THE DEFENSE *NEVER* RESTS

Vol. 10
Number 1
March 2008

Published by
the Federal Public
Defender's Office for the
Eastern District of Louisiana

CJA Panel Rep Extraordinaire Herb Larson Passes the Baton

Like a rock! So it was said. Often we have said that Herb Larson is as steady as a rock!

But more recently, what was said of Herb Larson is that he, like Sisyphus, continued to push on the CJA rock when other mere mortals would certainly have given up. And accordingly, the Defender Services Branch of the Administrative Office of the U.S. Courts presented him his very own rock in recognition of his tireless efforts on behalf of CJA panel attorneys.

Herb, happily pictured here with his wife Julianne, was the recipient of congratulations and many accolades from CJA Representatives from around the nation who recently had an opportunity to wish him well in his new position as Director of Tulane's International Legal Programs as well as Professor of the Practice. The cocktail party was hosted by the New Orleans Chapter of the Federal Bar Association at L'il Dizzy's in grateful appreciation of his contribution to our federal court on behalf of indigent clients, but especially on behalf of his colleagues on the CJA Panel.

As for our office, we have always said that "Herb Larson rocks our world!" Our new CJA Rep, Billy Gibbens, will have big shoes to fill.

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Winning Strategies

Several attorneys in our office along with several panel attorneys from the Eastern District of Louisiana presented segments at the National Winning Strategies seminar held locally in February. In keeping with our now "well-known" policy of encouraging national conferences to come to New Orleans, all participants received an invitation to cocktails on the first night of the seminar. The "ice breaker" allowed for lots of networking opportunities. As you can see from the photos, a good time was had by all.

A National Panel of Federal District Court Judges Carl Barbier, Kathleen Cardone and Henry Kennedy provided federal sentencing insights.

Lori A. Green (Attorney-Advisor, Training Branch), Stephen Marley (Attorney-Advisor, Training Branch), Molly Roth (Visting Attorney-Advisor, Training Branch, AFPD, Western District of Texas) and Martin Richey, (Visiting Attorney-Advisor, Training Branch, AFPD District of Massechusetts).

When you are in New Orleans, the drinks are on us.

*Pictured here are:
Winning Strategies program director, Lori Green, and Keynote Speaker Denny LeBoeuf*

Chief Judge Ginger Berrigan and Local Host Virginia Schlueter flank Lori Green. Judge Berrigan outlined the multicultural aspects of New Orleans in her welcome to out of town panel attorneys.

A distinguished visitor made quite an appearance in a cross examination situational training exercise.

Keynotes by Denny LeBoeuf: Commitment Celebrated

Denny LeBoeuf was asked to present the keynote addresses for both the Winning Strategies Seminar which our office co-hosted along with Defender Services in February and the CJA Rep Conference attended by the representatives of each CJA panel in March. The efforts of our own panel attorney from a previous life, Lori Green, and the team she assembled (pictured above) resulted in a practical program which received rave reviews from practitioners from around the country.

Denny's commitment to ensuring the effective representation of counsel to indigent clients was evident from her recitation of the efforts of the Board of Directors of the Orleans Public Defenders in establishing and litigating reasonably appropriate caseloads for full-time attorneys consistent with national standards.

And her vivid recounting of post-Katrina efforts provided motivation and inspiration to visiting panel attorney reps later that same month. As always, Washington's Defender Services Division was able to identify and select one of our very own extraordinary panel attorneys as a national keynote speaker. This speaks volumes!

Powell v. Alabama

As New Orleans FBA Chapter President, Virginia Laughlin Schlueter, requested the assistance of the chapter in presenting a celebration of the seventy-fifth anniversary of the landmark Powell v. Alabama decision.

The event was co-sponsored by the Louis Martinet Society and the A.P. Toureau Inns of Court. The three organizations also joined in welcoming attorneys, law professors, law students and judges from both the Federal and State benches at a formal reception which was held in Chief Judge Ginger Berrigan's chambers following the program.

Law professors presented the legal background, framework and analysis of the Supreme Court's decision. Federal and state public defenders contrasted the systems. Federal and state judges and justices presented views from those benches.

Ms. Schlueter, as the Federal Public Defender for the Eastern District of Louisiana, framed the current Powell v. Alabama issues in the context of the federal legislation which establishes the federal criminal justice system and funds the representation of indigent clients. The federal public defender system was juxtaposed to the state public defender system from the standpoint of size, caseload, and funding.

As you know, the Office of the Federal Public Defender is established pursuant to 18 U.S.C. 3005 A and funded nationally as part of the Administrative Office of the United States Courts. The eight attorneys who comprise the office are hired for full time work and prohibited from the outside practice of law. The office handles court appointments of qualified indigent clients charged with federal crimes along with our conflict panel of approximately 100 court approved attorneys who are compensated at a rate of $100 per hour for felony cases and $170 in capital cases.

The event received extraordinary judicial support. Two of the Eastern District CJA Judicial Committee members who have an especially keen interest in the implementation of the federal criminal justice system, Judges Jay Zainey and Carl Barbier, were in attendance. In addition, Fifth Circuit Judge Jim Dennis, Chief Judge Ginger Berrigan, District Court Judges Eldon E. Fallon and Mary Ann Vial Lemmon, and her husband, retired Louisiana Supreme Court Justice Harry Lemmon, were also present.

