The Defense Never Rests

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FIFTH CIRCUIT JUDICIAL CONFERENCE

As you may remember, Chief Judge Carolyn Dineen King invited the CJA Panel Representatives to the Fifth Circuit Judicial Conference held in April. I'm happy to report that most of the Reps took time out of their schedules and expended a substantial amount of their own money to attend the conference on behalf of the CJA panel attorneys they represent.

At the conference, the Chief Judge met personally with the reps to discuss CJA issues, especially federal court's efforts to effect another increase of the out-of-court, as well as in-court CJA fees. Several of the CJA reps were invited to attend and meet Justice Antonin Scalia at the party which he hosted.

Our own CJA Representative, Herb Larson, was nominated to the DSAG (Defender Services Advisory Group) committee. I'm sad to report, however, that he has made known his desire to step down from both the DSAG committee and the position of CJA Representative for the Eastern District of Louisiana in 2003. You may want to give some thought to his replacement.

MAC THE JUDGE TAKES SENIOR STATUS

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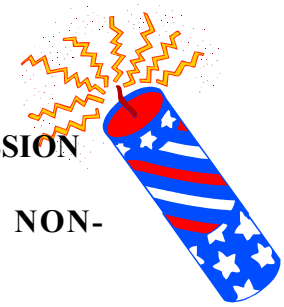
The Honorable A.J. McNamara recently stepped down as Chief Judge for the Eastern District. Upon reaching his 65th birthday, Judge Mac, with 15 years of service as a Judge, chose to take Senior Status. The court family showed their appreciation by giving him a birthday bash on May 31st where he passed the gavel to Judge Edith Brown Clement. With her pending nomination to the Fifth Circuit, however, it is unknown how long she will be our Chief Judge. Judge Ginger Berrigan, is on deck for that position if for any reason Judge Clement cannot serve out her term.

When a judge takes senior status, the judge can decide whether or not to continue taking cases. That decision drives their entitlement to staff. If the senior judge simply reduces caseload and still maintains ½ of the regular caseload, the judge is entitled to a full staff (2 law clerks and one secretary); ¼ and the judge loses a law clerk. It appears that Judge Mac will keep ¼ of his regular caseload. Judge McNamara is known affectionately for, among many other things, implementing "dress-down Fridays" around the court. He will be greatly missed as Chief Judge.

With Judge McNamara taking senior status, there are now two vacancies in the Eastern District and if Judge Clement goes to the Fifth Circuit, there will be three.

FELON-IN-POSSESSION OF A FIREARM: A CRIME OF NON-VIOLENCE



The Fifth Circuit has never decided whether a felon-in-possession of a firearm is a crime of violence under the Bail Reform Act. Only three circuits have addressed the issue. The D.C. and Sixth Circuits held that mere possession of a firearm by a felon is not a crime of violence. *See* **United States v. Singleton**, 182 F.3d 7 (D.C. Cir. 1999) and **United States v. Hardon**, 149 F.3d 1185, No. 98-1625, 1998 WL 320945 (6th Cir. June 4, 1998) (unpublished opinion). The Second Circuit has held that it is. *See* **United States v. Dillard**, 214 F. 3d 88 (2d Cir. 2000). Courts are concerned that since felons are barred from possessing firearms, their disregard for this bar creates a constant, on-going threat that they will use the firearms.

Although the Fifth Circuit has not yet spoken on the issue, Judge Clement in the Eastern District of Louisiana held that for purposes of the Bail Reform Act, a felon-in-possession of a firearm charged under §922(g) is a crime of violence. *See* **United States v. Kirkland**, No. Crim. A. 99-143, 1999 WL 329702 (E.D.La. May 21, 1999). The issue is most often battled out in the district court. The United States Supreme Court recently denied certiorari to a Second Circuit challenge to that circuit's own ruling in **Dillard**. Because the defendant will usually moot the issue by pleading to the felon-in-possession of a firearm charge, the issue does not routinely reach appellate review.

The Bail Reform Act defines a "crime of violence" as:

> (A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
> (C) any felony under chapter 109A [aggravated sexual abuse] 110 [sexual exploitation of children], or 117 [sexual abuse].
>
> 18 U.S.C. §3156(a)(4).

Courts have used a categorical approach to examine whether a violation of §922(g) is a crime of violence for the purpose of 18 U.S.C. §3142(f). That approach requires the court to look at the statutory nature of the offense rather than examining the specific factual circumstances that caused the defendant to be charged. The statutory requirements of §922(g)(1) provide that it is (a) "unlawful for any person who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year . . . to (b) receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." A convicted felon need only be in possession of a firearm. The underlying reason for the possession is irrelevant. The nature of prior offenses is equally irrelevant. Therefore, possession of a firearm does not imply a categorically violent offense and a defendant charged as a felon-in-possession of a firearm is generally entitled to reasonable conditions of release if none of the other factors are applicable.

MISSISSIPPI
FEDERAL PUBLIC DEFENDER POSITION CREATED

Applications are now being accepted for the newly-created position of Federal Public Defender for the Southern District of Mississippi. The Federal Public Defender is appointed by the U.S. Court of Appeals for the Fifth Circuit. The term of appointment (and reappointment) is four years. The office will be headquartered in Jackson, Mississippi, with a branch in Biloxi, Mississippi.

