



# The Defense Never Rests

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## *Panel Attorneys Recognized for Excellence*

### Denny LeBoeuf Receives NLADA Award

In March, CJA panel member Denny LeBoeuf was presented with the Life in the Balance Achievement Award. The Award, granted by the National Legal Aid and Defender Association, recognizes an individual whose career has exemplified the dedication, skill, and generosity of spirit that characterizes the capital defense community.

Denny's experience with capital defense began in 1989. Since then she has represented clients in both state and federal courts. She co-authored the winning brief in **Kyles v. Whitley** and served as co-counsel in the three subsequent retrials that resulted in Curtis Kyles' exoneration. Denny was also awarded the Benjamin N. Cardozo School of Law's "Access to Justice Award" for her extraordinary work in 2003. Denny currently directs the Capital Post-Conviction Project of Louisiana, which provides or obtains post-conviction representation for all Louisiana inmates sentenced to death.

### Julian Murray Receives Louisiana Bar Foundation Award

The Louisiana Bar Foundation (LBF) honored CJA Panel member Julian R. Murray, Jr. with its 2004 Distinguished Attorney Award. According to the LBF, the award recognizes those who "have distinguished themselves in their chosen profession and have brought credit and honor to the legal profession." Julian was presented with the award in April at the 19<sup>th</sup> Annual Fellows Dinner at the New Orleans Ritz Carlton.

### Former CJA Panel Attorney takes Position in D.C.

We're pleased and proud to report that former CJA panel attorney Lori Green recently relocated to Washington, D.C., where she is now working with the Training Branch of Defender Services. Most of us had an opportunity to work with Lori when she was in New Orleans and know what an excellent attorney she is. Now that she's in the Defender Services Training Branch, we hope to see her lecturing at our next CLE scheduled for November 17th-18th, 2005.

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## ***Increase in CJA Capital Rates***

The Fiscal Year 2005 Omnibus Appropriations Act includes, in the federal judiciary's Defender Services appropriation, funds to raise the maximum hourly compensation rate from \$125 to \$160 in capital cases (federal capital prosecutions and capital post-conviction proceedings) for attorneys appointed to represent persons financially unable to obtain adequate representations, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, and the Antiterrorism and Effective Death Penalty Act of 1996, codified in part in 21 U.S. C. § 848(q).

The new maximum capital attorney rate of \$160 per hour will apply to work performed on or after February 1, 2005. Where the appointment of counsel occurred before this effective date, the new maximum capital hourly rate applies to that portion of services provided on or after February 1, 2005.

## ***Case Management / Electronic Case Filing (CM/ECF)***

### ***Time is Ticking .....***

Like sands in an hourglass, so is the time left to get on board with CM/ECF. The Clerk of the Eastern District of Louisiana will fully implement electronic filing as of October 1, 2005 when attorneys begin filing documents electronically, as directed by the court.



With electronic filing all parties automatically receive electronic notification of all documents filed with the court. If you are submitting attorney or expert vouchers (CJA forms 20, 21, 30 and 31) on an interim basis, it may be necessary to request that they be filed under seal. Sample motions to seal expert and attorney interim vouchers are available on the CJA private side of our website [www.federaldefender.net](http://www.federaldefender.net).

## ***The National Legal Aid & Defender Association***

The National Legal Aid & Defender Association (NLADA) held its "Life in the Balance 2005: A Capital Defense Training Program" at the Sheraton Hotel from March 19, 2005 through March 22, 2005. Conducted in affiliation with the Federal Death Penalty and Capital Resource Counsel Projects of the Administrative Office of the U. S. Courts' Defender Services Division; the National Association of Sentencing Advocates, and; the ABA Death Penalty Project, the program featured leading lawyers, mitigation specialists and capital litigation experts, who stressed capital defense trial preparation and presentation and penalty phase mitigation.