The program garnered national attention deserving of the attendance by National FBA President Jim Richardson and National FBA Treasurer Lawrence Baca.

Pictured above: Program event organizer Loyola Law Professor Nannette Jolivette Brown; Cherrell R. Simms, representative of co-sponsoring Louis Martinet Society and the A.P. Toureau Inns of Court; and Virginia Schlueter, New Orleans Chapter President

Panelists

Left to right: Stephen Higginson, Loyola Associate Professor of Law; Nannette Jolivette Brown, Loyola Clinical Professor of Law; Virginia Schlueter, New Orleans Chapter President; Ivan L.R. Lemelle, United States District Court Judge; Justice Bernette Joshua Johnson, Louisiana Supreme Court Associate Justice; Majeeda Snead, Acting Director of the Loyola College of Law Clinic; Laurie White, Criminal District Court Judge; and J. Steven Beckett, Director of Trial Advocacy at the University of Illinois College of Law. Not pictured is Clinical Professor of Law at Loyola University Stephen Singer, who is Chief of Trials at the New Orleans Public Defender's Office.

2008 Criminal Justice Act Panel Representative Conference

Over one weekend in New Orleans, CJA Representatives tackled what they considered to be the biggest obstacles facing CJA panel attorneys in the representation of their clients. Among the issues raised were the following: (1) Remote Detention Facilities-Ensuring Quality Representation for Clients; (2) Geographic Barriers-Building Bridges to Your Panel; (3) Cooperation with the Federal Defender-Working Together for a Stronger Panel; (4) Hourly Rates-Evaluating the Compensation Necessary to Ensure a Qualified Panel; (5) Delays in Voucher Payment-Implementing Voucher Reduction Guidelines; (6) Overcoming Apathy-How to Inspire, Motivate, and Empower Your Panel; and finally (7) Creating/Improving CJA Committees as a Tool to Overcoming Obstacles.

The remote detention issues centered around the great distances between attorneys and clients now being housed in remote locations. Difficulties in communicating with clients and adverse impacts on the quality of representation were discussed. Remote detention was cited as the reason for increases in time and expenses on vouchers. One possible solution was to elicit the aid of the U.S. Marshal to house clients closer, especially early in the representation process. Videoconferencing was discussed but not generally viewed with favor.

Geographic barriers and building bridges between FPD's and panel members was also a hot topic. The suggestions for effecting change included what is already generally done in this district: Identifying panel members and having a CJA selection committee and a limited panel size to promote competence. Recognizing excellence by identifying individual panel members at coordinated annual events and honoring CJA "attorney of the year" is now done at NACDL's Annual Justice Tate Dinner. On a national level, the need for Federal Public Defenders to communicate with panel attorneys via email and list serves was stressed.

FPD's and CJA lawyers were encouraged to work together for a stronger panel. Regular communication about panel needs and selection of panel members as speakers at training programs focusing on the issues faced by individual practitioners as opposed to AFPD's was discussed.

Hourly rates commensurate with private counsel was seen as a problem impacting on attracting and keeping qualified counsel. Continued requests to Congress for increases are planned.

Delays in voucher payment and voucher reduction guidelines caused much debate. In districts experiencing these problems, reliance on Judicial Conference guideline (2.22D) indicating that courts should not reduce vouchers to balance the judiciary budget was stressed. A national alliance with DSAG, FDO, Defender Services Committee and ODS in districts where problems are reported was recommended.

In order to inspire, motivate, and empower the panel, FPD's considered a tiered system to help improve panel quality based on experience. Revising panel eligibility requirements, winnowing down panel to best-qualified, creating a mentor program and improving diversity programs were the suggestions for effecting positive change to local panels.

Participation of the panel attorney representative on local CJA committees was suggested as a tool to improving, expanding and strengthening the role of panel attorneys in each district.

If you have specific questions or would like further information about the issues discussed at the conference, please contact your CJA panel representative Billy Gibbens at 504-680-6050.

With the resignation of Herb Larson, came the election of John Convery, National CJA Rep for the Fifth Circuit.

Panel Reps questioned Defender Services on hot topics.

FPD's and their CJA Reps exchanged views over charbroiled oysters at a local dining establishment.

Crack Retroactivity Progress Report

As March came and went, the Eastern District of Louisiana District Court Judges continued to consider the sentences of approximately five hundred clients who were convicted of crack cocaine violations. At present, over one hundred and eighty clients have been reviewed, re-sentenced, and/or released on the basis of a two point reduction in the base offense levels previously calculated. This amazing feat is the result of a triage team composed of representatives of the US Attorney's Office, the Probation Office and our office, namely Gary Schwabe. At present, the cases of all clients scheduled for release in 2008, 2009, and 2010 have been addressed. With very few exceptions, the judges are sentencing within the new guideline ranges where recommended by the triage team. And the work continues and will continue until all cases have been reviewed and analyzed for reconsideration and/or re-sentencing.

For the first time in a very long time, we are able to inform clients of reductions in their sentences and receive expressions of gratitude and appreciation.

New Assistant Federal Public Defender on Board

The Office of the Federal Public Defender recently welcomed Sam Scillitani as an Assistant Federal Public Defender. Sam began work on March 3, 2008. Prior to accepting employment with our office, Sam was the owner and operator of the Hispanic Legal Center, L.L.C., a law clinic dedicated to the representation of Hispanic clients. He was also a member of our C.J.A. panel for the Eastern District of Louisiana. During his ten year panel tenure, he represented clients with enthusiasm and a sense of extraordinary commitment.

