

THE DEFENSE NEVER RESTS

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Carol Kolinchak Receives the LACDL Lucy McGough Juvenile Justice Award



In December at the 26th Justice Albert Tate, Jr. Awards Banquet hosted by the Louisiana Association of Criminal Defense Lawyers, CJA panel member Carol Kolinchak was awarded the LACDL Lucy McGough Juvenile Justice Award. This award honors those who have been involved with Juvenile Justice issues that affect our justice system daily. The juvenile has been elevated to its rightful place as an equal part of the criminal justice system and this has been done by the hard work and dedication of Ms. Kolinchak.

Pictured above: Sarah Ottinger presents the LACDL Lucy McGough Juvenile Justice Award to Carol Kolinchak.

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2011 Federal Public Defender's Continuing Legal Education Program

This year's two day continuing legal education program covered representation of clients from pretrial through sentencing and beyond (appeal). With presentations covering both an attorney's ethical duty to discuss collateral consequences post Padilla and a discussion of professionalism involving the seven deadly committed on appeal, the program satisfied all of Louisiana's CLE requirements. Evaluations disclosed that the "top notch" presentations were "meaningful", "informative" and "relevant". See you in November.



Kito Bess, Chief Probation Officer for the Eastern District of Louisiana



Maurice Hew, Associate Professor at Thurgood Marshall School of Law



Alan Dorhoffer, Deputy Director, Office of Education and Sentencing Practice, United States Sentencing Commission



Eastern District of Louisiana Assistant Federal Public Defender George Chaney and David Katner, Professor of Clinical Law at Tulane University Law School



Omodare Jupiter, Assistant Federal Public Defender in the Southern District of Mississippi



F. Edward Hebert Building, 600 S. Maestri St., New Orleans

NEW RULES TOOK EFFECT DECEMBER 1, 2011

Federal Rules of Appellate Procedure

- Appellate Rule 4 - (clarifies 60-day appeal deadline in cases where U.S., federal agency, or federal employee is a party)
- Appellate Rule 40 - (clarifies 45-day rehearing deadline in cases where U.S., federal agency, or federal employees is a party)

Federal Rules of Criminal Procedure

Note: almost all of these changes are to make the rules more “electronic technology” friendly. While most make things easier for the government, there are some that will make things a bit easier for defendants or defense counsel through use in some instances of video conferences.

- Criminal Rule 1 - (expands the definition of “telephone” and “telephonic” to include technologies that enable live, contemporaneous voice conversations)
- Criminal Rule 3 - (authorizes consideration of complaints and issuances of arrest warrants and summonses based on information submitted by reliable electronic means as provided for in proposed new Rule 4.1)
- Criminal Rule 4 - (authorizes consideration of complaints and issuances of arrest warrants and summonses based on information submitted by reliable electronic means as provided for in proposed new Rule 4.1. Also authorizes the return of warrants by reliable electronic means)
- Criminal Rule 4.1 - (new rule incorporates provisions of Criminal Rule 41 that allow a warrant to be issued based on information submitted by reliable electronic means and extends those procedures to complaints, arrest warrants, and summonses)
- Criminal Rule 6 - (provides that a grand jury return may be taken by video conference)
- Criminal Rule 9 - (authorizes consideration of complaints and issuances of arrest warrants and summonses based on information submitted by reliable electronic means as provided for in proposed new Rule 4.1)
- Criminal Rule 32 - (technical and conforming style amendment)
- Criminal Rule 40 - (permits the defendant, upon consent, to appear by video conference in a proceeding on arrest for failure to appear in another district)
- Criminal Rule 41 - (deleted provisions now covered by new Rule 4.1. Also authorizes the return of warrants by reliable electronic means)
- Criminal Rule 43 - (permits, with the defendant’s written consent, the arraignment, trial, and sentencing in misdemeanor cases to be conducted by video conference)
- Criminal Rule 49 - (authorizes local rules permitting papers to be filed, signed, or verified by electronic means)

Federal Rules of Evidence

Note: Be sure to check any “boilerplate language” in your forms or in “recycled work” that quotes portions of the evidence rules as the “restyling” may have changed the language you are quoting.

