THE DEFENSE NEVER RESTS

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A Fond Farewell to 500 Camp Street Address

It is with a measure of sadness that we announce that the old federal courthouse has been laid to rest. Clerk of Court Loretta Whyte and staff gave the old address a proper Jazz Funeral. We shall, however, remember with fondness those faithful Camp and Magazine Street entrances. They were such a dear part of our lives for so long. Let us not fret over our losses, but embrace our gains. On Tuesday, February 17, 2004, the new address, 500 Poydras Street, and the entrances, Lafayette Mall and Poydras Street, of the United States District Courthouse and Hale Boggs Federal Building were unveiled. Please note that the Clerk of Court's address is now 500 Poydras Street, Room C-151, New Orleans, Louisiana 70130, and our new address is 500 Poydras Street, Suite 318, Hale Boggs Federal Building, New Orleans, Louisiana 70130. This new beginning has also brought about another welcome change. Visitors are now allowed to bring cell phones and laptops into the building.

In This Issue

NEW ORLEANS MITIGATION SEMINAR - A HUGE SUCCESS

Last week, the Grand Ballroom of the Embassy Suites was filled to capacity as 100 mitigation specialists together with capital trial and postconviction lawyers from around the country gathered to brainstorm mental illness, mental retardation, and restorative justice as an outgrowth of Wiggins v. Smith, 537 U.S. 1231, 123 S.Ct. 1382 (2003). The program was so well received that we hope it will be repeated next year. It is also our hope that if New Orleans is selected to host the next program, attendance will not be restricted to attorneys and mitigation specialists with active capital cases.

CJA Representative Conference

Chief Panel Attorney Rep. Claire Rauscher, Defender Services Advisory Group Representatives David Beneman, Dean Stowers, Bill Swinford, and Herb Larson.

The annual National Criminal Justice Act Panel Representatives Conference was held in New Orleans on February 29 - March 1, 2004. Theodore Lidz, division chief of Defender Services, opened the conference with a historical overview of the implementation of the Criminal Justice Act . Herb Larson, the Eastern District of Louisiana CJA representative, as host of the event, introduced Chief Judge Ginger Berrigan (EDLA), who welcomed the group and thanked them for "keeping the promise" of affording effective representation for indigent clients. Judge Berrigan was followed by the Eastern District of Louisiana's Federal Public Defender and Governor at Large for Louisiana of the Bar Association of the Fifth Federal Circuit, Virginia Schlueter, who expressed similar sentiments before introducing Sister Helen Prejean, author of *Dead Man Walking*. Sister Helen's presentation was well received by all as it was both inspiring and educational.

Claire Rauscher

This year's conference was especially meaningful as 2004 marked the 40th Anniversary of the Criminal Justice Act which was prompted by the historic Gideon v. Wainwright Supreme Court ruling in 1963. The *Gideon* decision held that under the Constitution, every person charged with a felony is entitled to representation by an attorney even if he cannot afford one. This landmark ruling affirmed an American ideal of how criminal justice proceedings should be conducted. As the Supreme Court stated:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Prior to the *Gideon* ruling, there were several failed attempts to guarantee the right to counsel as defined in the Bill of Rights beginning in 1949 with the first attempt to pass the Criminal Justice Act. In 1958 and 1959, two bills, S. 3275 (which included a public defender system) and S. 895, were introduced and passed the Senate, but died in the House of Representatives. The following year, in 1960, the 86th Congress passed the District of Columbia Legal Aid Act, providing for a mixture of public and private representation, which would become a model for future legal aid agencies.

Support for the Criminal Justice Act picked up in 1960s. In 1961, Attorney General Robert F. Kennedy appointed the Allen Committee which spent two years reviewing the criminal justice system and the effects of poverty on an adequate defense. The committee issued its findings in a report in 1963. That same year, President John F. Kennedy promoted equality in the courts in his "State of the Union" address. Also that year, the Supreme Court handed down its *Gideon* ruling, and the American Bar Association named the Criminal Justice Act as its project of the year. In 1964, the CJA passed both the House and the Senate.

Today, 216 years after the adoption of the Sixth Amendment and 40 years after the enactment of the Criminal Justice Act, the lawyers providing representation to the poor continue to strive to perfect this ideal. They are committed to ensuring that attorneys appointed to represent indigent defendants under the Criminal Justice Act are not only competent but experienced, effective and committed. A debt of gratitude is owed appointed counsel who so ably accept its challenge. In that spirit, the Federal Bar Association, together with its New Orleans Chapter, hosted an evening cocktail party for the CJA Panel Representatives on February 29, 2004. The reception was attended by over 100 people, including Judges Lance Africk and Carl Barbier (EDLA), the Fifth Circuit Judicial Defender Services representative, as well as many attorneys from the Defender Services Division of the Administrative Office of the United States Courts.