Sam's resume includes a stint as an Assistant Indigent Defender for St. John the Baptist Parish. For the last six years, Sam has been a part of the capital defense team for Jefferson Parish. He is certified by the State of Louisiana to be lead counsel in capital defense cases and in that capacity has successfully negotiated four life sentences. He attended the Clarence Darrow Death Penalty Defense College and the Bryan R. Shechmeister Death Penalty College. In addition, his experience included successfully defending and negotiating a life sentence in Federal Court.

And lastly, Sam was born in Valencia, Venezuela and is fluent in Spanish.

NEW ORLEANS AREA HABITAT FOR HUMANITY "BENCH – BAR HOUSE PROJECT" 2008

The location of our Habitat Bench/Bar House is 3525 Eagle Street. It is near Carrollton Avenue and the Palmetto Overpass (not far from Xavier University). On Fridays and Saturdays until May 16, 2008, Federal Court generally and our office specifically are trying to form a work cadre of able bodied and not-so able bodied volunteers to help with this project. You, your spouse and support staff are invited to participate. Work begins at 8:00 a.m. and concludes around 2:00. Bring your own lunch and water. You can sweat with us oldies and have a great time doing something productive. For planning purposes, please let us know when you can participate.

Directions coming on Carrollton Avenue towards Canal Street and away from St. Charles Avenue
Turn Left on PALMETTO ST - go 0.3 mi
Turn Left on JOLIET ST - go 0.1 mi
Turn Right on STROELITZ ST - go 0.2 mi
Turn Left on EAGLE ST - go 0.1 mi
Arrive at 3525 EAGLE ST, NEW ORLEANS, on the Left

Directions coming on Carrollton Avenue away from Canal Street and towards St. Charles Avenue
Turn Right on PALMETTO ST - go 0.3 mi
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Public Internet Access to Plea Agreements

For the past year, the Judicial Conference Committee on Court Administration and Case Management (CACM), in conjunction with the Committee on Criminal Law, has been considering the implications of websites such as www.whosarat.com, whose purpose is to identify undercover officers, informants, and defendants who provide information to law enforcement. A small number of the posted documents on this website are from federal criminal case files, some of which were scanned from clerks' offices' paper copies, while others were electronic documents retrieved from the Judiciary's Public Access to Court Electronic Records (PACER) system.

In November 2006, the chairs of the CACM and Criminal Law Committees sent a memorandum to all district court judges, requesting that they "consider sealing documents or hearing transcripts in accordance with applicable law in cases that involve sensitive information or in cases in which incorrect inferences may be made." The two chairs also wrote a letter to the Department of Justice, asking for its comment on the Conference's privacy policy as it pertains to Internet access to criminal case files. In December 2006, the Department provided its response, requesting changes to the policy. Among other things, it suggested a uniform policy of eliminating public Internet access through PACER to all plea agreements.

After reviewing the Department's comments, the CACM Committee decided to solicit public comment on the suggestion to remove plea agreements from PACER. A request for public comment was published in the Federal Register in September 2007 and sent to all courts, as well as to other interested groups.[1] The comment period was open for six weeks, and during that time 68 comments were submitted.[2] While some comments came from within the Judiciary, many more were from private citizens and attorneys. The comments, by a margin of four-to-one, overwhelmingly favored retaining public Internet access to plea agreements.

At its meeting in December 2007, the Committee discussed the proposal and the public comments received. The Committee noted, as a preliminary point, that there was no evidence that anyone had been harmed as a result of the disclosure of information from a federal court case file. It also reasoned that the Department of Justice proposal would be an inadequate solution to the perceived problem, in that it would prohibit public Internet access to all plea agreements, most of which do not disclose cooperation, while simultaneously leaving all plea agreements (including those that contain cooperation information) available to the public in clerks' offices. Additionally, the Committee noted that several districts have developed solutions that work locally but – given the variations in circuit case law – would not be appropriate as national policy. For these reasons, the Committee declined to endorse the Department of Justice proposal.

Therefore, instead of recommending that the Conference adopt a national policy, the Committee is asking each court to consider adopting a local policy that protects information about cooperation in law enforcement activities but that also recognizes the need to preserve legitimate public access to court files.[3]

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[1]To ensure that the appropriate persons were aware of the comment period, the request was posted on www.uscourts.gov, mailed to public interest organizations involved in privacy issues, and e-mailed to every district judge, magistrate judge, clerk of court, and appellate court chief judge.

[2]The comments are posted at http://www.privacy.uscourts.gov/2007comments.htm.

[3]The Committee emphasized that many of the comments received expressed appreciation for the high levels of electronic access the Judiciary provides to its case files, and how such access has strengthened their understanding of and appreciation for the judicial process.

Public Internet Access to Plea Agreements

To this end, your court might want to consider the following suggestions received by the Committee during the public comment period:

- Ask the parties to convey cooperation information to the judge in a document other than the plea agreement, which could be held outside of the clerk's office's case file. For example, this process could include a government exhibit at the plea hearing (returned to counsel at the end of the hearing), as a letter in the judge's chambers file or in the probation officer's file. The cooperation document could be filed and included in the clerk's office file at a time when the fact of cooperation is no longer a sensitive matter in the case or never filed.