Also, amongst the program's speakers was former Illinois Governor George Ryan, who chronicled his evolution from a staunch death penalty advocate to a leading voice against capital punishment in the program's keynote address, "My Journey from Death to Life." Precipitated by his discovery that several people slated for execution were later exonerated on appeal, Governor Ryan conducted an extensive investigation into the capital justice process during his gubernatorial tenure. Governor Ryan described his conversations with the families of both victims and perpetrators conducted throughout the course of the investigation, stressing the emotional impact engendered by the death penalty. Further, the investigation exposed striking defects in the capital punishment system, such as mistaken eyewitness identifications, overreaching prosecutors, sloppy criminal investigations, unqualified and unprepared defense counsel and, in some cases, racial discrimination. In response to these results, Governor Ryan established a moratorium in Illinois and commuted the death sentences of all 156 Illinois inmates awaiting execution. Ultimately, Governor Ryan explained that there was no way to fairly impose the ultimate sanction of death.

This informative conference provided practical advice and techniques for defense counsel, investigators and mitigation specialists to more effectively serve their capital clients' interests. An excellent CD ROM containing materials from and information about the presenters is available for review at the Federal Public Defender's Office by contacting Lamont Lewis at (504)589-7930 or [lamont\\_lewis@fd.org](mailto:lamont_lewis@fd.org).

## ***Changes on the Bankruptcy Bench***

U.S. Bankruptcy Judge Jerry A. Brown was elevated to Chief Bankruptcy Judge, U.S. Bankruptcy Court for the Eastern District of Louisiana. Judge Brown succeeds U.S. Bankruptcy Judge Thomas M. Brahney, III, who passed away on January 3<sup>rd</sup>. Replacing Judge Brahney is Judge Elizabeth Magner.

## ***BOOKER/FANFAN PRESENTATION***



In the January, 2005 decisions, *United States v. Booker* and *United States v. Fanfan*, the Supreme Court ruled that sentencing judges no longer have to abide by the Sentencing Guidelines. The Court held that allowing factual determinations by the sentencing judge to determine mandatory guideline levels violates the Sixth Amendment right to trial by jury. The Guidelines, which had been mandatory since November 1, 1987, now are merely advisory. Although sentencing judges must consider the Guidelines, judges are free to render any reasonable sentence subject only to the constraints of the statutory minimums and maximums.

In response to the Booker/FanFan decision, our office sponsored a Booker/FanFan training seminar attended by more than half the panel.

## ***New Bill Would Prohibit Sentences Below Guideline Range***

Remember the Feeney Amendment to the PROTECT Act? It directed the Attorney General to report judges who grant downward departures to Congress. The Act was shepherded through Congress by Representative Sensenbrenner, chairman of the House Judiciary Committee.

Now Congressman Sensenbrenner has introduced HR 1528, which already has passed the House Subcommittee on Crime, Terrorism and Homeland Security and gone to the full Judiciary Committee. Like the PROTECT Act, HR 1528 flies under cover of protecting children; it is called "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005." But make no mistake: it is part and parcel of the attack on judicial independence.

Section 12 of HR 1528 eliminates virtually all grounds for sentencing below the Guideline range except a government motion for a downward departure on the basis of substantial assistance or assent to "fast track" procedures. As a result, the bottom of the Guideline range becomes a mandatory minimum. It also eliminates consideration of the educational and medical needs of defendants in sentencing.

For drug convictions, Section 5 directs the Sentencing Commission to amend the Guidelines to designate as "relevant conduct" the acts of co-conspirators, **whether or not a conspiracy was charged**. Even co-conspirator conduct that occurred **before** the defendant joined the conspiracy counts as relevant conduct if the defendant knew of it.

Section 2 coerces the general public to become government informants. It criminalizes failure to report drug offenses involving or occurring in the vicinity of minors within 24 hours, and failure "to provide full assistance in the investigation, apprehension, and prosecution" of the suspect. Violators are subject to imprisonment for 2 to 10 years, unless they are the parent or guardian of a minor, in which case the mandatory minimum sentence is 3 years.