Gordon Blackman

Special mention should be made of the fact that Gordon Blackman, Shreveport's CJA Representative, was named as the new Fifth Circuit Defender Services Advisory Group (DSAG) Representative. He can be contacted at 400 Travis Street, Suite 1801, Shreveport, Louisiana 71101, (318)222-7409, gnbj@bellsouth.net.

All in attendance agreed that the conference provided a great opportunity to address the many serious issues facing CJA lawyers such as voucher cutting, obtaining the assistance of necessary expert services and increasing the $90 hourly rate.

Criminal Justice Act Seminars and Workshops

Winning Strategies 2004

Ninth Annual CJA Panel Training Seminar
May 13-14, 2004
Rip Van Winkle Gardens, New Iberia, Louisiana

The Federal Public Defender for the Middle and Western Districts of Louisiana will offer training for CJA panel attorneys in the following topics: Working with the Probation Office: You and Your Client, Defending High Profile Homicide, Rethinking Plea Negotiations, Professionalism, Ethics, Fifth Circuit and Supreme Court Update, Cross Examination, Acting for Lawyers, Sentencing Guidelines, Discovery in Federal Court, Irving Younger's Ten Commandments of Cross-Examination with New Millennium Notes. For registration, contact Mrs. Cheryl Alexander at (337) 262-6336.

WINNING STRATEGIES SERIES
BOSTON, MA, MAY 20-22, 2004
MEMPHIS, TN, JULY 29-31, 2004

The Winning Strategies seminars will be configured so that individuals will have a choice of topics and smaller classes. Newer CJA participants will be able to be exposed to sessions to give them the information they need to build an effective federal practice. Topics include: fifth amendment case law and suppression motions, statements issues in multiple defendant cases, the role culture can play in a client confessing, using a mental health expert and advance mental health issues at trial and sentencing, evidentiary issues in cross-examination, case law surrounding affirmative defenses, defending gun and immigration cases, the chemistry and law around methamphetamine cases, handling presentence interviews, recent Guideline amendments, Supreme Court update, etc.

TRIAL ADVOCACY WORKSHOP
JUNE 24-26, 2004
WILLIAMSBURG, VIRGINIA

The Trial Advocacy Workshop will be developed around the use of courtroom technology to advance the persuasiveness of witness examination and argument skills. Participants will enhance their cross-examination, direct examination, and closing argument skills by applying courtroom technology, such as Trial Director and Power Point.

IMMIGRATION CRIMES SEMINAR
AUGUST 26-28, 2004
SAN DIEGO, CA

The Immigration Crimes Seminar will be a comprehensive training on effective advocacy in the defense of clients charged with immigration offenses. Topics include: motions, trial and sentencing in illegal re-entry cases, alien smuggling cases, and documents cases, as well as the immigration consequences of criminal convictions.

Supreme Court Updates

Banks v. Dretke, No. 02-8286 (Feb. 24, 2004): The state prosecutor did not disclose that his key witness at the penalty phase of this death case was a paid informant. The Fifth Circuit, however, denied habeas relief because Banks was not sufficiently diligent in seeking this **Brady** information during state postconviction proceedings. The Supreme Court reversed, finding cause and prejudice for any procedural default. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed **Brady** material when the prosecution represents that all such material has been disclosed. . . . A rule declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

Crawford v. Washington, No. 02-9410 (Mar. 8, 2004): The Confrontation Clause prohibits the introduction of testimonial statements of an unavailable witness absent prior opportunity to cross-examine. Overruling **Ohio v. Roberts**, the Supreme Court said that a judicial determination of reliability is not an adequate substitute for cross-examination.

Illinois v. Fisher, No. 03-374 (Feb. 23, 2004): Under **Brady**, failure to turn over material exculpatory evidence violates due process, regardless of whether the prosecution acts in good or bad faith. By contrast, the failure to preserve evidence that is only "potentially useful evidence" does not violate due process without a showing of bad faith on the part of the police.

Illinois v. Lidster, No. 02-1060 (Jan. 13, 2004): A police roadblock to solicit information about a hit-and-run does not violate the Fourth Amendment. The Supreme Court distinguished **Indianapolis v. Edmund**, where it prohibited roadblocks designed to ferret out crime by the occupants of the cars stopped. Here, by contrast, the police asked drivers whether they knew anything about a crime committed by someone else. The Court found the stop reasonable because the government interest in finding the killer was high, but the intrusion on privacy minimal.