- Seal plea agreements, consistent with circuit case law – keeping in mind that having a sealed entry on the docket sheet near the plea agreement may indicate cooperation.

- Enter a court order restricting Internet access to the plea agreement to the parties on a case-by-case basis.

- Order the parties to perform additional redaction, under Fed. R. Crim. 49.1(e)(1) to remove information regarding cooperation from the publicly available version of the plea agreement, with the unredacted plea agreement being filed under seal.

- Restructure the court's practices to make each case appear identically on PACER. For example, in the District of North Dakota, this was accomplished by filing all plea agreements as public [unsealed] documents, sanitized by the drafter of any references to cooperation. All pleas are accompanied by a sealed document, "plea supplement." The sealed plea supplement contains either a cooperation agreement or a statement that no agreement exists. To the public, every plea in that court will be displayed in identical form: a plea agreement devoid of any cooperation language and a sealed plea supplement.

- Delay the publication of any plea agreement that includes cooperation information, perhaps until after sentencing.

For more information on these suggestions, please contact Susan Del Monte of the Court Administration Policy Staff at (202) 502-1560 or via email at Susan Del Monte/DCA/AO/USCOURTS, who, as a member of the staff to the CACM Committee, will be gathering local court policies and information about how courts are handling the issue. The CACM Committee plans to monitor the development of local court policies and may revisit this issue in the future to determine if there is a need for a national policy.

Judge Carl Barbier, our Fifth Circuit Representative on the Defender's Services Committee of the Judicial Conference, has called a meeting of representatives from our office and the U.S. Attorney's Office to begin discussions regarding a local resolution of this issue. It is scheduled for April 1, 2008. Anyone wishing to offer comments should e-mail them to Virginia_Schlueter@fd.org.

Fifth Circuit Highlights

CONFRONTATION CLAUSE

United States v. Harper, 514 F.3d 456 (5th Cir. 2008): Defendant Ronald Harper was tried with with co-defendant Jimmie Collins. The Fifth Circuit held that the testimony of two ATF agents as to Collins' incriminating statements violated Harper's Confrontation Clause rights because Collins did not take the stand so he was not available for cross-examination. This is true even though Collins only incriminated himself. The error, however, was harmless as the district court instructed the jury not to consider the admissions against Harper. Unlike Bruton v. United States, the jury could be trusted to follow the instructions because Collins' admissions did not facially implicate Harper.

FOURTH AMENDMENT

United States v. Mata, 517 F.3d 279 (5th Cir. 2008): Undercover ICE agents made a controlled delivery of 1,000 kilograms of marijuana hidden in a tractor-trailer to a garage owned by the defendant, Mata. The police maintained surveillance. When they saw preparations to move a white box they believed contained the drugs, the officers moved in for the "take down." They found 7 to 10 people on site, whom they arrested. Immediately after the raid, an ICE agent made a "safety personnel sweep" of the garage, purportedly to see if anyone else was on the premises. He found no one, but saw substantial amounts of marijuana and firearms in plain view. The Fifth Circuit rejected defendant Mata's Fourth Amendment challenge to the protective sweep. One prerequisite for a protective sweep is "articulable facts plus rational inferences that allow a reasonable officer to suspect that an individual dangerous to the officers is within the area to be searched." The ICE agent admitted that "he had no idea" who was inside the premises. Mata argued that fell short of "articulable facts." The Fifth Circuit disagreed. A belief that the persons seized might have accomplices suffices for a protective sweep incident to a raid on a drug distribution or manufacturing center, the Court said, even if the officers do not know the identity of the specific individuals who may be inside. (Note that this case may *limit* the circumstances under which ignorance translates into articulable facts to support a sweep.)

United States v. Troop, 514 F.3d 405 (5th Cir. 2008): Border Patrol agents tracked suspected illegal aliens from a drop-off location to a house four or five miles away. It was after midnight and the agents walked through the open gate, up to the house. They knocked on the door but no one answered. Instead of leaving, they walked around the house. Two of the agents shined a flashlight through a window. There, they say two men lying on a bed. The men did not move when they shouted, "Wake up, Border Patrol." One agent claimed he reached through the window and shook one man's foot. Still, the man did not respond. So the two agents climbed through the window and let the other agents in through the front door. Once inside, they arrested the aliens and the owner of the house, whom they charged with helping the aliens enter illegally. The agents invoked exigent circumstances to justify the search. They claimed they suspected a medical emergency because the men had walked several hours in the heat and the footprints showed they were tired. The Fifth Circuit found this was not enough. "To hold otherwise would permit warrantless entries into homes in which an occupant had recently taken a long walk in the Texas summer and become tired as a result." One of the agents testified his concern arose when he got no response after reaching through the window and grabbing the alien's foot. But by that time, he already had exceeded constitutional bounds.

EVIDENCE – INCONSISTENT STATEMENT AS SUBSTANTIVE EVIDENCE

United States v. Cisneros-Gutierrez, No. 06-11156 (5th Cir. Feb. 13, 2008): The defendant and his brother Edgardo were charged with a methamphetamine conspiracy. Edgardo pleaded guilty and agreed at his rearraignment that the factual resume drawn up by the government was correct. The factual resume stated that the defendant had brought the methamphetamine seized by the DEA to Edgardo's house. But at defendant's trial, Edgardo denied it. The government introduced Edgardo's factual resume as substantive evidence under Fed. R. Evid. 801(d)(1), which provides that a statement given under oath at a trial, hearing, or other proceeding is not hearsay. The Fifth Circuit affirmed. That the government had written the factual resume was not dispositive because Edgardo affirmed that it was correct at rearraignment.