- Restyled Evidence Rules 101-1103 - (make the rules simpler and easier to read and understand without changing substantive meaning)

RISE AND RECOVER RE-ENTRY COURT

The Eastern District of Louisiana is starting a Rise and Recover Re-entry Court this year. Initially a small test group of about ten will be selected and asked to participate. Participation in this program is voluntary and clients will be rewarded after successful completion with a reduction in the length of supervision. The Re-entry court is a cooperative effort of the Court, Probation Office, Federal Public Defender’s Office, and the U. S. Attorney’s Office. The Eastern District of Louisiana is committed to providing a Re-entry Court program for individuals under federal supervision. This program shall offer a creative blend of treatment and sanction alternatives to effectively address offender behavior, rehabilitation, and the safety of our communities. The goals of this program are to reduce recidivism and promote successful community reintegration while maintaining public safety.

ELECTRONIC SUBMISSION OF CJA VOUCHERS IN DEVELOPMENT

This article original appeared in the October 2011 issue of The Third Branch and is used with permission.

It's not quite ready, but it is coming. A national application is in development for the electronic submission, processing, approval and payment of the vouchers submitted by panel attorneys representing clients under the Criminal Justice Act (CJA). Development of the core system requirements and independent testing of the Electronic CJA Voucher Processing System (eCJA VPS) are scheduled to be completed by next summer, followed by a roll-out and testing by pilot courts. If all goes as planned, the first wave of courts will begin using the new system in January 2013.

In fiscal year 2010, the Judiciary processed 145,473 vouchers submitted through the CJA panel attorney program. Each voucher went through an approval process requiring multiple reviews and certifications, along with repeated manual entry of information and issuance of a paper check. The eCJA VPS will give courts a faster, more responsive, more efficient system to process vouchers submitted in CJA cases and more rapid payments to panel attorneys.

"The way CJA vouchers are processed now involves a lot of people sending a lot of paper all over the place," said Judge Matthew F. Kennelly (N.D. Ill.). "When we're working on a new generation of our Case Management/Electronic Case Files system, and most of our court procedures are electronic, there's no good reason why voucher processing shouldn't be brought into the 21st century, too."

The Administrative Office's eCJA VPS Working Group—made up of panel attorneys, appellate and district court staff, and staff from the federal defender organizations—helped identify the requirements for the eCJA VPS. Kennelly is a liaison judge to the project from the Judicial Conference Committee on Information Technology. He joined judges from the Budget, Court Administration and Case Management and Defender Services Committees who worked on the project. As a former CJA panel attorney, Kennelly brings two frames of reference to the discussion.

"A number of very dedicated people spent an enormous amount of time identifying what we wanted to have in an electronic voucher processing system," he said. "The eCJA VPS is designed with those needs in mind."

The online eCJA VPS system eliminates redundant data entry and errors and allows all the representation-related documents, vouchers, and orders to be viewed simultaneously by persons with authorized access. The increased visibility of vouchers better detects expenses for which attorneys may not be compensated, while giving districts the ability to monitor budgets and incorporate their own controls on expenses.

The eCJA VPS will be able to exchange data with the Case Management/ Electronic Case Files system and the Judiciary's financial system, FAS4T. Once a CJA voucher is approved in eCJA VPS, payment information will be passed to FAS4T to electronically transfer funds directly to the attorney or expert service provider's bank account. A planned realtime interface between the two systems would allow users to see the latest status of voucher payments.

Courts will be able to customize eCJA VPS reports with drop down filters and also select which criteria to show, such as payee, service type, representation or case history. The system will document the voucher trail, from how it was prepared, through the internal review process, and on to payment. Rate information will be posted and edits made online. Attorneys and expert service providers will be notified of submission due dates and limits on expert services, when vouchers have been received, where any adjustment may have been made, and when payment occurs. Where questions arise or clarifications are needed, the court can communicate directly with panel attorneys through eCJA VPS and receive a response. And because it will be all online, a judge will be able to approve vouchers wherever she or he has a secure computer connection.

Stephen A. Higginson sworn in as the Newest Fifth Circuit Judge



On November 2, 2011, Judge Stephen A. Higginson was sworn in as the newest addition to the Fifth Circuit's bench. He fills the seat vacated by Judge Jacques Wiener who took senior status. As most of you know, Steve Higginson was the Chief of Appeals in the U.S. Attorney's office where he has worked since 1993. His education includes an A.B. from Harvard College, a J.D. from Yale Law School and a Master of Philosophy from Cambridge University. In addition, his professional career included clerkships with D.C. Court of Appeals Judge Patricia Wald and Supreme Court Justice Byron White.

