THE DEFENSE *NEVER* RESTS

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RECOMMENDED CONTINUING LEGAL EDUCATION

Federal Law at the French Quarter

Texas Criminal Defense Lawyers Association
2005 Federal Law
Fall Conference

September 8 & 9, 2005
Hotel Monteleone, New Orleans
13.0 CLE hours including 1.0 Ethics

The Federal Law seminar, for the first time, is a two track seminar structured to address the needs of all Texas Practitioners, the seminar is a two track program with the overarching theme of defending the citizen accused in the Age of Terrorism. For those layers whose practice is principally in the federal courts, there are programs on representing the lawyer in federal court, the federal death penalty, Sec. 2255 challenges to sentencing in light of Booker and Fan-Fan, presenting a defense in a complex federal trial. There will be sessions for all to attend: Gerry Goldstein on Search and Seizure, Barbara Bergman of the University of New Mexico on Evidence, Stephen Wax of Portland Oregon who represented Brandon Mayfield, the lawyer accused of involvement in the Madrid Al Qaeda bombing and others.

Office of the Federal Public Defender

Eastern District of Louisiana
Annual CLE
2005

November 17 & 18, 2005
Plimsoll Club, New Orleans
13.0 CLE hours including
Professionalism and Ethics

Winning Strategies

January 19 - 21, 2006
Wydnam Hotel,
New Orleans

INSIDE

IMPORTANT REMINDER

September is the last month in the fiscal year 2005. In order to avoid a possible delay in obtaining payment of CJA vouchers, you may want to submit 2005 vouchers immediately.

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Recent Supreme Court Death Penalty Decisions

By Robert F. Barnard
Asst. Federal Public Defender
Eastern District of Louisiana

In **Rompilla v. Beard**, 125 S.Ct. 2456 (2005), the Court once more reduced the heavy burden for proving ineffective representation first enunciated in **Strickland v. Washington**, 466 U.S. 668 (1983). **Rompilla** is the most recent application of the two-part test set out in **Strickland** for determining whether a defendant received effective assistance of counsel especially in a capital case. The Court began tilting its **Strickland** standard more toward the defendant in **Williams v. Taylor**, 529 U.S. 362 (2000) and expanded on **Williams** in **Wiggins v. Smith**, 539 U.S. 510 (2003). However, no new test has been established. Instead, the Court has made clear it will hold counsel accountable by measuring his or her performance against the ABA requirements for effective assistance. Justice Marshall in his dissent in **Strickland** pointed out the shortcomings in the majority's standard for effectiveness, characterizing the test as far too malleable to have any practical application. Id at 712. The Court now is attempting to address the issues raised in his dissent.

In **Rompilla**, defense counsel ignored leads that were readily available such as the defendant's abuse of alcohol contained in a criminal case file from an earlier offense. In addition to evidence of alcoholism, the file contained records of Mr. Rompilla's childhood poverty and abuse along with his mental health history. Even though counsel engaged the services of three mental health experts, the failure to review material which would ultimately assist these professionals fell far short of the ABA standards of fully investigating any possible defenses. As most will recall, in **Strickland** the defense attorney completely failed to investigate his client's background but the Court refused to find his representation ineffective. In contrast, in **Rompilla** and **Wiggins** counsel attempted to look into some aspects of the defendants' upbringing and criminal history to obtain evidence of mitigation to present in the penalty phase. Counsel, however, ignored other promising leads.

So, a far more extensive investigation by counsel in **Rompilla** to uncover mitigating factors than was conducted in **Strickland** was held to be insufficient. In so holding the Court reversed the defendant's sentence. One significant factor both **Wiggins** and **Rompilla** shared is that there was a lack of candor by the lower courts. In **Wiggins** the government eventually conceded that reports examined by defense counsel did not contain evidence of sexual abuse suffered by the defendant as first claimed by the state. The prosecution's argument that the defense considered presenting the defendant's history of abuse in mitigation was simply untrue and the lower courts' reliance on this misinformation was given no weight by the Supreme Court. A failure to fully investigate Mr. Wiggins' background was demonstrated. Similarly, in **Rompilla** neither counsel looked at a crucial prior conviction file until trial was underway after being repeatedly alerted by the prosecution to the file's importance. Despite this error the lower courts ruled that counsel had sufficiently investigated possible mitigating evidence. The Supreme Court characterized counsels' investigation as nothing more than inattention to easily accessible leads and concluded the efforts insufficient.