Those interested in applying should write to Gregory A. Nussel, Circuit Executive, U.S. Court of Appeals, Fifth Circuit, 600 Camp Street, Room 300, new Orleans, Louisiana 70130, for the selection procedures and an application form. Alternatively, these materials are available at www.ca5.uscourts.gov. The deadline for filing completed applications is **August 15, 2001.**

2001 EDITION OF *DEFENDING A FEDERAL CRIMINAL CASE* NOW AVAILABLE

In grateful appreciation to our panel members, we now have the 2001 Edition of *Defending a Federal Criminal Case* published by the Federal Defenders of San Diego, Inc., along with the *Practice Guide* published by the Federal Defenders of Eastern Washington and Idaho, free of charge. Previous editions of these books have been enormously popular with the panel. Defender Services Division Training Branch has provided us with fifty book sets and forty editions on compact discs. Because of the limited number of book sets and CDs, they are available to all panel members on a first come, first served basis. Only one book set or CD per customer. In order to receive a book set or CD, please come by our office and see our CJA Panel Administrator, Barbara Daigle. You must sign for receipt of the book set or CD. We ask that if you are computer literate, please take a CD so as those who are not can have the hard copy. Mississippi panel members, please note that the book set or CD is available through your CJA Panel Representative:

Southern District of Mississippi:
Dennis Joiner - 601-824-3211
Northern District of Mississippi:
Ronald Lewis - 662-234-0766

CLE OPPORTUNITIES

The Sixth Annual National Federal Habeas Corpus Seminar will take place August 9-12, 2001 in Nashville, Tennessee. Space is limited. If you are interested in attending, contact Merle Freedman of the Administrative Office of the United States Courts at 202-502-3167.

Also, don't forget our annual CLE seminar that will be held at the Plimsoll Club on November 1st and 2nd, 2001. Stay tuned for more details!

WELCOME TO OUR NEWEST CJA PANEL MEMBERS

We would like to extend a warm welcome to our newest additions to the CJA Panel:

Sally Fleming, a former panel member who has recently returned to the solo practice of law;

Nicholas Trenticosta, the former director of the Death Penalty Resource Center, who has extensive experience in the area of federal post-conviction death penalty litigation;

Pauline Hardin, a partner at Jones Walker and a former First Assistant United States Attorney and Chief of the Criminal Division in the Eastern District of Louisiana, who specializes in white-collar crime;

Gina Recasner, partner and wife of panel member George Chaney, and former judicial clerk for the central staff of the Minnesota Court of Appeals, who specializes in appellate work; and

Michael Fawer, famous in song and legend, who has represented many of our state officials.

We are constantly trying to make additions to the panel which will enhance the quality of representation afforded our clients. We hope that you will enjoy working with them.

TO DETAIN OR NOT TO DETAIN, THAT IS THE QUESTION (DON'T LEAVE THE ANSWER TO THE GOVERNMENT)

The purpose of a detention hearing is to determine whether conditions exist that will reasonably assure the appearance of the defendant at trial and the safety of any other persons and the community. Defense counsel should be vigilant about motions for pre-trial detention hearings and insure that the motion is being properly brought. There are too many clients ordered detained. Nationally, only 2% of people released on bond fail to appear for trial. With such a reduced chance of nonappearance, risk of flight is historically unlikely. At least one of the threshold requirements of 18 U.S.C. §3142(f) must be present in order for the government to move for detention. Under the Bail Reform Act, if none of these requirements are met, there is no basis for the detention hearing. A nexus must exist between the charge and the request for detention. If a nexus does not exist, the felon may not be detained unless the defendant is a risk of flight or will obstruct justice. Otherwise, danger to the community is not a viable reason to request detention.

The government can only move for a detention hearing when the case involves:

(1) a crime of violence;
(2) an offense for which the maximum sentence is life imprisonment or death;
(3) a drug offense carrying a maximum term of imprisonment of ten years or more;
(4) any felony committed after the person has been convicted of two or more of the above offenses (state or federal);
(5) a serious risk of flight; or
(6) a serious risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to do so to a prospective witness or juror.

The burden is on the government to prove that one of the six factors exist. If the case does not involve a crime or circumstance set out above, the defendant may not be detained even if the judge finds him to be a danger to the community. In **United States v. Byrd**, 969 F.2d 106, 110 (5th Cir. 1992), the Fifth Circuit held that "a detention hearing can only be held in a case that involves a crime or circumstance set out in section 3142(f) of the Act. ... [t]herefore, the fact that [a felon] may pose a threat to the community is not, standing alone, a sufficient basis to detain him before conviction, his detention is not authorized by the Act." The Fifth Circuit is in agreement with the First and Third Circuits. *See* **United States v. Ploof**, 851 F.2d 7, 9-11 (1st Cir. 1988) and **United States v. Himler**, 797 F.2d 156, 160 (3rd Cir. 1986).