SELECTED SUPREME COURT ORAL ARGUMENTS: 2012 WINTER TERM

Double Jeopardy

Blueford v. Arkansas, Dkt No. 10-1320 (oral argument February 22, 2012): The jury was instructed to consider four possible charges - capital murder, first-degree murder, manslaughter and negligent homicide - one at a time in descending order. The jury unanimously rejected the two higher offenses but deadlocked on the manslaughter charge. Despite subsequent *Allen* and "Dynamite" charges, the jury was ultimately dismissed and the court refused to enter a verdict as to the two greatest offenses. The question presented is whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars re prosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

Juveniles

Miller v. Alabama, Dkt No. 10-9646 (oral argument March 20, 2012): (1) Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children and (2) does imposition of mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide - a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances - violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments?

Harmless Error

Vasquez v. United States, Dkt No. 11-199 (oral argument March 21, 2012): (1) Did the Seventh Circuit violate this Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all and (2) did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case?

RECENT SUPREME COURT OPINIONS

Perry v. New Hampshire, Dkt No. 10-9874 (January 11, 2012): In an 8-1 decision, the Court held that the Due Process Clause does not require a threshold judicial review of the reliability of an eyewitness identification unless suggestive circumstances of the identification were created by law enforcement. The case involved an identification made by an eyewitness who had called the police regarding burglaries at her apartment complex. She saw a man being questioned on the scene by police and made an ID. However, neither weeks later nor at trial could she make a positive identification. The Court found that the "procedural safeguards" inherent in a trial, such as vigorous cross-examination, will allow the jury to assess the reliability of an eyewitness' identification.

Smith v. Cain, Dkt No. 10-8145 (January 10, 2012): In another 8-1 decision, the Court held the prosecutors violated *Brady* by withholding prior inconsistent statements of the lone eyewitness. Juan Smith was convicted of five counts of first degree murder based on one witness' identification of Smith as the gunman. During Smith's post-conviction proceedings, the investigative file revealed multiple instances where the purported witness stated he was unable to make an identification. The Court found these statements were "material" under *Brady* and that their nondisclosure undermined confidence in the conviction. Reversed and remanded

SUPREME COURT GRANTS WRITS TO ANSWER RETROACTIVITY OF FSA

On Monday, November 28, 2011, the Supreme Court granted a writ of certiorari in Hills v. U.S. (11-5721) to determine whether the Fair Sentencing Act should be applied retroactively to crack pipeline cases (criminal activity occurring before August 3, 2010 but not convicted and/or sentenced until after that date). This will resolve the current circuit split which has been requiring motions to continue in crack cases.

The district court can anticipate the filing of additional Motions to Continue crack cases in this posture until the Supreme Court rules on the important issue of which law applies (F.S.A. 18 :1 ratio vs. Old law 100:1 ratio).

LIONS OF THE TRIAL BAR

A CLE PANEL DISCUSSION

WEDNESDAY, FEBRUARY 1, 2012

6:30 – 8:30 P.M. (DOORS OPEN AT 5:45 P.M.)

6363 ST. CHARLES AVENUE

MONROE HALL, THIRD FLOOR, NUNEMAKER AUDITORIUM



Daniel E. Becnel, Jr.
Law Offices of Daniel E. Becnel, Jr.
Reserve, Louisiana



Russ M. Herman
Herman, Herman, Katz & Cotlar
New Orleans, Louisiana



Arthur A. "Buddy" Lemann, III
Arthur A. Lemann, III & Associates, Inc.
New Orleans, Louisiana

CJA Panel Member Buddy Lemann, one of the lions of the trial bar, will participate in Loyola Law School's February 1, 2012 professionalism and ethics presentation. The Director of Loyola's CLE, Lana Corll, has graciously offered to allow any Eastern District of Louisiana Panel Member to attend the program at a reduced rate of \$10.

National legal journalist Mark Curriden expounds on the legal careers of some of this nation's most successful trial lawyers, three of which are from right here in New Orleans, Louisiana. Curriden will discuss his interviews and subsequent ABA article of seven great trial attorneys from across the country. Hear him tell their extraordinary stories and discover what special characteristics and unique techniques that made them great in the courtroom. After the lecture Curriden will moderate a panel discussion with some of Louisiana's own great trial attorneys, who will be present to share their stories and insights. Mark Curriden is an award-winning legal journalist, bestselling author, and frequent lecturer at legal organizations across the country. Educated as a lawyer, Mark is a senior writer for the ABA Journal, which is the nation's largest legal publication, and a regular contributor to the New York Times DealBook on matters of corporate and business law. He also holds the position of Writer in Residence at the SMU Dedman School of Law in Dallas.