Cert. granted: Illinois v. Cabelles, No. 03-293: Does the Fourth Amendment require resonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop? The Illinois Supreme Court held it did.

Fifth Circuit Updates

Batson

Miller-El v. Dretke, No. 00-10784 (Feb. 26, 2004): On remand from the Supreme Court, the Fifth Circuit rejected Miller-El's **Batson** challenge on the merits. The state court had found that the prosecutor's peremptory challenges were not racially motivated. Applying the highly deferential AEDPA standard of review of state court fact-findings, the Fifth Circuit found no error.

Child Pornography

United States v. Slanina, Nos. 03-20181, 03-20447 (Jan. 28, 2004): The Supreme Court invalidated the Child Pornography Act insofar as it criminalized possession of pornographic images of virtual children. But that decision did not impose on the government the burden of presenting evidence that the children were real. That issue could be left for the jury to decide on the basis of the images themselves.

Conspiracy

United States v. Tenorio, No. 02-50691 (Feb. 17, 2004): Rejecting a sufficiency-of-evidence appeal of a conspiracy conviction, the Court held that implausibly denying knowledge and refusing to answer pre-arrest questions from police is evidence of guilty knowledge.

Death

Roberts v. Dretke, No. 02-51339 (Jan. 9, 2004): Although the defendant told his trial lawyer not to oppose death, the Fifth Circuit granted COA as to whether counsel was ineffective for failing to develop evidence of defendant's mental illness and failing to make adequate use of a court-appointed psychiatrist. Trial counsel admittedly knew of defendant's previous hospitalization for psychiatric problems following a suicide, and defendant presented evidence of a childhood head injury to the state habeas court.

Habeas

United States v. Reinhart, No. 02-30697 (Jan. 14, 2004): Counsel was ineffective for failing to appeal sentence enhancement based on two minors appearing in a child pornography tape made *before* Reinhart joined the conspiracy.

The indictment charged making a child pornography tape with knowledge that it would travel in interstate commerce, not transporting the tape in interstate commerce. See 18 U.S.C. § 2251(a). Therefore, the offense occurred when the coconspirator made the tape, not when Reinhart transported the tape across state lines with the coconspirator. Since relevant conduct reaches the conduct of another only if it is reasonably foreseeable to the defendant on a prospective basis, the two minors in the tape should not have been counted as enhancements. Had counsel raised the error, which was preserved below, Reinhart would have received five years less time. Therefore, he was prejudiced.

Larry v. Dretke, No. 02-21010 (Mar. 16, 2004): An application for Texas post-conviction relief is not "properly filed" for purposes of tolling the one-year federal statute of limitations when it is filed before the Supreme Court denies the defendant's petition for a writ of certiorari on direct appeal.

Ineffective Assistance of Counsel

Young v. Dretke, No. 02-50341 (Jan. 9, 2004): In **Lockhart v. Fretwell**, the Supreme Court used current law to decide the prejudice prong of a **Strickland** ineffective assistance of counsel claim. The Supreme Court reasoned that the defendant should not benefit from law that was favorable to him at the time of counsel's error but subsequently was overturned. While **Fretwell** challenged counsel's failure to invoke an intermediate appellate court decision that was subsequently reversed, **Young** involved counsel's failure to invoke a statute that was later amended. The Fifth Circuit distinguished **Fretwell** and declined to use current law because the Texas statute in place at the time of the error was "vested."

Post-Trial Motions

United States v. Redd, No. 02-60453 (Dec. 30, 2003): If the defendant files a motion for a new trial based on newly discovered evidence while his appeal is pending, the district court may not grant the motion, but should not dismiss it for lack of jurisdiction. Rather, the district court should hear the motion and either deny it or certify its intent to grant it to the court of appeals.

Sentencing

United States v. Torres-Aguilar, No. 03-40055 (Dec. 3, 2003): If a district court orally imposes supervised release without stating applicable conditions, inclusion in written judgment of conditions that are mandatory, standard, or recommended by the Sentencing Guidelines does not create a conflict with the oral pronouncement.

United States v. Houston, No. 02-20470 (Mar. 16, 2004): In sentencing the defendant for possession of a firearm by a felon, the district court misapplied the sentencing guidelines. Houston's prior conviction, statutory rape, was not a crime of violence absent aggravating circumstances apparent from the face of the charging instrument. Furthermore, there was insufficient evidence that Houston's two guns were possessed in connection with another felony offense. Possession of the 12 grams of marijuana found in the motel room was a misdemeanor only. Possession of the forged identification documents produced by Houston to the police was not the type of violent felony that requires the offender to have a gun for protection.

