

THE DEFENSE NEVER RESTS

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Herbert V. Larson, Jr. Receives the 2010 CJA Award

Each year a member of the Criminal Justice Act Panel is presented with an award distinguishing the recipient for exemplary service to indigent clients. Herb Larson was presented that honor at LACDL's Albert Tate Award Banquet on December 3, 2010 by CJA Panel Representative Billy Gibbens and FPD Virginia Schlueter. The award was presented close in time to his extraordinary win on behalf of his capital client, Paul Hardy, who was facing the death penalty until the district court ruled that he could not face the death penalty based on *Atkins*. His thirty-year career is marked by numerous achievements both in state and federal court, with countless briefs and appearances before the Fifth Circuit and the U.S. Supreme Court, as well as the Louisiana Supreme Court.

Herb is recognized by other attorneys in the community as an exceptional advocate. They frequently seek his representation when dealing with ethical issues, disciplinary actions, and contempt charges. His leadership in the legal community is also reflected in his prior responsibilities as CJA Panel Representative for the Eastern District of Louisiana from 1995 to 2008 and his membership in the National Defender Services Advisory Group for over ten years, where he advocated effectively for increases in the hourly rates of panel lawyers.

Herb is also an intellectual leader, thanks to his academic approach to the law and his passion for sharing his knowledge and skills with others. He is a frequent speaker at CLEs and conferences around the country. He taught criminal law and trial advocacy at both Loyola and Tulane. He is currently an adjunct professor at Tulane Law School, where he teaches several classes and seminars. He also recently became the Executive Director of International Legal Programs, in recognition of his long-standing interest in comparative and international law. Herb studied criminology at Cambridge twenty years ago, was a Fulbright Fellow in Poland in 2005, and regularly teaches courses for Tulane in Amsterdam, Paris, Siena, Italy and Tbilisi, Republic of Georgia. We celebrate those many accomplishments at home and around the world.

Herb subscribes to Shakespeare's theory that "brevity is the soul of wit." If one were to follow Polonius's advice in *Hamlet* and limit comment based on that guidance, one would succinctly say that Herb is the consummate student of the law: a lawyer's lawyer, a mentor to younger lawyers, a teacher to law students, and a zealous advocate for his appointed clients, capital and non-capital alike.



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New CJA Panel Members

Criminal Justice Act Panel Representative Billy Gibbens and Federal Public Defender Virginia Schlueter recently reviewed the Criminal Justice Act Panel applications filed in the Clerk's Office. In conjunction with efforts to continually improve the quality of representation under the Criminal Justice Act, Title 18, United States Code, Section 3006A, they conducted in-depth interviews with the applicants. Recommendations were made to the Criminal Justice Act Judicial Committee comprised of Judges Carl J. Barbier, Lance M. Africk, Jay C. Zainey, and Louis Moore, Jr. The applicants who received unanimous approval for membership are as follows:

- **Brian Capitelli** - served as an Assistant United States Attorney in this district from 2006 - 2010 and is currently associated with Capitelli and Wicker. He has extensive trial experience in federal court as well as handling several appeals.
- **Peirce Hammond** - was a member of this district's CJA panel from 1995-2000 and was placed on inactive status due to firm obligations. He is now in private practice and is seeking to reactivate his membership on the panel. Mr. Hammond has extensive litigation experience in both state and federal courts.
- **Eric Hessler** - has been engaged in the active practice of criminal law since 2001. His experience includes serving as an Assistant Orleans Parish Public Defender from 2001-2003 as well as being associated with panel member Frank DeSalvo. He has been a solo practitioner since 2004. Mr. Hessler has extensive federal experience in this district as well as the Southern District of Mississippi.
- **Kimya Holmes** - practiced criminal law in state court for the last nine years, including serving as an Assistant District Attorney for Orleans Parish. She has experience handling capital cases and currently is a staff attorney with the Capital Defense Project of Southeast Louisiana.
- **Eddie Jordan** - was an Assistant United States Attorney in this district from 1984-1987, and later served as United States Attorney from 1994-2001. He was elected Orleans Parish District Attorney from 2003-2007. Mr. Jordan is in private practice where he is associated with panel member James C. Lawrence. He previously clerked for the Honorable Clifford Scott Green in the Eastern District of Pennsylvania. He has trial experience in both state and federal court.
- **Gary Jordan** - has practiced criminal law in both state and federal courts since 1990 and is currently a private practitioner in Tangipahoa Parish. He was an Assistant District Attorney in Orleans Parish from 1990-1992. Mr. Jordan has been certified by the State to defend capital cases. He recently served a two year term on the Board of Directors with the Louisiana Criminal Defense Lawyers Association (Tangipahoa Parish District).
- **Sarah Ottinger** - has practiced criminal law for over twenty-five years, largely representing indigent clients facing the most serious consequences. She has been associated with numerous local agencies including the Capital Post-Conviction Project, Juvenile Justice Project, and Louisiana Crisis Assistance Center. Ms. Ottinger currently is the Executive Director of the Capital Appeals Project.
- **Ross Scaccia** - began his career as an Assistant District Attorney in Orleans Parish and later became an Assistant United States Attorney before becoming a public defender in Orleans Parish. He was previously a member of our panel and has reapplied for panel membership.
- **Gaynell Williams** - was a Jefferson Parish Assistant District Attorney before becoming a supervisory Assistant United States Attorney and the First Assistant District Attorney in Orleans Parish. She is presently in private practice and has extensive trial experience in both the state and federal criminal courts. Following Hurricane Katrina, Ms. Williams was appointed as Judge Pro Tempore for the 24th Judicial District Court.