ABA CRIMINAL JUSTICE SECTION

2012 ABA Mid-Year Meeting

February 3, 2012

Royal Sonesta Hotel, New Orleans, LA

For more information, contact Carol Rose at Carol.Rose@americanbar.org.

A COMPREHENSIVE VIEW OF WHERE CYBER CRIME IS HEADING IN 2012 *Program 1:00 - 3:00 pm*

Cyber crimes affect us all, and cyber-security has been identified by President Obama as "one of the most serious economic and national security threats our nation faces." The area of cyber crime is vast, diverse, highly complex, ever growing, and ever changing. It has been observed that the biggest challenge for law makers, the judiciary, attorneys, and private business is to keep up with the pace of emerging technologies, track and trace cyber criminal activities, and understand the increasing sophistication of cyber attacks. Panelists will provide an overview of the laws relating to cyber crime and proposed changes, and the problems and emerging trends in cyber crime investigations. Panelists will focus on the area of cyber-security and the types of breaches that occur as a result of cyber attacks, internal compromises by disgruntled and former employees, negligence, vulnerable software, and inadvertent user error. With the theft of industrial data constituting a great risk to every corporation today, it has become absolutely necessary to study the issues and formulate approaches to deal with the inevitable breach or theft of data when it occurs. Panelists will conclude with practice tips for how to handle the inevitable cyber attack or data breach, highlighting the unique challenges corporations and their counsel, as well as government officials, face. Other topics will include social media as an instrument of crime, and as a source of evidence, and legislation around the country regarding cyber-bullying.

WHY IS QUI TAM LITIGATION OFTEN SO DIFFICULT TO RESOLVE What Has and Has Not Worked in the Past And Ways to Do It Better *Program 3:30 - 5:00 pm*

There is a new paradigm in qui tam cases. There seem to be more qui tam cases being filed now than ever before. They are more complex and more far reaching than those historically filed. There is also a confluence of federal and state false claims acts that has changed the legal landscape forever. These new cases represent a hybrid mixture of state FCA cases, and federal FCA cases driven by private relators and their counsel sometimes moving forward in tandem, sometimes not. Federal district courts and a growing number of state courts are becoming more comfortable with private relators moving forward with these often complicated cases, with or without the government. Are there ways in which to resolve the cases that should be efficiently, fairly, appropriately, and without making them into scorched-earth land wars? This panel will discuss the new paradigm and the practices and procedures that can be utilized to find quicker, more efficient and more equitable settlements of appropriate qui tam cases. Whether meritorious or not, these cases consume massive amounts of counsel, corporate and judicial resources. This panel will also examine what has and has not worked in the resolution of complex FCA cases and what should be more carefully examined going forward to adapt to the ever-changing face of vigorous qui tam enforcement.

RECOMMENDED TRAINING PROGRAMS FOR CJA PANEL ATTORNEYS

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE

FEBRUARY 2, 2012 - SANTA FE, NEW MEXICO

Contact: Jenna_Shepard@ao.uscourts.gov

The Fundamentals of Federal Criminal Defense Program (The Fundamentals Track) is a one-day program specifically designed with the new practitioner in mind. Despite your years of practice in other areas of law, if you are new to the world of federal criminal defense this program will introduce you to a number of vital areas which are essential when providing effective representation in federal criminal court. Unlike more advanced programs, attendees will have the luxury of learning, asking questions and working with other attendees who are likewise new to this difficult area of practice. The Fundamentals Track is a rare opportunity for new CJA panel attorneys, and those seeking to join the Panel, to hear a dynamic group of attorneys, professionals and judges, speak on a wide variety of topics most vital to providing robust and effective representation. Best of all, the Fundamentals Track is offered on the first day of our Winning Strategies Seminar. This allows attendees of the Fundamentals Track to join in with Winning Strategies attendees for one-and-a-half days after the Fundamentals Track is concluded. Since both programs are offered at the same location attendance in both programs is easy and encouraged. A perfect mix for the new federal criminal defense attorney wishing to get a day of basics and a great look at more complex areas during later sessions.