PATIENT-THERAPIST PRIVILEGE

United States v. Auster, 517 F.3d 312 (5th Cir. 2008): This extortion prosecution arises from defendant's threat of

Fifth Circuit Highlights

violent retribution if his workers compensation benefits were cut. The defendant made the threat to his therapist, who notified the intended victims, as required to do by law. After indictment, the defense moved to suppress the statements as protected by the patient-therapist privilege and the district court granted the motion. The government appealed. The Fifth Circuit reversed, holding that the privilege protected only confidential communications and the threat that the defendant conveyed to his therapist was not confidential because the defendant knew from prior incidents that his therapist would notify the targets. The Fifth Circuit's position is in disagreement with the Sixth and Ninth, setting up a circuit split.

IMPROPER PROSECUTORIAL ARGUMENT

United States v. Mendoza, No. 06-51685 (5th Cir. Mar. 26, 2008): The prosecutor may not comment in closing argument on a defendant's demeanor during trial. While the jury is free to look at the defendant, his demeanor is not evidence and therefore cannot be considered by the jury in reaching a verdict.

AMBIGUOUS VERDICT

United States v. Howard, No. 07-20212 (5th Cir. Feb. 12, 2008): The defendant, chief financial officer of Enron Broadband Services, and others were indicted for conspiracy to commit wire fraud and to falsify Enron's books. The defendant also was charged with the substantive count of falsifying the books. A jury convicted on all counts. The conspiracy conviction had to be vacated under an intervening Fifth Circuit case, but defendant's conviction on the substantive count remained. At trial, the district court had given a Pinkerton instruction at trial, allowing the jury to convict on the substantive count if the falsification was done by a co-conspirator. Since the conspiracy count fell, the Pinkerton theory of liability was no longer valid. Moreover, it was impossible to tell whether the jury relied on the Pinkerton theory to convict or found that defendant personally caused the books to be falsified. Therefore, the conviction on the substantive count had to be vacated as well.

ILLEGAL RE-ENTRY & RECIDIVISM ENHANCEMENTS

United States v. Rojas-Luna, No. 07-40016 (5th Cir. Mar. 26, 2008): The defendant was convicted of illegal re-entry after a 1988 removal from the United States. But the government wanted to use a later aggravated felony, a 2003 conviction for aggravated assault, to enhance his sentence. The statutory maximum sentence for illegal re-entry is two years, unless the prior removal followed conviction of an aggravated felony. Here, the 1988 removal came first. The government claimed Rojas–Luna also was removed in 2006, which came after the 2003 aggravated assault conviction. But the Fifth Circuit held that the fact of whether Rojas-Luna was removed in 2006 did not fall within the Almendarez-Torres exception to Apprendi. As a result, it had to be found by a jury beyond a reasonable doubt before the higher statutory maximum could be triggered. The decision sets forth the Fifth Circuit's recognition that "the Supreme Court has shown a reluctance to expand Almendarez-Torres's holding to any fact other than a prior conviction." A removal proceeding does not have the procedural safeguards that accompany a criminal prosecutions. Therefore, it falls under Apprendi, not Almendarez-Torres.

United States v. Garcia-Arellano, No. 06-11276 (5th Cir. Mar. 25, 2008): Sentences for illegal re-entry convictions can be enhanced for prior convictions for a drug trafficking offense, as defined by the Sentencing Guidelines. The Texas controlled substances statute is broader than the Guideline definition. In Shepard v. United States, the Supreme Court limited the documents that could be used to determine which prong of an overbroad statute a defendant's conviction fell under. In the instant case, the Fifth Circuit adds judicial confessions to those permissible documents. In his written judicial confession, the defendant confessed that he violated the part of the Texas statute which qualifies as a drug trafficking offense under the Guideline definition. Therefore, the enhancement could be applied.

RESTITUTION

United States v. Nolen, No. 05-40859 (5th Cir. Mar. 25, 2008): The amount of restitution that can be imposed in a criminal proceeding is limited to losses attributable to the offense of conviction. It does not include losses associated with relevant conduct, unless the defendant so agrees in a plea agreement. Inclusion of losses from

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relevant conduct is plain error.

SENTENCING

United States v. Quintana-Gomez, No. 07-10139 (5th Cir. Mar. 25, 2008): A district court may not order that its sentence run consecutively to a sentence that has not yet been imposed in a proceeding pending in another federal court.

United States v. Newson, 515 F.3d 374 (5th Cir. 2008): The government may condition a motion for a third point for acceptance of responsibility on the defendant waiving his right to appeal his conviction and sentence.