Amendments to Federal Rules of Criminal Procedure and Federal Rules of Evidence Took Effect on December 1, 2010

On December 1, 2010, a number of amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence took effect. Among the most notable changes to the rules are the following:

- Fed. R. Crim. P. 12.3, amended to implement the Crime Victim's Rights Act, now provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. Rather, if defendant establishes a need for that information, the court may either order its disclosure or "fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests."
- Fed. R. Crim. P. 21 now requires a court, when a defendant moves to transfer a case to another district for trial on grounds of convenience, to consider the convenience of victims (as well as the convenience of the parties and witnesses, and the interests of justice) in determining whether to transfer all or part of the proceedings.
- Fed. R. Crim. P. 32.1 is amended to clarify that only paragraph (a)(1) of 18 U.S.C. § 3143(a) and not paragraph (a)(2) applies to proceedings involving the pretrial release or detention of a person charged with violating a condition of probation or supervised release. The amendment also clarifies the standard of proof in such proceedings: the person seeking release must establish by clear and convincing evidence that he or she will not flee or pose a danger to any other person or to the community.
- Fed. R. Evid. 804, in keeping with the prevailing case law, now requires the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. Prior to the amendment, only the defendant was required to make such a showing.

Report From the Padilla Conference

In response to Padilla v. Kentucky, 130 S.Ct. 1473 (2010) AFPD Samuel J. Scillitani attended an intensive two day seminar addressing the affirmative duty imposed by the Padilla holding to properly advise non-citizen clients of the possible immigration consequences of a guilty plea. After Padilla, general advice, no advice, or improper advice regarding immigration consequences will be considered ineffective assistance of counsel.

AFPD Scillitani advises that, when representing anyone charged with a criminal offense, the attorney should in every case ascertain the client's immigration status; a sample intake sheet can be found at Washington Defender Association's Immigration Project. When representing a non-citizen, you must investigate the client's immigration status (Lawful Permanent Resident, Temporary Protected Status, non-immigrant visa, undocumented, previously deported, asylum, etc.), criminal history. You must then consult with the client regarding his goals as they pertain to the penal and immigration aspects of the case and research and analyze immigration consequences of any potential plea. Defense counsel must be familiar with the types of offenses that make the client eligible for deportation, inadmissibility, and/or relief from removal (waivers, cancellation of removal, adjustment of status, asylum, withholding of deportation, etc.).

Defense counsel must advise the client prior to a guilty plea the nature and degree of the immigration risks associated with the plea and any alternatives. Further, counsel must inform the client of how each considered alternative subjects him or her to an immigration-safe disposition, or to possible removal/inadmissibility, or disqualifies the client from eligibility for relief from removal. The representation of non-citizen clients has become complex, as it should, given the additional and more onerous penalty that non-citizens face when they are convicted of criminal offenses. The following sites are great sources of information regarding the immigration consequences of criminal convictions: www.defendingimmigrants.org, www.nationalimmigrationproject.org, www.ilrc.org and www.immigrantdefenseproject.org.

Fifth Circuit Vacates Defendant's Conviction in *United States v. Delgado*

In a careful and detailed opinion authored by Judge Dennis and joined by Judge Wiener, the Fifth Circuit recently vacated Maria Aide Delgado's convictions for possession of marijuana with the intent to distribute and conspiracy to commit the same offense.