United States v. Adams, No. 03-30219 (2004): When a defendant pleads guilty, the scope of his offense for purposes of the Mandatory Victims Restitution Act is defined not only by the indictment but also by the mutual understanding of the parties. Adams pled guilty to two specific instances of filing fraudulent insurance claims, not the broader conspiracy. Even though the indictment incorporated the broad conspiracy in each of the substantive counts, the parties understood that Adams was not pleading guilty to the entire conspiracy. But the amount of restitution ordered accounted for the conspiracy as a whole. Hence, it was excessive.

OTHER DECISIONS OF NOTE:

United States v. Lee, No. 01-1629 (3rd Cir. Feb. 20, 2004): Third Circuit weighs in on a circuit split to hold that government may plant a bug in a suspect's hotel room without a warrant, if it records only when its consenting informant is in the room. The Second and Eleventh Circuits agree, but the First Circuit held to the contrary in 1975, afraid the temptation to listen in when the CI was not present would be too great.

United States v. Fell, No. 02-1638 (2nd Cir. Mar. 2, 2004): The Federal Death Penalty Act's use of relaxed standard for admission of evidence at penalty phase is not barred by **Ring v. Arizona**. The heightened reliability standard applicable in death penalty cases requires more evidence, not less. The Federal Rules of Evidence are not constitutionally mandated. The court must still exclude evidence where admission would violate the defendant's constitutional rights.

State of New Jersey v. McAllister, N.J. Super. Ct. App. Div., No. A-56221-01T4 (Feb. 5, 2004): New Jersey's constitution bestows the right to privacy in one's bank records, notwithstanding a 1976 Supreme Court decision finding no Fourth Amendment protection, the New Jersey Superior Court, Appellate Division, ruled. Therefore, a grand jury subpoena is not enough to authorize access to the records, unless it gives the customer notice and a reasonable opportunity to object. The alternative is a search warrant.

En banc Fifth Circuit holds:

POLICE MAY MAKE PROTECTIVE SWEEP OF HOME EVEN WITHOUT AN ARREST.

Reversing circuit precedent, the en banc Fifth Circuit held that a warrantless protective sweep of a house is not *per se* unconstitutional simply because it was not accompanied by an arrest. *United States v. Gould*, No. 02-30629, Mar. 24, 2004. Rather, police may conduct a cursory visual inspection if they enter the home legally and for a legitimate law enforcement purpose, and the sweep is supported by a reasonable, articulable suspicion that the area harbors a person who poses a danger to those on the scene. Furthermore, the sweep may last no longer than necessary to dispel the reasonable suspicion of danger and no longer than the police are justified in remaining on the premises.

The search in this case was triggered by a telephone tip that Gould was planning to kill two state judges. Sheriff's deputies went to Gould's trailer to talk to him. The person who answered the door, also a resident, said Gould was asleep in the bedroom. The deputies entered the trailer and walked to the bedroom. The door was open and the deputies did not see Gould inside. But they went into the bedroom anyway and looked for him under the bed and in the closets. In one closet, they found three rifles. Later, the deputies found Gould hiding outside in the woods. They arrested him, obtained his consent to search, and then seized the rifles. State charges were dismissed, but the U.S. Attorney for the Middle District of Louisiana indicted Gould for possession of a firearm by a felon. The district court granted Gould's motion to suppress and the panel affirmed on the basis of circuit precedent requiring an arrest to justify a protective sweep.

Reversing, the *en banc* court recognized that the seminal case, *Maryland v. Buie*, 494 U.S. 325 (1990), defined a protective sweep as incidental to an arrest. But *Buie* on its facts involved an arrest, so it did not address the constitutionality of searches in other circumstances. Adopting *Buie's* reasonableness test, the Court held that an arrest, while "highly relevant" to balancing interests, was not necessary. Any circumstances giving rise to a reasonable suspicion of danger would support a sweep. But the Court left open the constitutionality of a pretextual "knock and talk" undertaken for the purpose of gaining entry to do a protective sweep.

Judge Jolly dissented in part and Judges Smith, DeMoss and Stewart dissented in full. Noting the adage that "the road to hell is paved with good intentions," Judge DeMoss wrote: "In my view the gambit of getting permission to enter a citizen's home to talk to someone and then conducting a protective sweep search under the guise of sensing danger to the investigating officer will effectively eliminate the need for complying with the Fourth Amendment and at that point we will all be, literally and figuratively, on the road to hell."