United States v. Gonzalez-Terrazas, 516 F.3d 357 (5th Cir. 2008): In deciding whether a prior conviction qualifies for a recidivism enhancement, this Court takes a categorical approach, examining the elements of the statute, not the specific offense conduct. There is an exception for "disjunctive" statutes: those which can be violated in any of several alternate ways. Documents such as the charging instrument, jury instructions, factual basis and judgment of conviction can be used to decide which of prong of a disjunctive statute the defendant was convicted under. In the instant case, the question was whether the defendant's conviction of the California offense of residential burglary qualified as "burglary of a dwelling," an offense that is listed as a crime of violence under the Sentencing Guidelines. The California statute does not require unlawful entry but the generic, contemporary definition of "burglary of a dwelling" does. It is *not* permissible to look beyond the elements of the statute in this case because the California statute does not have a subsection requiring unlawful entry. In any event, even if the criminal complaint could be consulted, it did not bring the conviction within the Guideline definition because there was no reliable evidence as to whether the defendant pled guilty to the complaint as written.

United States v. Price, 516 F.3d 285 (5th Cir. 2008): A prior conviction for the Texas offense of delivery of a controlled substance did not count as a "controlled substance offense" for Guideline purposes because the statute included "offer to sell" in the definition of delivery and offering to sell without possession was not distribution. Although the court can consult a limited range of reliable documents, the written judgment following the guilty plea did not specify the manner in which the defendant delivered the cocaine and thus did not exclude the possibility that he merely offered to sell.

REVOCATION OF SUPERVISED RELEASE

United States v. McKinney, No. 07-50170 (5th Cir. Mar. 7, 2008): At McKinney's original sentencing, the district court departed downwardly from the Guideline range under U.S.S.G. § 4A1.3, finding that the criminal history category of VI overstated the defendant's record. His sentence corresponded to a criminal history category of III. The defendant served his time and was released on supervised release. In the instant revocation proceeding, the defendant wanted the district court to use the post-departure criminal history category of III in determining his sentence. The district court disagreed and the Fifth Circuit affirmed. The appropriate criminal history category was the category at the time supervised release was imposed, *before* any departures.

HARMLESS ERROR

United States v. Alvarado-Valdez, No. 99-40370 (5th Cir. Mar. 12, 2008): The parties agreed there was a Confrontation Clause violation under Crawford v. Washington at trial. The issue was whether it was harmless. The government argued for a harmless error test focusing on the other evidence of guilt. The defendant urged a test focusing on the impact of the erroneously admitted evidence; if it might have contributed to the verdict, the defendant contended the error was not harmless. The Fifth Circuit agreed with the defendant. The government's test of harmless error was appropriate when evidence that should have been admitted was erroneously excluded. By contrast here, evidence was erroneously admitted. In that situation, the focus must be on how damaging the erroneously admitted evidence was.

Snyder v. Louisiana

SUPREME COURT VACATES ANOTHER CONVICTION DUE
TO PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORIES

In Snyder v. Louisiana, 128 S. Ct. 1203 (2008), the U.S. Supreme Court took the unusual step of reversing the denial of a Batson challenge because it found the prosecutor's explanation implausible. Mr. Snyder, who was facing the death penalty, was represented by, among others, Marcy Widder of the Capital Appeals Project and a member of our own CJA panel. Kudos to Marcy for a well-deserved win.

We all know how hard it is to win Batson challenges in the trial court, let alone get relief from an appeals court. So we want to spend some time discussing Snyder to see how we can use it in our own practice.

I.

Mr. Snyder was convicted by an all-white jury. Five of the 36 jurors who survived challenges for cause were African-Americans and the prosecutor used his peremptory strikes to remove them all. In the Supreme Court, Snyder challenged two strikes only. After finding one strike discriminatory, the Supreme Court did not reach the other strike. One discriminatory strike is enough to get a reversal. So while you generally want to preserve objections to all strikes of African-Americans at trial (by going back after a pattern emerges from the second or third strike of an African-American to make clear that you are challenging the previous strikes as well), be more selective on appeal. As in any appeal, don't dilute the strength of your good claims by mixing them with weak ones.

As you know, there are three steps to a Batson challenge: (1) the defendant makes a prima facie case of discrimination, usually by showing a pattern of striking African-Americans; (2) the prosecutor gives an explanation for the strike; and (3) the district court decides whether the prosecutor's explanation was a pretext for discrimination. The Supreme Court repeated in Snyder that appellate courts defer to the trial court on this third step because the trial judge sees the demeanor of the prosecutor whose credibility in question and the demeanor of the juror who was struck. Often prosecutors give reasons relating to juror demeanor (yawned, wouldn't look me in the eye) to justify a strike and the appellate court cannot tell from the cold record whether the juror in fact exhibited that demeanor.

But in Snyder, the Supreme Court did not defer to the trial judge. The prosecutor gave two reasons for striking juror Jeffrey Brooks. One was that he was nervous during voir dire. The other was that he was worried about missing "student teaching" hours he had to fulfill for a course he was taking. Defense counsel disputed both explanations. The trial judge, however, did not specify the basis for his ruling. He said only "All right, I'm going to allow the challenge." Therefore, the Supreme Court could not tell the basis for the trial judge's ruling. As a result, the Court could not infer that the trial judge remembered that Mr. Brooks had been nervous during voir dire, as the prosecutor claimed.

We get "demeanor" explanations from prosecutors all the time. Unless you agree, dispute the prosecutor's description on the record. Make clear that you are challenging the demeanor explanation. Point out that the prosecutor did not follow up on "demeanor" concerns with the juror. If the prosecutor gives multiple reasons for the strike and the trial judge, as in Snyder, fails to specify the ground for his ruling, you have a good issue on appeal.