Delgado owned a trucking company that hired drivers to transport Mexican produce in the company's semi-trailer. Vasquez was an employee of one of the produce brokers that used Delgado's company to ship produce. Vasquez claimed that Delgado had offered him \$10,000 to commingle bundles of marijuana in a shipment with Mexican broccoli. Vasquez reported the incident to Immigration and Customs Enforcement (ICE) and became an ICE informer. Vasquez later notified ICE that a rig with marijuana was parked at Delgado's house. ICE officers went to Delgado's house and, with Delgado's permission, searched the truck and found 230 kilograms of marijuana hidden in its sleeper compartment. An officer later testified that Delgado denied knowledge of the marijuana and said it belonged to somebody else. Following a two-day trial in the United States District Court for the Southern District of Texas, during which Delgado did not testify, Delgado was convicted of possession of marijuana with the intent to distribute and conspiracy to commit the same offense.

On appeal, the Fifth Circuit considered *sua sponte* the question of whether there was sufficient evidence to support the conspiracy conviction. Focusing on the element of agreement required for a conspiracy, the Court found that there was no evidence from which a jury could rationally infer that Delgado had reached an agreement with anyone other than Vasquez, and Vasquez could not be a *bona fide* co-conspirator because he was a government informant. The Court acknowledged that Delgado must have obtained the marijuana from a supplier, and that Vasquez had testified that she planned to deliver the marijuana to a purchaser. However, no evidence was introduced about the possible source or recipient, and the Court concluded that evidence of a mere buyer-seller relationship does not establish the existence of a conspiracy.

As to the conviction for possession with intent to distribute, the Court applied the "cumulative error doctrine" and found that several errors committed by the prosecution team and the district court combined to infect the proceedings and render the trial fundamentally unfair. The Court discussed five errors: the prosecutor's expressing his personal opinion of Delgado's credibility during his closing argument, even though she had not testified at trial; an ICE agent's testimony that Delgado's trucking company had been involved in previous narcotics trafficking, though there was no evidence that Delgado had ever been convicted of or charged with such an offense; the district court's instruction that "deliberate ignorance" satisfies the knowing requirement, when there was no evidence that Delgado had contrived to remain ignorant of the marijuana in the truck; the district court's failure to properly instruct as to the law of conspiracy; and the lack of a complete transcript of Delgado's trial.

Judge Clement dissented. On the conspiracy conviction, Judge Clement noted that Delgado did not challenge the sufficiency of evidence for conspiracy either at trial or on appeal; her failure to do so should have waived the issue. The dissent also stated that the majority had ignored substantial evidence from which jury could have inferred that Delgado was part of a high volume marijuana trafficking operation. On the finding of an unfair trial, she disagreed with the majority's application of the cumulative error doctrine, stating that the Court "ha[d] never vacated a verdict for cumulative error on such weak grounds."

United States v. Delgado, — F.3d —, 2011 WL 148886 (5th Cir. Jan. 19, 2011).



FIFTH CIRCUIT UPDATES

Search and Seizure

United States v. Oliver, No. 09-10133 (5th Cir. Jan. 6, 2011): court affirmed defendant's conviction for aiding and abetting mail fraud and aggravated identity theft where the initial private search, which was reasonably foreseeable, and the searcher's act, later that day, of voluntarily giving authorities defendant's box, in which no reasonable expectation of privacy remained, rendered the subsequent police search permissible under the Fourth Amendment.

Sentencing

United States v. Rodriguez, No. 10-40023 (5th Cir. Jan. 6, 2011): court vacated defendant's sentence for unlawfully transporting illegal aliens within the U.S. by means of a motor vehicle for private financial gain where the district court erred by applying a reckless-endangerment enhancement.

United States v. Shabazz, No. 10-10553 (5th Cir. Jan. 6, 2011): court held that where there are successive revocations of supervised release, the statutory cap applies to each individual revocation, so that the defendant may not be sentenced above the cap in any one revocation proceeding, but may be sentenced to the cap each time his supervised release is revoked.

Habeas

Hernandez v. Thaler, No. 10-50319 (5th Cir. Jan. 6, 2011): court denied petitioner's motion for a certificate of appealability of the denial of his habeas petition because petitioner could not use Rule 60(b)(6) to circumvent the principle that, when the Supreme Court announces a new rule of law and applies it to the parties before it, the new rule is given retroactive effect only in cases that are still open on direct review.