Although the Supreme Court refuses to abandon the **Strickland** test, it has raised the standard as to what is "reasonably effective assistance." It now employs the ABA guidelines setting forth the obligations of defense counsel in capital cases and will reverse the death penalty when an attorney's efforts fail to comport with those guidelines. There is no indication in any of these cases that the Court plans to reformulate **Strickland** .

State Parole/Probation

If you have a client in federal custody, who is on state parole, it may be a good idea to contact the state parole officer to begin and complete parole revocation proceedings with the parole board before pleading guilty to the instant federal charge or before trial. By doing so, you will not affect the guidelines calculations as this is **PAROLE** and **not** probation. The major potential benefit is that the state may start the revocation jail time upon revocation and it would, therefore, run concurrently with any future federal time. Waiting until after a federal conviction automatically results in the revocation of state parole, and, according to LA. R.S. 15:574.10, the parole term would likely run consecutive to the new term of imprisonment. There is no guarantee that the state will start the time or run it concurrently, but early (pre-conviction) parole revocation is the best shot.

If your client has been charged with a federal crime after having been sentenced to a term of **PROBATION** in state court, and your client is in federal custody, it might be better to have your client delay any appearances in state court on the revocation of his probation. You have to keep your client out of state custody if at all possible. It is far easier to have a state court judge agree to your client doing time in federal custody, than for a federal judge to agree to anything.

If your client is convicted in federal court, the probation officer gets to decide his criminal history category in preparing the PSI. The probated state court sentence will get him one criminal history point. Being on probation when the federal crime was committed will get him two more points. If the state revokes his probation before he is sentenced in federal court and he gets a sentence of thirteen months or more in state court, he could get still another two points, for a total of way too many points. One probated sentence could be parlayed into five criminal history points.

It might be better to delay any revocation action on state probation until after your client is sentenced in federal court. That way, the state court judge might be amenable to running the state sentence concurrent to already imposed federal sentence. Remember, there is always about a six-week delay between sentencing and the trip to the federal institution. It is during this time, that it would be relatively uncomplicated to get your client back to state court for the revocation proceedings.

Judicial Independence

By Honorable Mary Ann Vial Lemmon
Federal District Court Judge
Eastern District of Louisiana

Judicial independence is in danger on many fronts. Public confidence in the judicial system is at an all-time low, with the public receiving information about the system mainly from media sources, which often are poorly informed or are seeking sensationalism. Judge-bashing has become an acceptable means of attracting public attention to some elected officials, both state and federal, irrespective of the fairness of the criticism. A contributing cause of these attacks is a misperception by some legislative and executive officials that the judicial branch is not separate, and certainly not equal.

Traditionally, many judges, in an earnest attempt to avoid any appearance of impropriety, have remained mute while under attack. As attacks have intensified, we badly need judicial response to the hostile climate. One means of responding is through judicial outreach programs to educate the public with accurate information about the judicial system. Judges and judicial officers can begin to turn public perception around by having meaningful direct contacts with schools and civic organizations and by promoting cordial relationships with the media. The media depends largely on the judiciary, for example, for enforcement of its First Amendment rights, when those rights are ignored in the context of attempts to keep secret those happenings of which the public has the right to be informed. Likewise, the judiciary depends upon the media to provide fair and accurate coverage of court proceedings and other judicial events. Clearly, better communications between the media and the courts leads to a better understanding of the other's role, problems, and needs. Surveys have shown that the public perceives judges as being in the best position to educate about the judicial system.

A more imminent threat to judicial independence involves some inter-governmental attempts at lessening the role of the third branch. This threat may best be addressed by searching for mutual understanding of each other's constitutional authority and responsibility in a tri-partite system. The first step is for judges to keep informed about the legislative and executive activities which impact the judiciary and are contrary to the interests of an independent judiciary.