III.

The prosecutor's alternate explanation for striking Mr. Brooks was that he expressed concern about missing his student-teaching hours, a prerequisite for passing a class in which he was enrolled. But the judge's law clerk called the juror's professor, who said there would be no problem in making up the time. When juror Brooks was informed, he raised no further objections. Furthermore, the prosecutor anticipated that the trial would last only until the end of the week – and Mr. Brooks was not voir-dired until Wednesday, so serving on the jury would have taken him away from school only a couple of more days.

Probably the most important thing to take away from this part of the ruling is that the Supreme Court was

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influenced by the disparate treatment of two white jurors, neither challenged by the prosecutor – who expressed concern about missing work and being unable to meet pressing obligations.

It is difficult, of course, to pull together this type of comparison on the spot when you are standing at the bench arguing. But Snyder and Miller-El II indicate that it must be done. One distinguished criminal defense lawyer suggests the following: argue to the judge that Miller-El II and Snyder require a comparison with how the prosecutor treated white jurors with similar disabilities; therefore, the voir dire responses of each white juror whom the prosecutor did not strike must be reviewed in open court to make this comparison. This gives you some time to review your notes and marshal the facts. You might also consider getting the voir dire transcript and filing a motion for a new trial if you think the record needs further development.

IV.

Finally, the Snyder Court answered a question brewing in the circuits: whether race must be the only reason for the strike if a Batson objection is to succeed. The answer in Snyder was no: "[A] peremptory strike shown to have been motivated in substantial part by discriminatory intent [can]not be sustained" unless the prosecutor, at the least, showed race was not determinative. As a result, a district judge cannot deny a Batson challenge simply by finding race was not the sole reason for the strike. The court also must decide whether the prosecutor would have made the strike had the juror been white.

Arizona v. Gant

SUPREME COURT WILL RECONSIDER 1982 CASE
ALLOWING AUTOMATIC VEHICLE SEARCH UPON ARREST OF OCCUPANT

Did you every wonder why the police were allowed to search your client's vehicle while he was sitting in rear of the police car, hands cuffed behind his back? Did something seem wrong with that rule?

Several justices on the Supreme Court – maybe even a majority – have the same question and granted certiorari in Arizona v. Gant, No. 07-452, to decide it. The question presented is "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conduct after the vehicle's recent occupants have been arrested and secured?" If the Court says "yes," then automatic vehicle searches upon arrest will no longer be permissible.

The Supreme Court established the "search incident to arrest" exception to the warrant requirement in Chimel v. California, 395 U.S. 752 (1969), which involved an arrest inside a house. The Court held that police could search the area within the arrestee's "wingspan" to counteract the risk that he would grab a weapon or destroy evidence. Lower courts differed on how to apply Chimel to arrests of drivers or passengers in a vehicle. So in 1982, the Supreme Court established a "bright line rule" in New York v. Belton, 453 U.S. 454, that police could search the passenger compartment of a vehicle (including closed containers) whenever they arrested an occupant. Justice Stevens was on the Court at the time and remembers that the typical cases involved the arrest of a suspect who was seated in or driving an automobile when the police approached him. Thornton v. United States, 541 U.S. 615, 635 (2004) (Stevens, J., dissenting).

Since then, police practices have changed. Nowadays, police routinely handcuff the suspect and place him inside the police car before searching his vehicle. Thornton, 541 U.S. at 628 (Scalia, J., concurring in result). At the time of the vehicle search, it is highly unlikely that he will be able to reach into his car to grab a gun or destroy evidence. Id. at 626.

In 2004, a divided Court rejected a challenge to the Belton automatic-search rule in Thornton. The challenge was framed, however, in an unfortunate way. The question presented was whether Belton applied when the police first made contact with the suspect after he had left the vehicle. A majority of the Court said the propriety of a search

Arizona v. Gant

should not depend on when the officer first made contact with the suspect because such a rule would affect a police officer's choice of tactics. The officer might accost the suspect while he was still in the car, even if that approach was more dangerous, so that he could search the vehicle.

Justice Scalia disagreed. The problem with that reasoning, he said, is that it assumes an entitlement to search the vehicle upon arrest rather than recognizing that search-incident-to-arrest is an *exception* to the warrant requirement. Thornton, 541 U.S. at 627. Nevertheless, Scalia concurred in the judgment because the police found drugs on the defendant's person during a frisk so they had reason to believe they might find more drugs inside the car. Scalia proposed "reason to believe" that the officers would find evidence of the same crime for which the defendant was arrested as an additional reason to justify a vehicle search. (N.B. Is this nothing more than the venerable "probable cause" exception to the warrant requirement?)

Arizona v. Gant poses the issue more directly than did Thornton. Police officers first encountered Gant when they went to a house where they suspected drug dealing for a "knock and talk." Gant said the owner was out. The police left, but ran a computer check and discovered that Gant's driver's license had been suspended and he had an outstanding warrant for driving on a suspended license. They did not arrest him at the time.

Later that evening, the police returned to the house. They had just finished arresting a couple of occupants in the yard when Gant drove up and parked in the driveway. As one officer walked up to Gant's vehicle, Gant got out and walked toward the officer. The officer arrested Gant on the outstanding traffic warrant. He handcuffed him and placed in the back of a police car. Only then did he search Gant's car. He found a gun and a plastic bag of cocaine.