Matthis v. Cain, No. 09-30576 (5th Cir. Dec. 14, 2010): court affirmed dismissal of petitioner's habeas petition as untimely where, because the overturning and reinstatement of petitioner's state conviction occurred solely through post-conviction review, this did not affect the date his conviction became final under direct review and, therefore, his federal habeas petition was untimely.

Numerous District Courts Applying the Fair Sentencing Act to Offenses Committed Before its Enactment

While several recent Circuit cases have held that the Fair Sentencing Act of 2010 ("FSA") does not apply retroactively to sentences imposed prior to its enactment, those cases do not address the issue of whether the new mandatory penalties apply, post-August 2010, when sentencing defendants whose conduct predates enactment of the FSA. Fortunately, numerous district courts throughout the country are now sentencing those defendants under the FSA. Most of them rely expressly on the reasoning of Judge Hornby in United States v. Douglas, — F.Supp. 2d —, 2010 WL 4260221 (D. Me. Oct. 27, 2010), the first case to explicitly address the issue.

In Douglas, the court was preparing to sentence a defendant whose offense (distribution of a total of 113.1 grams of crack) was committed in 2009. In determining whether the reduced mandatory minimum of five years should apply, the court engaged in a lengthy analysis of the background to the FSA's enactment, as well as the FSA's legislative history and intent. It ultimately concluded that by enacting the FSA, "Congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before enactment" and that "the Fair Sentencing Act of 2010 permits no further federal crack sentencings that are not 'fair.'"

In this District, the Federal Public Defender's Office successfully argued in front of Judge Barbier that the FSA should apply to a defendant whose offense predates the FSA. Assistant Federal Public Defender Roma Kent and Research and Writing Specialist Melissa Harris based their legal argument on Congress's clear intent to make relief under the FSA immediately available. Senators Durbin and Leahy recently confirmed their intent that the new penalties be made applicable "as soon as possible" in a November 17, 2010 letter to Attorney General Eric Holder, available at http://www.fd.org/pdf_lib/fair-sentencing-act-ag-holder-letter-111710%5B1%5D.pdf.

THE ANNUAL NATIONAL SEMINAR
on the
FEDERAL SENTENCING GUIDELINES

PRESENTED BY
THE UNITED STATES SENTENCING COMMISSION



Wednesday through Friday ~ May 18-20, 2011
Manchester Grand Hyatt ~ San Diego, CA

**NO TUITION ~ NO REGISTRATION FEE
SEMINAR REGISTRATION REQUIRED**

TOPICS INCLUDE:

- For Beginners: A Basic Introduction to the Federal Sentencing Guidelines
- Tips from the District Court Bench
- Update from the Sentencing Commission
- Guideline Departures & Variances
- Relevant Conduct
- Organizational Guidelines
- Drug Offenses
- Fraud & Theft Offenses
- Criminal History
- Immigration Offenses
- Role in the Offense & Other Chapter Three Adjustments
- Child Pornography & Sex Offenses
- Firearms Offenses
- Alternatives to Incarceration
- Restitution Issues
- Grouping of Multiple Counts
- Sentencing Ethics
- Special interest forums for defense attorneys, probation officers, law clerks, judges, and prosecutors

This is a seminar you don't want to miss. Please join us to discuss the latest issues in federal sentencing with some of the top experts in the field. For hotel reservations call: 1-888- 421-1442. Ask for the group rate for the "Federal Sentencing Seminar."

For more information as it becomes available: www.ussc.gov.

Application for pre-approval of CLE will be made to all state bar associations.

Recommended Training Programs for Panel Attorneys

WINNING STRATEGIES

FEBRUARY 10 - 12, 2011 - SAN ANTONIO, TEXAS

Contact: Jenna_Shepard@ao.uscourts.gov

Drawing its faculty from the ranks of federal judges, defenders and practitioners, Winning Strategies presents legal techniques for use in securing pretrial, trial, sentencing and appellate relief in a wide variety of federal cases. The seminar will employ both plenary and break-out instructional sessions to present "nuts and bolts" defenses to firearms, drugs, child pornography and immigration prosecutions - as well as to present defenses to more novel prosecutions such as mortgage fraud, identity-theft, etc. Winning Strategies additionally provides important guidance and insights concerning the new post-Booker sentencing landscape now facing federal defense attorneys. Participants will receive analysis of the Supreme Court's recent criminal law decisions and insights into that Court's pending criminal cases. They will also hear forecasts from the Sentencing Resource Counsel's representatives on proposed guideline amendments and will learn strategies to better advocate for - and achieve - just sentences.