In a recent editorial, American Judicature Society's publication referred to "the dismal state of interbranch relations at the federal level," and called for legislators and judges to exercise restraint in expressing frustration over the tension between the branches. There are many causes for tension between the branches. For example, impartiality is the hallmark of the judiciary, while legislators are expected to be partisan in favor of the areas that elected them or the interests that financed their election; judges simply cannot be swayed by such considerations, and often are required by law to render unpopular decisions. The judicial branch also sits in judgment over the constitutionality of the enactments of the branch that controls judicial purse strings, creating additional tensions.

Another criticism is that some judges engage in law-making functions reserved to the legislature. Certainly, such behavior would be improper, but much of that criticism is unjust. Most cases turn on issues which are not clearly controlled by positive law, and judges must decide such cases by applying the most nearly applicable law or by analogy to closely related laws. This is not law-making; this is the essence of the judicial process, but that process frequently is misunderstood.

Perhaps the greatest area of judicial criticism, and one of the most contentious issues of the day, involves the exercise of judicial discretion, particularly in imposing criminal sentences. The legislative branch clearly has the constitutional power to decide the sentencing range for one who violates a criminal statute enacted by the legislature. But for each crime and each criminal, individual considerations are involved that bear on the sentencing decision, and these factors simply cannot be controlled by general legislation. The legislative branch has appropriately taken many such factors into consideration in enacting sentencing guidelines that narrow the sentencing range, but the judge who presides over the case must exercise individual discretion in weighing guideline factors.

Tension between the legislative and judicial branches is not new, and mutual respect for constitutional powers demands that both branches should pursue means of relieving such tensions. The focus of the National Conference of Federal Trial Judges for 2004-2005 is to promote an open relationship between Congress and the Federal Judiciary. To this end, the Congressional Affairs Committee of the conference has been formed. The Conference is reaching out to entities which have undertaken in the past, and now, to preserve judicial independence. The American Judicature Society has been a staunch advocate of judicial independence. Their creation of the High School Curriculum on the Courts project, funded with grants from the "Foundation for the Advancement of Independent Judiciary and the Rules of Law," to improve and enhance students understanding and appreciation of the justice system, is further evidence of AJS's commitment.

At annual meeting in Atlanta this month, the House of Delegates of the American Bar Association adopted a resolution directed to the current crisis in federal court funding, urging Congress to fund the courts sufficiently to enable the courts to fulfill their separate constitutional and statutory duties. (I am proud that the Louisiana State Bar Association was a co-sponsor of the resolution.) The Long Range Plan for the Federal Courts of the Judicial Conference of the United States suggests that positive communication and coordination between the judicial branch and the executive and legislative branches should be enhanced. One specific recommendation is that judges invite members of Congress to visit their courts and to discuss the work of the judiciary and the justice system generally.

The ABA Standing Committee on Federal Judicial Improvements has monitored federal courts and made constructive suggestions for improvements. In previous years, it formed the Commission on Separation of Powers and Judicial Independence to "respond to the recent attacks on the Judiciary and to deliver the overriding message that the vitality of our

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democracy is rooted in an independent judiciary." One of their current initiatives involves dialogue between Congress and the Courts. Hopefully, our conference can work side by side with the standing committee on this project.

Prominent persons and groups have called for inter-branch dialogue. Justice Stephen Bryer has recently suggested "reviving programs that once provided opportunities for members of congress and federal judges to talk to each other." Bipartisan groups, such as Justice At Stake, are undertaking a campaign to keep politics and special interests out of the courtroom.

Senator Orin Hatch demonstrated his sensitivity to judge-related issues in urging a bipartisan solution to the sentencing dilemma caused by the Blakely decision. Senator Patrick Leahy has expressed his deep concerns about the impact of Blakely, and his appreciation of the difficulty of the unanswered questions presented. He stressed his respect for the decision of the Supreme Court, and his understanding of the principles of the 1984 Sentencing Reform Act to narrow disparities in sentencing, "while leaving judges enough discretion to do justice in the particular circumstances of each individual case."