Initially, an intermediate Arizona court reversed the conviction, finding a Fourth Amendment violation because the police did not make contact with Gant until after he got out of his car. The Arizona Supreme Court denied review, but the case went up to the Supreme Court, which remanded for reconsideration in light of a new Arizona Supreme Court decision holding that Belton searches extended to recent occupants of the vehicle. The trial court held an evidentiary hearing on remand and overruled the motion to suppress. Again, the intermediate appellate court disagreed. The Arizona Supreme Court granted the State's petition for review and held the search invalid because neither of the Chimel concerns – need to protect officer safety and to prevent the destruction of evidence – was present when the defendant was handcuffed and placed inside the police car. State v. Gant, 162 P.2d 640 (Ariz. 2007). That is the opinion which the Supreme Court is reviewing.

Arizona v. Gant presents the issues troubling the justices more cleanly than did Thornton. Not only is the question focused squarely on whether the Chimel concerns must be present to justify a vehicle search, but also, the police had no reason to believe that a search of the vehicle would turn up evidence to support the offense for which Gant was arrested: driving on a suspended license. Hence, the ruling in this case could be a big deal.

REGISTER NOW for the Jimmy & Rosalynn Carter Work Project!

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Volunteer with New Orleans Habitat and former U.S. President and First Lady Jimmy and Rosalynn Carter. Since 1984, the Carters have led thousand of volunteers to help build Habitat houses across the globe. Join us in New Orleans to Blitz Build seven homes, frame and dry-in 20 homes and dedicate up to 25 more. This unbelievable weeklong experience will make a lasting impact on the still recovering Upper 9th Ward neighborhood of New Orleans.

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Recommended Training Programs for Panel Attorneys

WINNING STRATEGIES SEMINARS

SCOTTSDALE, ARIZONA - JUNE 12-14, 2008

Winning Strategies offers both new and experienced panel attorneys the opportunity to attend presentations on criminal defense topics of interest in both large and small group settings. The presentations focus on the nuts and bolts of federal criminal practice including the sentencing guidelines, sentencing mitigation, and the Federal Rules of Criminal Procedure. Sessions focusing on the impact of cases such as Rita, Booker and Crawford, and Fourth, Fifth and Sixth Amendment issues are also included. In addition, participants can expect presentations on trial skills such as cross examination, defending gang cases and attacking wiretap evidence. Also included are presentations on the use of technology in the courtroom and an explanation of CJA guidelines and procedures. Register online at http://www.fd.org/odstb_ONLINEREG.htm.

LAW & TECHNOLOGY WORKSHOP

PORTLAND, OREGON - JULY 24 - 26, 2008

The Law and Technology 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 Trial Director and PowerPoint products to sharpen their courtroom skills. Attendees will enhance their direct-examination, cross-examination, and 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.

In order to participate in this program, participants are required to provide their own laptop computers. General presentations and demonstrations are supplemented by concentrated small group workshops. In the smaller breakout groups, attendees receive hands-on guidance to apply the information presented in the plenary sessions using facts from a mock case file. Each participant will practice direct and cross-examination, and closing arguments, using Trial Director and PowerPoint software. Register online at http://www.fd.org/odstb_ONLINEREG.htm.

LOUISIANA PUBLIC DEFENDERS ASSOCIATION DEATH PENALTY CLE SEMINAR

PARAGON CASINO RESORT, MARKSVILLE, LA - JULY 18-19, 2008

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CLARENCE DARROW DEATH PENALTY DEFENSE COLLEGE

DEPAUL LAW SCHOOL, CHICAGO, ILLINIOS - MAY 27 - May 31, 2008

Contact: Mary H. Bandstra: 312-362-5837, Andrea Lyon: 312-362-8402

This is an intensive death penalty trial practice institute. The Office of Defender Services' Training Branch provides financial assistance to a limited number of lawyers with federal capital cases to attend this college.

Louisiana Association of Criminal Defense Lawyers

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MESSAGE BOARD

- The cost of gas has gone up and so too has the reimbursable mileage rate; Effective March 19, 2008, the new mileage rate for use of privately owned vehicles while on official travel increased to 50.5 cents per mile.

- The Judicial Conference recently announced that there will be no national change in PACER/Online access to cooperator plea agreements. Local meetings are underway to discuss a possible local approaches.

- CJA attorneys should have two PACER accounts, one for exclusive use on CJA cases for which they are not charged, and a second account for use on retained cases. For full electronic public access fee schedule see www.federaldefender.net.

- We recently were apprised of improvements to the offices of Michael Credo, United States Marshal, EDLA. Improvements included the addition of two attorney-client visitation rooms large enough to accommodate meetings of multiple participants such as psychiatrists, psychologists, agents, etc. As always, it will take a significant period of time to complete construction.

- Please be aware that when obtaining investigative, expert and other services in CJA appointed cases, district court approval is required for compensation of services over $500 but not in excess of $1600. If in excess of $1600, the district court and the new Fifth Circuit court designee, Judge Jennifer Elrod, must approve. All approvals are required ***prior*** to having the investigative, expert and other services rendered.

FEDERAL PUBLIC DEFENDER'S OFFICE

Hale Boggs Federal Building
500 Poydras Street
Suite 318
New Orleans, LA 70130

www.federaldefender.net