. If your client is out on bond, accompany him or her to the Probation Office immediately after the rearraignment to schedule an interview. If your client is detained, telephone the probation officer as soon as possible to set a date. Delay in scheduling an interview will result in a request for a continuance by Probation.

[1] *The Third Branch,* Vol.34, No.6, June 2002. Reprinted with permission from the Administrative Office of the United States Courts.

CHANGES IN IMMIGRATION LAW

Before April 1996, resident aliens ordered deported on the basis of a criminal conviction sometimes could seek a waiver of deportation due to social or humane considerations under section 212(c) of the Immigration and Naturalization Act. In the 1996 amendments to the Act, Congress expanded the category of convictions that make an alien ineligible for section 212 (c) relief. The INS applied the amendments retroactively by denying section 212(c) hearings even for resident aliens whose convictions occurred prior to the amendments. But in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that retroactive denial of section 212(c) relief was unconstitutional.

In light of *St. Cyr*, attorneys defending illegal re-entry charges under 8 U.S.C. § 1326 against aliens deported on the basis of pre-1996 convictions should review the underlying deportation hearing to determine whether the immigration judge advised of the possibility of 212(c) waiver. If not, the deportation order may be violative of due process. *United States v. Galvin-Munoz*, No. 00-50412 2002 WL 1929342 (9th Cir. Aug. 16, 2002)(unpublished). You should consider a motion to dismiss the indictment on that basis. See *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987;

YOU'RE INVITED

to Chief Hobden's retirement party on **Thursday, October 10, 2002**, from **3:00 p.m. to 6:00 p.m.** in the chambers of Chief Judge Ginger Berrigan.

CHIEF PRETRIAL SERVICES OFFICER RETIRES

Effective May 31, 2002, Jim Hobden officially retired from federal service. He remained as Chief Pretrial Services Officer until the new selection was made. His last official day was October 4, 2002. Jim was appointed Chief Pretrial Services Officer on October 26, 1987, at the time the Pretrial Services Office was established.

Chief Hobden graduated from the College of Santa Fe in Santa Fe, New Mexico in 1968. He subsequently earned his master's degree from the University of St. Louis, St. Louis, Missouri, in 1972. Prior to his tenure as Chief, Jim had been a United States Probation Officer.

During his federal service, Chief Hobden volunteered his time for many years to the United Way Combined Federal Campaign. He is married and the father of three daughters. Now that his replacement is on board, Chief Hobden will have a lot more free time to spend fishing. We wish him a long and happy retirement! You can keep in touch with Jim by e-mail at JimHobden@aol.com.

☆☆☆☆☆

NEW CHIEF PRETRIAL OFFICER APPOINTED

Harold J. Schlumbrecht, Jr. took the helm as the new Chief Pretrial Services Officer effective October 7, 2002. He joined Pretrial Services in 1988 and established the electronic monitoring program. He has served as Supervising Pretrial Services Officer since 1992 and was instrumental in establishing a statewide Officer Safety Academy.

Chief Schlumbrecht graduated with a degree in Criminal Justice from LSU in 1984 and earned his Master's in Public Administration from UNO in the year 2000. He is married and the father of two children. He spends his free time coaching Little League and fishing.

We want to congratulate Harold on his appointment and look forward to a good working relationship with him as Chief. With the changing of the guard, the Federal Public Defender and CJA Representative, Herb Larson have already made overtures to the new Chief to increase the number of bonds. We have high hopes for more bonds in 2003.

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
501 MAGAZINE STREET, SUITE 318
NEW ORLEANS, LA 70130
www.federaldefender.net

We are updating our e-mail address list. Please send your up-to-date e-mail address to fpdedla@federaldefender.net.

JUDGE BARBIER TO HOST A COURT ROOM PERSPECTIVE ON SUCCESSFUL FEDERAL COURT PRACTICE

Judge Carl J. Barbier will host a seminar entitled "The Seven (more or less) Habits of Highly Successful Practitioners: A Federal Court Perspective" in his courtroom on December 6, 2002 from 10 to noon. The seminar will provide the Judge's perspective on advocacy in the federal court system. Enrollment is limited to 20 lawyers to ensure the most effective and meaningful discourse. 2.4 CLE credit hours will be awarded to attendees. The cost is $30.00 for panel lawyers and $20.00 if you are a member of the Federal Bar Association. Those interested should return the attached form to Stevan C. Dittman.

THE SEVEN (more or less) HABITS OF HIGHLY SUCCESSFUL PRACTITIONERS: A FEDERAL COURT PERSPECTIVE

Friday, December 6, 2002
10:00 a.m. - Noon

Section "J" Courtroom
United States District Court
500 Camp Street, New Orleans, LA 70130

Name: _____

Address: _____

_____

Please return this form to:
Stevan C. Dittman, Esq.
1100 Poydras Street, Suite 2800
New Orleans, LA 70163
(504) 522-2304

OCTOBER 22ND CLE: SENTENCING PROGRAM PRESENTED BY THE U.S. PROBATION OFFICE

There is a distinct advantage when a CJA panel member becomes a Federal Judge. Judge Jay Zainey requested that the Probation Office put together a sentencing program for CJA panel attorneys, Federal Public Defenders and United States Attorneys designed to inform practitioners of offender programs and sentencing options other than incarceration. The program will be in the jury room of the United States District Court from 9:00 a.m. to 12:00 p.m. on October 22, 2002. Immediately following the two hour sentencing portion of the presentation, Judge Zainey will moderate an hour of professionalism with a panel of Assistant United States Attorneys and Assistant Federal Public Defenders. A total of 3.6 hours of CLE credit will be earned. We hope that you can arrange your schedules to attend this program. For more information contact Barbara Daigle at 589-7930.