It is encouraging to note the formation of the bipartisan Congressional Caucus on the Judicial Branch, headed by Representative Judy Biggert (R-Illinois) and Representative Adam Schiff (D-California). Their stated purpose is to "forge a closer working relationship with the judicial branch . . . on issues that come before Congress that directly impact the Judiciary."

We welcome the invitation for interaction and offer our participation in this timely effort. Hopefully, this undertaking will lead to a mutual understanding of the necessity for opening lines of communications between Congress and the judiciary to protect the constitutionally mandated separation of powers and the mutual respect implicit in that mandate.

Secure CJA Panel Website

Attention all CJA Panel Members, if you haven't been to the Public Defenders secure CJA Panel section of our website, then you are missing out on some very valuable materials that are being provided for you. All panel members are given access to this area by going to www.federaldefender.net, selecting the "CJA PANEL" button and logging on to the secure side of our website. Your logon credentials are

Username: 1st initial of 1st name + full last name
Password: last 4 digits of social security number

Documents available include CJA forms, sample motions,

Please take some time and surf around in this secure section, that is provided only to our panel members, and see all of the tools and helps that are available to you. If you have any questions or comments, please contact me, Lamont P. Lewis at 504-589-7930 for help.

PACER, CM/ECFRegistration

Due to the ever-increasing technical changes in the courts, the following is an informational guideline for PACER and CM/ECF registration.

The process includes two steps that involve setting up a PACER account and registering with CM/ECF to receive e-mail notifications.

It is possible to register for a PACER account on-line at http://pacer.psc.uscourts.gov/ or call the PACER Service Center at (800) 676-6856 or (210) 301-6440. When registering on-line, it is imperative to type **CJA** (in caps) before the name of the person registering in the Contact Person section. Also under the section for Firm Name, use the same information as Contact Person. Example, ***CJA Panel Member*** would be used for Contact Person and Firm Name.

Once you have filled in all information, click the SUBMIT button at the bottom of the screen to complete the registration process.

To register for CM/ECF, go to http://www.laed.uscourts.gov/ and click on the **CLICK HERE To Consent for E-Mail** button and follow the on-line instructions to register for electronic notifications.

FY 2004 Costs of Incarceration and Supervision

	Imprisonment In Bureau of Prisons Facility*	Community Correction Centers*	Supervision by Probation Officers**
Daily	$63.57	$55.07	$9.46
Monthly	$1,933.80	$1,675.23	$287.73
Annually	$23,205.59	$20,102.75	$3,452.72

*Costs provided by the Federal Bureau of Prisons

**Costs provided by the Office of Probation and Pretrial Services

CASE DEVELOPMENTS

APPEAL

United States v. Pineiro, No. 03-30437 (5th Cir. May 20, 2005): Apprendi objection preserved Booker error because sentencing challenge based on same constitutional issue was addressed by both cases.

BATSON

Miller-El v. Dretke, No. 03-9659 (U.S. June 13, 2005): This is the second time that the Supreme Court reversed the Fifth Circuit on this Batson habeas petition. The first time, it held that the Fifth Circuit should have granted a COA. This time, it held that the state court had acted unreasonably in denying relief on the claim. Miller-El's lawyers presented extensive evidence of discriminatory use of peremptories by the state. Prosecutors justified strikes of African-American jurors on grounds that also applied to white jurors who were not stricken. They also engaged in disparate questioning, using lurid language when questioning black venirepersons about possible opposition to the death penalty, but using more neutral language when questioning whites.

Johnson v. California, No. 04-6964 (U.S. June 13, 2005): A party raising a Batson challenge need not prove that a strike was "more likely than not" race-based in order to make a prima facie case that shifts the burden to the other party to articulate a neutral reason. It is enough to point to facts and circumstances that "raise an inference" of discrimination. Only at the third stage of the inquiry must the party making the Batson challenge prove discrimination by a preponderance of evidence.