WINNING STRATEGIES SEMINAR

FEBRUARY 2 - 4, 2012 - SANTA FE, NEW MEXICO

MAY 10 - 12, 2012 - MINNEAPOLIS, MINNESOTA

Contact: Jenna_Shepard@ao.uscourts.gov

The Winning Strategies Seminar brings together a dynamic group of attorneys, professionals and judges, speaking on a wide variety of topics, all specifically designed to keep Panel Attorneys abreast of the most recent and important developments in federal criminal defense. This two-and-a-half day program provides attendees with the opportunity to delve into a host of topics which most often confront federal criminal defense attorneys. Sessions include both large plenary lectures as well as smaller "break-out" lectures that meet the specific needs of the advanced practitioner and the less experienced attorney alike. Sessions will include such topics as new sentencing strategies in a post-Booker world, neutralizing and using experts, immigration-related defenses and the new Padilla requirements, understanding and defending computer crimes, persuading judges to move away from over-dependence on the Guidelines, how to attack notices pursuant to 18 U.S.C. Section 851, defending gun cases, recurring issues in drug cases, how to best take advantage of proffers and cooperation, Supreme Court updates, and ethics.

FEDERAL LAW AT THE FRENCH QUARTER

MARCH 8 - 9, 2012 - NEW ORLEANS, LOUISIANA

REGISTER ONLINE: www.tcdla.com

Current and former NACDL presidents, TCDLA presidents, leading federal public defenders and federal law experts gather to share their insights into the pitfalls and promise of federal criminal defense. The program is designed for both the occasional and the experienced federal lawyer, with an emphasis on cutting-edge issues unique to this challenging and exciting practice.

SENTENCING ADVOCACY WORKSHOP

MARCH 29 - 31, 2012 - REDONDO BEACH, CALIFORNIA

Contact: Shemiah_Schuler@ao.uscourts.gov

The Sentencing Advocacy Workshop is a tuition-free CLE for Federal Defender attorneys and CJA panel attorneys which focuses on an often neglected, yet extremely important, area of practice. The workshop 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. Participants bring a pending case of their own to the workshop where they brainstorm the facts of the case, develop a theory and theme, apply storytelling techniques, write the first part of their sentencing memo, and discuss what to present and how to conduct the sentencing hearing. Enrollment is limited to 60 Federal Defender and CJA attorneys who have not previously participated in this workshop. Early registration is encouraged.

NINTH NATIONAL SEMINAR ON THE DEVELOPMENT AND INTEGRATION OF MITIGATION EVIDENCE IN CAPITAL CASES

APRIL 26 - 29, 2012 - ATLANTA, GEORGIA

REGISTER ONLINE: www.capdefnet.org

This seminar has been held annually since the Supreme Court decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), which recognized the need for thorough mitigation investigation and acknowledged the importance of the non-lawyer who had compiled the mitigation in the successful postconviction presentation. This year's seminar will include presentations on the use of narrative, finding and telling humanizing stories, utilizing state-of-the-art technologies to present mitigating evidence, and both helpful and harmful developments in the domain of mental health evidence. Additional topics will include gangs and neighborhood investigation, using mitigation to resolve cases, and exploring the impact of history on our clients' lives. Faculty will include academics and writers as well as litigators, mitigation specialists, and mental health experts. Breakout sessions will include a beginners' track on mitigation basics as well as advanced workshops on specialized problems.

MESSAGE BOARD

- CJA panel attorneys who use experts/service providers should make every effort to submit the expert/service provider's voucher along with the attorney voucher at the final completion of the case. This will increase the likelihood that both vouchers will be approved.
 - As of January 3, 2012, United States Circuit Judge Catharina Haynes is now been designated by the Chief Judge to review and authorize excess district court vouchers in the Fifth Circuit.
 - If you have a CJA appointed case and anticipate that your costs will approach \$30,000, you **must** submit a full budget. Further, if you foresee your case proceeding to trial, notify Barbara Daigle or Heather Davis at least 30 days before the scheduled trial date. If a budget is not submitted and your costs exceed \$30,000, reimbursement for all compensation and expenses may be difficult to obtain. CJA Form 28A is the *Attorney Services Detailed Budget Worksheet for Non-capital Representations*. It is available on our website at www.federaldefender.net.
 - 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.
 - Our office routinely moots our cases before Fifth Circuit arguments. Recently appellate panel attorneys have requested that our office moot their cases as well. We are happy to do so if your case is scheduled for Circuit argument.
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