The bill also increases various mandatory minimum sentences and tightens availability of the safety valve.

The bill has run into broad opposition, including the Committee on Criminal Law of the Judicial Conference, the U.S. Chamber of Commerce, and the Sentencing Commission. Sentencing Commission data show little change in the percentage of sentences outside the Guideline range in the aftermath of **Booker**. There is no "crisis" as might justify a "quick fix."

# Sentencing After Booker

Does **Booker** mean business as usual at sentencing? The Fifth Circuit is leaning in that direction. Even some critics of the Sentencing Guidelines agree, hoping to stall efforts to legislate mandatory minimums in Congress. (See accompanying article.) But Justice Scalia, an **Apprendi**<sup>1</sup> enthusiast, thinks **Booker** requires real change.

On January 12, 2005, the Supreme Court held in **United States v. Booker**<sup>2</sup> that the federal Sentencing Guidelines were unconstitutional because they required sentencing enhancements based on judicial fact-finding. To remedy the constitutional violation, the Court struck the statutory language that made the Guidelines mandatory and that required *de novo* review of Guideline departures. The Court directed district courts to consider the Guideline range as one of several considerations listed in § 18 U.S.C. § 3553(a) in selecting a sentence and directed appellate courts to review the ultimate sentence for reasonableness. The remedial opinion was written by a different majority than the merits opinion, with Justice Ginsburg the only judge who signed onto both.

## 1. *What weight should a judge give to the Guidelines?*

One of the big questions post-**Booker** is what “consider” means. Courts agree that sentencing judges must calculate the applicable Guideline range. But they disagree about how much weight to give it. In **United States v. Mares**,<sup>3</sup> the Fifth Circuit came down on the side of substantial reliance. A sentence within a properly calculated Guideline range, the Court said, will rarely be reversed as unreasonable. But other courts warn that a presumption against non-Guideline sentences is tantamount to the sentencing regime that **Booker** held unconstitutional.<sup>4</sup> A district judge must have discretion to give a non-Guidelines sentence based on personal disagreement with the Guidelines, Justice Scalia explained at the recent Fifth Circuit Judicial Conference. “Otherwise, you’ve got a **Blakely**<sup>5</sup> problem.”

Courts which favor heavy reliance on the Guidelines point out that the Sentencing Commission, an “expert agency” charged with implementing congressional sentencing objectives, relied on nationwide data to formulate the Guidelines and continues to rely on nationwide data to refine them.<sup>6</sup> Courts which consider the Guidelines as one factor among others note that § 3553(a) calls for consideration of personal circumstances such as socioeconomic status, family ties and responsibilities, and lack of guidance as a youth. These factors cannot be considered under the Guidelines. They also point to the Sentencing Commission’s disagreement with the crack/powder disparity;<sup>7</sup> to the Guideline equation of the seriousness of a drug offense with drug quantity; and to the impact of government charging decisions on uniformity.<sup>8</sup> These areas are ripe for variances from the Guidelines. So too is the Guideline career offender enhancement, which the Sentencing Commission has found to have a disparate impact on minority defendants that is not justified by recidivism rates.<sup>9</sup>

## 2. *Is “preponderance of evidence” a sufficient standard of proof?*

Another big post-**Booker** question is whether a preponderance of evidence standard is high enough for fact-findings that increase a sentence. Preponderance of evidence is not enough for elements of the offense, but now that the Guidelines are discretionary, the facts that trigger enhancements within the statutory range are no longer elements. Hence, the Fifth Circuit held in **Mares** that a judge’s fact-finding by a preponderance of evidence suffices to support a Guideline enhancement. Still, nothing in **Booker** prohibits district courts from requiring proof beyond a reasonable doubt, and the higher standard of proof may be advisable under the doctrine of constitutional avoidance, particularly if the disputed fact triggers a large enhancement.<sup>10</sup> The Supreme Court repeatedly has expressed discomfort with sentencing factors that appear to be the “tail that wags the dog of the substantive offense.”<sup>11</sup> Also vulnerable are enhancements based on acquitted conduct. Once the jury has spoken, a contrary finding by the judge would undermine the jury’s role as “circuitbreaker in the [government’s] machinery of justice.”<sup>12</sup>