CONFESSIONS

United States v. Cardenas, No. 04-20449 (5th Cir. May 20, 2005): Fifth Circuit reverses district court's suppression of defendant's statements. Finding that Miranda waiver was not signed until after statement was made does not undercut testimony that verbal warnings were given earlier. Fact that defendant waived her initial appearance, even if coercive, does not warrant relief because statements were made *before* appearance was to occur. Presence of four male interrogators questioning a female detainee is not inherently coercive, nor is the use of handcuffs during the questioning. Accusing the defendant of lying in the first statement is not coercive. Simultaneous recording is not necessary to comply with the Fifth Amendment protection against self-incrimination; failure to simultaneously record goes only to the weight of the confession.

DEATH

Deck v. Missouri, No. 04-5293 (U.S. May 23, 2005): Visibly shackling a convicted defendant during the penalty phase of a capital case is unconstitutional unless justified by an essential statement interest such as courtroom security, specific to the particular defendant. Shackling violates the presumption of innocence and the related fairness of fact-finding, interferes with ability to help counsel and affronts the dignity of the proceeding.

FOURTH AMENDMENT

United States v. Jaquez, No. 04-10978 (Aug. 15, 2005): The Fifth Circuit reversed the denial of a motion to suppress for lack of reasonable suspicion to justify the vehicle stop leading to the discovery of contraband. The officer had received a radio call that a "red vehicle" was involved with the firing of gun shots in a high crime neighborhood. The officer stopped the defendant because he was driving a red vehicle in the same vicinity. Upon her request, he consented to a search that turned up a handgun that he possessed illegally. The Court held that the bare similarity of vehicle color did not create reasonable suspicion for the stop. Further, the defendant's consent did not cure the taint of the unlawful stop.

GUILTY PLEAS

United States v. Reasor, No. 03-50478 (5th Cir. July 21, 2005): Fifth Circuit reverses guilty plea to possession of forged securities for lack of a factual basis as to interstate commerce element of the offense. The securities belonged to a church and the factual basis did not specify how the church was an organization that operates in or whose activities affect interstate commerce. On appeal, the government argued for the first time that the forged securities were those of a bank, but this argument would work a constructive amendment of the indictment, which the Fifth Circuit would not allow.

HABEAS

Dodd v. United States, No. 04-5286 (U.S. June 20, 2005): Under 28 U.S.C. § 2255, federal defendants generally have one year from the date their conviction became final to file a motion for post-conviction relief. If the § 2255 motion is based on a new Supreme Court case, however, the one year begins to run from the date of the new decision. The statute actually states that the

limitation period begins to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." However, the Supreme Court sometimes does not make a case retroactively applicable on collateral review until more than a year after it originally recognized the right. The defendant argued that the cause of action did not accrue until the latter date, which therefore should also start the running of the limitations period. The Supreme Court rejected the argument based on the plain language of the statute, even though it might require § 2255 motions to be filed before the defendant has a claim.

ILLEGAL RE-ENTRY

United States v. Sanchez-Villalobos, No. 04-50732 (5th Cir. June 7, 2005): The defendant's prior Colorado conviction for possession of codeine is an aggravated felony for purposes of the enhanced offense level upon conviction of illegal re-entry. A drug trafficking crime is an aggravated felony if it is punishable under the federal Controlled Substances Act (which possession of codeine is) and is a felony under either state or federal law. Although Colorado characterizes possession of codeine as a misdemeanor, it is punishable by more than one year in prison. 21 U.S.C. § 802(13) defines "felony" by the classification given the offense by the jurisdiction that prosecuted it, but 21 U.S.C. § 802(44) defines "felony drug offense" by the length of the sentence. The Fifth Circuit decided to use the § 802(44) definition; otherwise, Congress would have had no reason to put it in the statute. Since the Colorado conviction was punishable by more than a year in prison, it satisfied the second prerequisite of the Guideline definition and application of the enhanced offense level was proper. Alternatively, the Fifth Circuit said the possession offense was punishable as a felony under federal law because the defendant had an earlier conviction for possession of marijuana, which could have triggered the felony provisions of 21 U.S.C. § 844(a).