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE

FEBRUARY 10, 2011 - SAN ANTONIO, TEXAS

Contact: Jenna_Shepard@ao.uscourts.gov

The Fundamentals of Federal Criminal Defense Program (Fundamentals) is an additional one-day program offered during the Winning Strategies Seminar (see Winning Strategies description above). It will take place on Thursday, February 10, 2011. Specifically designed for criminal defense attorneys who are new to the CJA panel, it will offer sessions on topics that every new practitioner should master. After participating in the Fundamentals, attorneys are encouraged to participate in the remaining Winning Strategies sessions which continue on Friday and Saturday.

SENTENCING ADVOCACY WORKSHOP

MARCH 10 - 12, 2011 - ATLANTA, GEORGIA

Contact: Shemiah_Schuler@ao.uscourts.gov

The Sentencing Advocacy Workshop focuses on an often neglected, yet extremely important area of practice. Since approximately 97% of federal criminal cases proceed to the sentencing phase, participation in the Sentencing Advocacy Workshop should not be missed. The program presents a comprehensive approach to sentencing advocacy. Participants will learn a process for the development of a persuasive, fact-based sentencing theory and the advocacy skills necessary to advance that theory in writing and during sentencing hearings. Among other subjects, presentations and demonstrations will address changes in federal sentencing law, judging at sentencing, storytelling and persuasive writing. The workshop consists of plenary sessions and small group breakout sessions. In the small group breakout sessions, participants will use a case of their own to brainstorm facts, develop a theory and theme, tell a story, and persuasively write a portion of their sentencing memo.

TRIAL SKILLS ACADEMY

APRIL 25 - 30, 2011 - SAN DIEGO, CALIFORNIA

Registration is available through www.fd.org.

The skills-based Academy has been a tremendous success. This program focuses on (1) the use of a trial advocacy process to facilitate development of a persuasive, fact-based theory and supporting themes, and (2) the advocacy skills necessary to persuasively advance that theory and those themes. The program is conducted by very experienced and skilled faculty as a series of plenary sessions and workshops. The elements of effective litigation advocacy skills are presented in the plenaries and participants then engage in hands-on practice of those skills and receive feedback in small group workshops. Participation is limited to 50 attendees.

LAW AND TECHNOLOGY WORKSHOP SERIES: ELECTRONIC COURTROOM PRESENTATION

JULY 21 - 23, 2011 - PROVIDENCE, RHODE ISLAND

Contact: Shemiah_Schuler@ao.uscourts.gov

The Law and Technology Electronic Courtroom Presentation Workshop focuses on the use of modern technology to improve the persuasiveness of courtroom presentations. This workshop is an intensive program where participants will learn to use TrialDirector and PowerPoint products to sharpen their courtroom skills. Attendees will enhance their direct-examination, cross-examination, and opening/closing argument abilities with detailed application and use of these litigation tools. Today, many federal courtrooms are "wired" to accommodate the latest computer programs, and this technology has proven to be an effective and persuasive addition to lawyers' arsenals. Participation in the Law and Technology Workshop is particularly valuable for federal criminal defense attorneys.

MESSAGE BOARD

- If you have a CJA appointed case and anticipate that your costs will approach \$30,000, you must submit a full budget. This will improve the likelihood of your receiving reimbursement for all of the time expended. CJA Form 28A is the *Attorney Services Detailed Budget Worksheet for Non-capital Representations*. It is available on our website at www.federaldefender.net. The form breaks down the categories of work into specific tasks and makes the process less onerous. The budget follows this format: 1. Discovery retrieval, organization and review; 2. Trial; 3. Motions and hearings; 4. Witness interviews and other investigations; 5. Client consultation; 6. Expert witness consultation; 7. Other meetings and consultations; 8. Case budget preparation time; 9. Travel costs; and 10. Other miscellaneous costs and expenses.
 - When obtaining investigative, expert, and other services in CJA appointed cases, district court approval is required for compensation of services which exceed \$800. If in excess of \$2,400, the district court and the Fifth Circuit must approve. Approval is required **before** the investigative, expert, and other services are rendered.
 - Effective January 1, 2011, the new mileage rate for use of privately owned vehicles while on official travel increased to \$.51 per mile.
 - 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.
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