## 3. *Plea bargains and appeal waivers*

Plea bargains provide even less assurance of a sentence within a particular Guideline range after **Booker**, so Fed. R. Crim. P. 11(c)(1)(C) plea agreements, which specify a particular sentence or Guideline range, are even more desirable. The government has removed the exception for sentences above the Guideline range from the appeal waiver provisions of its plea agreements. In the Eastern District of Pennsylvania, the plea agreements allow defendants to appeal the reasonableness of a sentence above the guideline range. We should try for similar language here.

## 4. *Advance notice of sentences above Guideline range*

In this judicial district, **Booker** has been used as authority for imposition without advance notice of a non-Guideline sentence due to criminal history. This procedure is vulnerable to challenge. The Guidelines provide for a departure based on criminal history in § 4A1.3. But advance notice of intent to depart and reason for the departure is necessary. **Mares** requires the sentencing judge to consider the Guidelines first. If she selects a non-Guideline sentence, she must explain why. There is no reasonable explanation for imposing a non-Guideline sentence on § 4A1.3 grounds but without § 4A1.3 procedural safeguards.

# Sentencing After Booker cont.

## 5. Ex Post Facto/Due Process protection?

For defendants whose offense conduct pre-dated **Booker**, there's a strong argument that due process prohibits a sentence above the Guideline range, unless it would qualify as a pre-**Booker** departure. The Ex Post Facto Clause applies to legislation only, but the Supreme Court recognizes "that limitations on *ex post facto* judicial decision-making are inherent in the notion of due process." **Rogers v. Tennessee**, 532 U.S. 451, 456 (2001). Due process guarantees fair warning and fair warning is lacking when a court unforeseeably changes precise statutory language. **Id.** at 457. **Booker** made such a change by striking the language in 18 U.S.C. § 3553(b)(1) that made the Guidelines mandatory. Hence, retroactive application of the **Booker** remedy would deprive a defendant of due process insofar as it increases his sentence.

## 6. Fact-finding related to a prior conviction

Also vulnerable to challenge is the **Almendarez-Torres**<sup>13</sup> exception to **Apprendi** for a prior conviction. In **Shepard v. United States**,<sup>14</sup> the Supreme Court recently held that sentencing courts may not consult police reports to determine whether a prior conviction is for the type of crime that counts as a predicate for an enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Four justices said a contrary result might violate the Sixth Amendment right to a jury trial; a fifth justice said it would. **Shepard** is authority for interpreting the prior conviction exception to **Apprendi** narrowly. It also highlights the importance of preserving **Almendarez-Torres** objections, as five justices have expressed disagreement with that decision.

District courts must now consider all § 3553(a) factors when choosing a sentence.  
18 U.S.C. § 3553(a) provides:

The court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed –
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established [by the Sentencing Guidelines];
- (5) any pertinent [Guideline] policy statement . . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

1. **Apprendi v. New Jersey**, 530 U.S. 466, 471 (2000).

2. 125 S. Ct. 738 (2005).

3. 420 F.3d 511 (5<sup>th</sup> Cir. 2005).

4. **United States v. Crosby**, 397 F.3d 103 (2<sup>nd</sup> Cir. 2005) (treating the Guidelines as though they were mandatory is a procedural error requiring resentencing); **United States v. Huerta-Rodriguez**, 355 F. Supp. 2d 1019 (D. Neb. 2005); **United States v. Myers**, 353 F. Supp. 2d 1026 (S.D. Iowa 2005); **United States v. Ranum**, 353 F. Supp. 2d 984 (E.D. Wis. 2005); **United States v. Jaber**, \_\_\_ F. Supp.2d \_\_\_, 2005 WL 605787 (D. Mass. Mar. 16, 2005). 5

5. **Blakely v. Washington**, 124 S. Ct. 2531 (2004).