INEFFECTIVE ASSISTANCE OF COUNSEL

Rompilla v. Beard, No. 04-5462 (U.S. June 20, 2005): Counsel was ineffective at penalty phase of capital case for failing to obtain and review the public court file on a prior conviction that the prosecutor had said he planned to use in aggravation. Had they done so, they would have gotten leads for a mitigation case. This case was different than Wiggins v. Smith in that counsel did not have leads that they failed to pursue. But O'Connor's swing vote concurrence lists three factors that made the failure to review the prior conviction file unreasonable. The lawyers knew that the prior conviction would be at the heart of the prosecution's penalty phase case; the use of the prior conviction threatened to eviscerate the defense's primary mitigation argument of residual doubt; and the decision not to obtain the file was not the result of an informed tactical decision about how the lawyers' time would best be spent.

United States v. Herrara, No. 04-50633 (5th Cir. June 10, 2005): The Fifth Circuit orders a hearing on Herrara's ineffective assistance claim, raised in a § 2255 motion. Herrara claimed that his lawyer incorrectly advised him to reject the government's plea offer of a 48-month maximum because the maximum Guideline sentence he faced was 51 months. In fact, Herrara faced a sentencing range of 78 to 97 months. "One of the most important duties of an attorney representing a criminal defendant is advising the defendant about whether he should plead guilty. . . Apprising a defendant about his exposure under the sentencing guidelines is necessarily part of this process." Without such information, the defendant cannot make an intelligent choice whether to accept a plea offer. The 27-month error in Herrara's lawyers's advice constitutes prejudice. At a hearing, the Court should take evidence on whether the lawyer in fact gave Herrara erroneous advice.

Miller v. Dretke, No. 04-40419 (5th Cir. July 28, 2005): Trial counsel was ineffective for failing to investigate his client's mental disabilities in connection with the penalty phase of a non-capital state trial and his deficiency prejudiced the defendant, entitling her to sentencing relief under § 2254. Before the penalty phase started, the lawyer knew that the defendant suffered mental and emotional injuries as a result of a car accident. Indeed, he called the defendant and her ex-husband to so testify. But he did not ask the defendant for the names of her doctors until preparing a motion for a new trial. His explanation was that he thought the defendant would accept a plea bargain for deferred adjudication. This is not strategy. Had the lawyer contacted the doctors, he would have found their testimony would have been helpful. The prosecutor was able to discredit the testimony of the defendant and her ex-husband as self-serving. But had the doctors testified, the jury might have perceived the defendant as a sick person.

JURY INSTRUCTIONS

Arthur Anderson v. United States, No. 04-368 (U.S. Apr. 27, 2005): After shredding Enron documents, auditor Arthur Anderson was convicted of violating 18 U.S.C. § 1512(b)(2)(A) and (B), which prohibits "knowingly . . . corruptly persuad[ing] another person" to withhold a document from an official proceeding or to destroy an object with intent to impair its availability for use in an official proceeding. The Fifth Circuit affirmed the conviction but the Supreme Court reversed due to faulty jury instructions. "The jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing," the Court said. They told the jury that good faith was not a defense and diluted the meaning of "corruptly" to cover innocent conduct. They also omitted the requirement of a nexus with a particular proceeding. While a particular proceeding need not be pending, the defendant must at least contemplate a particular proceeding in which the documents might be material.

JUROR MISCONDUCT

Brooks v. Dretke, No. 04-70023 (5th Cir. July 20, 2005): The Fifth Circuit grants relief from a death sentence in a § 2254 proceeding on the basis of implied juror bias. One of the jurors was arrested on his way into the courthouse for carrying a firearm in his briefcase. While sitting through the penalty phase, he did not know whether the DA would prosecute and send him to jail. This was the same DA who was seeking prosecuting the capital case. The juror's future was even more in the hands of that DA than it would have been had he been a DA employee. The juror's assurances of impartiality during post-incident questioning by the judge did not cure the problem.

REVOCATION OF SUPERVISED RELEASE

United States v. Spraglin, Nos. 04-51331, 04-31332 (5th Cir. July 21, 2005): A district court may revoke supervised release based on a state court conviction that is pending on appeal. The conviction suffices to prove by a preponderance of evidence that the defendant did not comply with the terms of supervised release.