Under 18 U.S.C. §3142(e), if the judge orders pre-trial detention, a rebuttable presumption arises that no conditions will reasonably assure the safety of other persons and the community. Any evidence favorable to the defendant may rebut the presumption, including evidence of family and employment ties. Proof that the charge is not listed under §3142(f) can also serve to overturn detention.

A challenge to the presumption that a 18 U.S.C. §922(g) (felon in possession of a firearm) violation is a crime of violence has important ramifications for motions brought by the government for pre-trial detention hearings. Defense lawyers may challenge motions brought under §3142(f)(1)(A) when a crime of violence has not been charged and the remaining factors have not been met. Under **Byrd**, a ruling that a defendant be detained based solely on a determination that he is a danger to the community is improper unless the defendant is charged with a crime of violence or one of the other 5 crimes or circumstances listed in §3142(f)(1).

AND SPEAKING OF DETENTION...

DO YOU KNOW THE COST OF INCARCERATION AND SUPERVISION?***

Federal Prison Facilities		Community Correction Centers		Supervision	
Daily	$ 59.02	**Daily**	$ 52.24	**Daily**	$ 8.00
Monthly	$ 1,800.11	**Monthly**	$ 1,593.32	**Monthly**	$ 243.98
Annually	$ 21,601.32	**Annually**	$ 19,119.84	**Annually**	$ 2,927.82

***Administrative Office of the United States Courts, May 31, 2001

ADMISSION OF INTERNET-BASED DOCUMENTS AT TRIAL

Panel attorney George Chaney is steering evidence from the Information Superhighway directly into the courtroom. Recently, in his defense of Sidney Joseph before Judge Clement, Chaney successfully introduced into evidence hard copies of several documents generated from electronic Internet images which contained photographs of prop firearms used in theatrical settings. Overcoming an initial government objection regarding a lack of proper foundation, Judge Clement admitted the Internet-based documents for use in cross-examination of the government's firearms expert. Only after the expert erroneously identified these items as photographs of genuine firearms, did Chaney reveal that they were photos of prop guns. Chaney was thus able to argue in closing that if a firearms expert could be so easily mistaken, the government's photographs of the perpetrator depicting what appeared to be the defendant holding a .38 Smith & Wesson was all the more suspect.

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Key evidentiary rules potentially pertinent to this issue are Fed. R. Evid. 803(6) regarding hearsay exception for business records, Fed. R. Evid. 901regarding authentication of documents and Fed. R. Evid. 1001 and 1003, regarding admission of electronically re-recorded versions of original documents. For further background on introducing Internet-generated documents, see Dieseth, Paul, *The Use of Document Depositories and the Internet in Large Scale and Multi-jurisdictional Products Liability Litigation*, 27 Wm. Mitchell L. Rev. 615, 625 (2000).

Kudos to George Chaney for using the Net to blaze the trail into the 21st century courtroom.

YOU DON'T KNOW WHAT YOU DON'T KNOW

We need your e-mail address so we can send you information hot off the press! Last month we e-mailed a synopsis of all Supreme Court writ grants and opinions for this term and a wonderful compilation of reasons for downward departures entitled *88 Easy Reasons for Downward Departure* to our panel members. If you have not received these e-mails from our office, it means that we don't have your correct e-mail address. Give us a call with your address so that you won't miss out on future updates.

ASSISTANCE FOR DETAINED COLOMBIAN NATIONALS

It is the official duty of the Consul General of Colombia in New Orleans to make a monthly visit, accompanied by one of the lawyers representing the Consulate, to an institutional facility within this jurisdiction (Louisiana, Alabama, Arkansas and Mississippi) to meet with Colombian Citizen prisoners. This courtesy visit is to assure that Colombian prisoners are not being abused or mistreated while in prison, as well as to facilitate communications between the prisoner and his home country. Consul will also, at a prisoner's request, contact his/her lawyer to ascertain the status of a case or to offer whatever other services the Colombian Consulate may be able to provide.

If you become aware of Colombian nationals who are detained in any jails, state or federal, within your jurisdiction, the Consul of Colombia in New Orleans would appreciate knowing so that he or one of the Colombian Consulate's attorneys, Maria Stephenson or Cathy Chavarri at (504) 523-6496, Stephenson, Matthews & Chavarri, L.L.C., 2305 World Trade Center, New Orleans, Louisiana 70130, may make an official visit with the Colombian national.

CHANGES IN U.S. ATTORNEY'S OFFICE

On April 20, 2001, Jim Letten became the Acting United States Attorney. Recently the Chief of the Criminal Division, Walter Becker, tendered his resignation. He was replaced by Jan Mann. Mike Magner is now the Acting Strike Force Unit Supervisor. Sal Perricone is the Acting Drug and Violent Crime Unit Supervisor.

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CHANGES IN U.S. MARSHAL'S OFFICE

Charles Serio, the U.S. Marshal for the Eastern District of Louisiana recently resigned his position. The selection of the next U.S. Marshal has not yet been made. In addition, two supervisors are making lateral moves: Herman Brewer is relocating to Greenville, North Carolina and Ron Gibbs is going to Nashville, Tennessee. Dana Dickson is now the Deputy Chief.