6. **United States v. Wilson**, 350 F. Supp. 2d 910 (D. Utah, 2005), adhered to on reconsideration, 355 F. Supp. 2d 1269 (2005).

7. **United States v. John Smith**, 359 F. Supp. 2d 771 (E.D. Wis. 2005); **Simon v. United States**, \_\_\_ F. Supp. 2d \_\_\_, 2005 WL 711916 (E.D.N.Y. Mar. 17, 2005).

8. **Huerta-Rodriguez**; **Ranum**; **Myers**.

9. Sentencing Commission, *Fifteen Years of Guideline Sentencing*, Ch. 4, pp. 133-134 (2004), available at <http://www.ussc.gov>.

10. **Huerta-Rodriguez**, *supra*; **United States v. Pimental**, \_\_\_ F. Supp. 2d \_\_\_, 2005 WL 958245 (D. Mass. Apr. 21, 2005); see also Steve Sady, **Booker**: Reasonable Doubt Survives," <http://circuit9.blogspot.com/2005/01/booker-reasonable-doubt-survives.html>.

11. **Blakely**, 124 S. Ct. at 2539; **Apprendi**, 530 U.S. at 471 (2000); **McMillan v. Pennsylvania**, 477 U.S. 79, 88 (1986).

12. **Blakely**, 124 S. Ct. at 2539. See **United States v. Gonzalez**, \_\_\_ F.3d \_\_\_, 2005 WL 1023059 (2<sup>nd</sup> Cir. May 3, 2005) (noting that district court declined to sentence the defendant for drugs of which the jury acquitted her).

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

14. 125 S. Ct. 1254 (2005).

## ***DNA WAIVERS IN PLEA BARGAINS***

The Innocent Protection Act of 2004 created a procedure for current federal inmates to have critical evidence subjected to DNA testing. The tested evidence can relate to the crime of conviction or to prior offenses which made the inmate a career offender or an armed career offender. This right will be of real significance to a number of defendants.

Well, the Justice Department wants our clients to give up that new right. Recently, the Government has been including a waiver of DNA testing in plea bargain agreements. The language of the waiver shows how far-reaching its effect might be: "Pursuant to this agreement, the defendant knowingly and voluntarily waives and relinquishes this right and fully understands that as a result of this waiver to the right to DNA testing, the defendant will never have another opportunity to have the physical evidence in this case submitted for DNA testing or employ the results of DNA testing to support any claim of innocence regarding the offense(s) to which the defendant is pleading guilty."

This agreement may very well stand for the proposition that the Government has no problem with innocent people remaining imprisoned because they once executed this waiver. It also may mean that years from now the current offense might be offered as an aggravating circumstance in a capital case, turning a plea of convenience into ammunition for the death penalty.

This waiver should be given careful scrutiny before it is accepted.

## ***New Rules for Notaries***

As of January 1, 2005, Louisiana law (R.S. 35:12) requires notaries to include the full names of all parties and witnesses in all documents, including affidavits. Notaries are also now required to include their notary identification numbers or bar roll numbers with their signature. The names notaries use on all documents must match the names on their notarial commissions. Public agencies are required to reject documents which do not conform to these rules.

## ***Budget Submission Required in Certain Felony Cases***

CJA guidelines now require budgets in felony cases where attorney's fees will exceed 300 hours and/or the total cost may exceed \$30,000 for counsel and all other services. This would apply in complex, non-capital CJA representations that are or appear likely to become extraordinary in terms of cost.

Sample budget worksheets are available at [www.fd.org/cja](http://www.fd.org/cja) or on the CJA private side of our website [www.federaldefender.net](http://www.federaldefender.net).