SENTENCING

United States v. Scroggins, No. 03-30481 (5th Cir. June 6, 2005): In his original appeal, the Fifth Circuit vacated Scroggins's sentence due to inconsistencies in the evidence about drug quantity. However, it rejected the claim, first advanced in a supplemental brief, that all the enhancements were unconstitutional under *Blakely v. Washington*. The Supreme Court granted cert., vacated and remanded in light of *Booker*. On remand, the Fifth Circuit rejected Scroggins's ex post facto argument that he could only be sentenced on the basis of facts found by the jury. Rather, the Court said Justice Breyer's remedial opinion applied in full. The Fifth Circuit also rejected the government's effort to prevent reconsideration of the enhancements for leadership role and obstruction of justice. There was only a single sentence for a single offense. That sentence had been set aside on a pre-*Booker* basis. Resentencing should occur under the Breyer opinion in *Booker*. In formulating a new sentence, the court was free to reconsider all the prior enhancements.

United States v. Pineiro, No. 03-30437 (5th Cir. May 20, 2005): Apprendi objection preserved Booker error because sentencing challenge based on same constitutional issue addressed by both cases. Government fails to prove error was harmless beyond a reasonable doubt. To accept the government's argument – that the district court failed to indicate it would impose a different sentence but for the mandatory nature of the Guidelines – would shift the burden of proof to the defendant.

United States v. Garza-Lopez, No. 03-41750 (5th Cir. May 19, 2005): District court may not rely on the PSI's factual description of a prior conviction in deciding whether it is a "drug trafficking crime" for purposes of the 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(i). Doing so would contravene Shepard. Statutory definition of California offense of transportation/sale of a controlled substance was broader than the definition of "drug trafficking offense" under § 2L1.2, and charging instrument was not before the court. Therefore, the court erred in imposing the enhancement. The error was not harmless and should be corrected under plain error review because the enhanced range did not overlap with the correct range, so the error resulted in a greater sentence.

United States v. Inman, No. 04-10136 (5th Cir. June 7, 2005): A defendant convicted of using an unauthorized access device can be required to pay restitution only for losses that occurred within the temporal scope of the indictment. Where the offense of conviction is a scheme, the MVRA authorizes restitution for actions pursuant to that scheme. But still, restitution for the underlying scheme is limited to temporal scope of the indictment.

TRIAL

United States v. Walker, No. 04-50455 (5th Cir. May 27, 2005): The district court did not abuse its discretion in refusing to admit videotaped police interview with a co-defendant that exculpated the defendant. The defendant was charged with possession with intent to distribute crack cocaine that he tossed into his hotel room after police tried to stop him in the parking lot. The co-defendant was in the hotel room and claimed she saw no cocaine. The defendant invoked the residual hearsay exception, arguing that the statement was reliable because it was given to the police, subject to their cross-examination, and it did not contradict her previous statements. The Fifth Circuit, however, found that the co-defendant was not under oath and had an incentive to lie in that she was facing criminal charges herself. She disappeared before trial, confirming her untrustworthiness. Furthermore, "the fact is . . . she WAS in a room with a lot of cocaine."

UNAUTHORIZED ACCESS DEVICES

United States v. Inman, No. 04-10136 (5th Cir. June 7, 2005): Using a company credit card in a fraudulent manner is obtaining a credit card with intent to defraud, where the defendant set up the fraud scheme before obtaining the card. Therefore, it is illegal under 18 U.S.C. § 1029(a). So too is using an authorized card for unauthorized purposes.

STATE SUPREME COURT CASES

Boyle v. State of Wyoming, No. 04-125, 2005 WL 1771001 (Wyo. July 28, 2005):

A highway patrol officer stopped Kevin O'Boyle for traveling 79 mph in a 75 mph zone. O'Boyle was driving a rental car in his daughter's name. While waiting for the dispatcher to do a background check, the officer asked O'Boyle over 30 questions, ranging from his travel plans to his employment history to the price of airfare from San Francisco to Boston, where his son was in college.