RESTITUTION ORDER ABATES WHEN CLEINT DIES DURING APPEAL

CJA Panel Rep. Herb Larsen persuaded the en banc court to overrule precedent and hold that restitution orders automatically abate, along with convictions, when the defendant dies while his appeal is pending. **United States v. Parsons**, No. 01-50464 (Apr. 16, 2004) (en banc). But Larsen's client had paid part of the restitution before he died and the Court refused to order the government to return the money to the estate.

SENTENCE ENHANCEMENT FALLS FOR LACK OF EVIDENCE DRUGS WERE WITHIN SCOPE OF AGREEMENT.

Kendall Phillips pled guilty to making two drug sales to a confidential informant in front of the apartment where he lived with others. But when police arrested him, they found substantially more drugs in the living room. Over Phillips' objections, the district court used those additional drugs to enhance his sentence.

The Federal Public Defender's office was appointed to represent Phillips on appeal. We argued that regardless of whether the drugs were foreseeable to Phillips, there was no evidence that they were within the scope of his agreement. The Fifth Circuit agreed and reversed the sentence. *United States v. Phillips*, No. 03-30711 (Feb. 25, 2004) (unpublished). "The indictment, the factual basis offered in support of the plea, and the presentence report simply do not show that Phillips entered into any criminal venture with others," the Court said. "Rather, these documents show only that Phillips conducted two transactions with a confidential informant."

Career Offender Status and the 924(c) Gun Count

Under recent amendments to the Sentencing Guidelines, a defendant convicted of possessing a gun under § 924(c) in furtherance of a crime of violence or a drug trafficking offense now faces a career offender enhancement if he has two prior convictions for a crime of violence or a drug trafficking offense. Under the career offender guideline, U.S.S.G. § 4B1.1(c)(3), the guideline range after trial on a § 924(c) conviction is 360 months to LIFE. A guilty plea with full acceptance of responsibility decreases the range only to 262-327 months.

FEDERAL BAR ASSOCIATION

New Orleans Chapter

presents the

TWELFTH ANNUAL JUDGE ALVIN B. RUBIN SYMPOSIUM

An Annual Panel Discussion on Aspects of Federal Law or Federal Practice
Held As a Living Memorial To Judge Rubin's Contribution To
The Federal Jurisprudence and Legal Scholarship

TOPIC: Attorney Disqualification and Judicial Recusal: The New Frontier
Ethics and Professionalism Credit Hours (2.0 Hours Total)

PANELISTS: District Judge Kurt D. Engelhardt, U.S. District Court, Eastern District of Louisiana
Magistrate Judge Sally A. Shushan, U.S. District Court, Eastern District of Louisiana
Richard C. Stanley, Stanley, Flanagan & Reuter
Kim M. Boyle, Phelps Dunbar

MODERATORS: District Judge Sarah S. Vance, U.S. District Court, Eastern District of Louisiana
James M. Garner, Sher Garner Cahill Richter Klein McAlister & Hilbert

WEDNESDAY, MAY 5, 2004, 2:00 - 4:00 P.M.
Federal District Court, Eastern District of Louisiana
500 Poydras Street, Ceremonial Courtroom, 5th Floor

FEDERAL LAW SYMPOSIUM REGISTRATION FORM

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Message Board

Meeting with Chief Judge King

Herb Larson, our CJA Representative for the Eastern District of Louisiana, will be attending the Fifth Circuit Judicial Conference in May where he and other CJA Representatives will meet with Chief Judge Carolyn Dineen King. Contact Herb via e-mail at hlnola@aol.com with any questions, problems or concerns that you might want broached with the Chief Judge.

Moot of Capital Appellate Case

Our office will conduct a moot of United States of America v. Len Davis; Paul Hardy (No. 03-30077) on Thursday, April 29, 2004, at 11:00 a.m. Anyone wishing to participate is encouraged to do so. The oral argument in this capital case will be heard on May 4, 2004, at 9:00 a.m. in the Fifth Circuit En Banc Courtroom. We hope to add the briefs to our website.

Mass E-mails

Panel members may want to consider sending out mass e-mails to their colleagues on the panel when preparing for cases. Shaun Clarke recently utilized this method of inquiry in preparing for the cross examination of a particularly difficult expert.

New Assistant U.S. Attorneys

The United States Attorney's Office has added three new Assistant U.S. Attorneys. They are Jon Maestri, Juan Masini, and Bing Simpson.

Newsletter Articles

Any attorneys wishing to submit an article for publication in our next newsletter should forward a draft of the article to Charlotte Jarreau at charlotte_jarreau@fd.org.

Office of the Federal Public Defender
Eastern District of Louisiana
501 Magazine Street, Suite 318
New Orleans, LA 70130