## ***May 13th FBA White Collar CLE in the Big (Not So) Easy***

The Criminal Law Section of the FBA is hosting its national CLE Conference in New Orleans on May 13, 2005. It will be held in the W Hotel. Because of the 40th Anniversary of the Criminal Justice Act, the registration fee for panel members is **\$90.00**, not so coincidentally the equivalent of one billable hour! The keynote speaker is Jeff Fisher, who argued and won both **Blakely and Crawford**.

From internal investigations through sentencing, the conference will explore how recent developments have transformed the handling of federal white collar criminal cases. For the names of speakers and more information on the Conference visit [www.fedbar.org/crimlaw05.pdf](http://www.fedbar.org/crimlaw05.pdf). To register call the Program's Department of the FBA at 202-785-1614 and ask for the Government Employee rate of \$90 or just call Virginia Schlueter, the Vice-Chair of the FBA's Criminal Law Section.

## ***FREE CAPITAL POST CONVICTION CLE***

Free Capital Post Conviction Continuing Legal Education is being offered by the Mississippi Office of the Federal Public Defender in Jackson. This training is specifically designed to help prepare CJA lawyers to handle Capital Federal Post Conviction petitions. It also offers capital and appellate attorneys an invaluable opportunity to meet National Resource Counsel. If you are interested please contact the office of

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# *Criminal Justice Act Seminars and Workshops*

**WINNING STRATEGIES SERIES  
MINNEAPOLIS, MN, JULY 21-23, 2005  
PHILADELPHIA, PA, SEPTEMBER 15-17, 2005**

The Winning Strategies seminars this year will address various areas of federal criminal practice, generally spinning off of Fourth, Fifth, and Sixth Amendment issues, with a half day committed to federal sentencing law and practice. The seminar will feature a number of break-out sessions, to give participants a choice of topics, and allow for smaller classes. Sessions will provide innovative ideas for seasoned CJA practitioners. Newer CJA practitioners will find sessions to give them the information they need to build an effective federal practice.

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**TRIAL ADVOCACY WORKSHOP  
JUNE 23-25, 2005  
SAN FRANCISCO, CA**

The Trial Advocacy Workshop focuses on 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. Since many federal courtrooms are now "wired" with the latest computer technology, and this technology has proven to be persuasive and effective, participation in the Trial Advocacy Workshop will be particularly timely. Faculty will conduct presentations and demonstration on evidentiary issues associated with using technology, using Power Point and Trial Director in the courtroom, cross and direct examination, closing argument, among other topics. There will also be small group break-outs in which participants will apply the skills presented in the plenary sessions to the facts of the mock case with which they will be provided. Each participant will practice cross examination, direct examination, and closing argument using the Trial Director and Power Point technology.

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**COMPLEX LITIGATION SEMINAR  
AUGUST 18-20, 2005  
LOCATION TO BE ANNOUNCED**

With the increasing number of multiparty and complex cases being brought in federal court, this seminar is intended to address important and practical issues faced in this type of litigation, including the impact on counsel's role, handling pretrial procedures, joint defense agreements, discovery issues, the effective use of technology, trial administration, cost containment, and others.

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# Message Board

## New Mileage Rates

Effective February 4, 2005, the new mileage rates for use of privately owned vehicles while on official travel is as follows: Automobiles \$.405 per mile, Motorcycles \$0.285 per mile.

## Service of Subpoenas

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.

## Government's Peremptory Challenge of African Americans

Panel member Neal Walker is collecting information regarding the following questions:

- (1) Is there any evidence that the U.S. Attorney's office uses peremptory challenges disproportionately against African Americans?
- (2) If so, can you point to any recent prosecutions which might reflect this?
- (3) Are you aware of any instances where federal prosecutors were not permitted to use a peremptory against a African American?

Please address your responses to [nealw@thejusticecenter.org](mailto:nealw@thejusticecenter.org) or call 558 9867.

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