The dispatcher advised that O'Boyle had prior convictions but none were for violent or drug-related offenses. The officer gave O'Boyle's documents back to him and told him to have a safe trip. But then he asked O'Boyle if he could ask a few more questions. O'Boyle acquiesced and the officer posed an additional 30 questions, including the name of the mascot of his son's college. Ultimately, O'Boyle consented to a search of the car, which revealed five pounds of marijuana.

The Wyoming Supreme Court ordered the marijuana suppressed on state constitutional grounds. It held the detention unreasonable and the ensuing consent involuntary. "Questioning during a traffic stop must be limited to the purpose of the stop and may not be extended unreasonably beyond the scope of the stop absent valid consent, a reasonable suspicion of other illegal activity, or officer safety concerns." Concurring, Justice Voigt said such interrogations were for drug interdiction purposes, unrelated to the traffic violation that occasioned the stop, and called opinions that did not acknowledge this "intellectually dishonest."

State of Washington v. Brown, Nos. 75635-0, 76195-7, 2005 WL 1829979 (Wash. Aug. 4, 2005):

This is another traffic stop case decided on state constitutional grounds. A Vancouver police officer pulled over a station wagon displaying an Oregon trip permit which the officer thought was illegal. The defendant, Byron Lee Brown, was a passenger in the car. After taking the driver's license, the officer asked Brown for his name, birth date, and residence. Brown gave him a fake name. When a records check exposed the lie, the officer asked Brown for ID. Brown said he had none on him. The officer asked to check Brown's pockets, and Brown acquiesced. The search revealed a palm pilot. Inside the palm pilot was a credit card bearing the name of Tim W. Cross. The officer called the credit card company, which confirmed that the credit card was forged. Brown was arrested.

The Washington Supreme Court ordered the evidence suppressed. It held that Brown was seized when the officer asked Brown to identify himself for investigative purposes. At that point, the officer lacked reasonable suspicion that Brown had committed a crime. The state claimed the officer had reasonable suspicion that the station wagon had been stolen. The court disagreed. Merely driving a borrowed vehicle that *may* have an expired plate or *may* have just been sold does not raise a reasonable suspicion that the vehicle was stolen, particular since there had been no report of a theft.

State of Washington v. Dubose, 699 N.W. 2d 582 (Wis. July 14, 2005):

This case is about eyewitness identification. It too was decided under the state constitution. Taking note of empirical studies about the unreliability of eyewitness identification, the Wisconsin Supreme Court returned to the Warren Court test for the admissibility of identifications made at a show-up. In **Stovall v. Denno** (1967), the Supreme Court held that one-on-one show-ups were so inherently suggestive that resultant identifications must be suppressed unless the circumstances made the use of a show-up (rather than a line-up) necessary. In later cases, the Supreme Court added another prerequisite for suppression: a likelihood of misidentification. "Studies have now shown that approach is unsound," the Wisconsin Supreme Court said, "since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable." Accordingly, the court went back to the **Stovall v. Denno** rule: show-up identifications will be excluded from evidence unless necessary. A show-up is not necessary unless the police lacked probable cause to make an arrest, or exigent circumstances prevented a line-up or photo array.

MESSAGE Board

■ As you know, the cost of service of subpoenas is not a reimbursable expense. The U.S. Marshals are responsible for service of all subpoenas at no cost in any CJA case and will do so if timely submitted. These requests for service can be filed under seal.

■ Please remember that for capital cases, monthly interim bills are due on or before the 20th day of the following month that expenses incur. This procedure insures that payments are made in a timely manner.

■ The latest version of the U.S. Sentencing Guidelines Manual can be downloaded (in its various parts) for free on the Sentencing Commission's web site, www.ussc.gov . Or, you can purchase it through West Group by calling (800) 328-9352; the cost is approximately $25. If you prefer the official version, you can order it through the Government Printing Office, bookstore.gpo.gov , for $55.

■ The Bureau of Justice Statistics: http://www.ojp.usdoj.gov/bjs/

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