



THE DEFENSE NEVER RESTS

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Message from the FPD

As another year begins, I would like to take this opportunity to look back on all we accomplished in 2003. As you know, this past year marked the 40th anniversary of Gideon v. Wainwright, the landmark decision which prompted the enactment of the Criminal Justice Act. In keeping with this theme, the Federal Public Defender's Office for the Eastern District of Louisiana held its annual continuing legal education program on November 6 and 7, 2003. The two-day program was a resounding success and we thank all who participated in the event.

We are also especially proud of the three-part Capital Appellate Continuing Legal Education program conducted by our office. The two-day training melded capital and appellate specialists and provided them with an opportunity to network as well as increase their understanding of the capital appellate process. The program included a one-hour moot of Ted Calvin Cole v. Doug Dretke (No. 01-10646), the observation of the actual Fifth Circuit oral argument, and a one-hour discussion and critique following the argument. Robert Owen, attorney for Mr. Cole, reported that the exercise was helpful because the moot panelists accurately anticipated some of the court's difficult questions. (see photo) We hope to repeat this program in the coming year.

As we celebrate past successes, we also look ahead to our plans for this year. 2004 is the 40th anniversary of the Criminal Justice Act, which authorized the Federal Public Defender's Office, panel attorneys and funding for client services. Please know that we appreciate your services and recognize that you provide them at a reduced rate in deference to our budget. Preparations are underway to commemorate the anniversary of the Criminal Justice Act during the CJA Panel Representatives' Conference in New Orleans on February 29 - March 1, 2004.

When welcoming new admittees to the Eastern District of Louisiana, Chief Judge Ginger Berrigan customarily stresses the importance of all litigants having equal access to the court. She is also quick to interject that lawyers who represent clients through the Criminal Justice Act routinely carry out that ideal. I felt strongly that each of you should know that our office joins the Court in thanking you on behalf of our clients.

Wishing you good health and prosperity in the new year,

Virginia Laughlin Schlueter

Federal Public Defender
Eastern District of Louisiana

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Lordy, Lordy, Lordy Clarence Earl Gideon's Ruling is 40!

Drawing on the backdrop of the 40th anniversary of the Supreme Court's historic *Gideon v. Wainwright* ruling, the Federal Public Defender's Office for the Eastern District of Louisiana held its annual continuing legal education program on November 6 and 7, 2003. The two-day event was held at the Plimsol Club in New Orleans. It also celebrated the impending 40th anniversary of the Criminal Justice Act which was prompted by the Gideon ruling.

Chief Judge Ginger Berrigan opened the program. Speaking from a background in federal criminal defense, Judge Berrigan acknowledged the importance of the Sixth Amendment right to counsel and the contribution made by the attorneys who so ably accept the challenge of representing indigent defendants unable to afford counsel. In offering her welcoming remarks to seminar participants, Judge Berrigan cautioned against the erosion of the constitutional rights embodied in the Bill of Rights.

Later, the Honorable Jay C. Zainey, previously a member of the CJA panel of the Eastern District of Louisiana and now a federal district court judge, made clear the professional obligation of attorneys to "keep the promise" of equal access to the courts for the poor as well as the rich. Another speaker, Paul Rashkind, Chief of Appeals in the Federal Public Defenders' Miami office, presented an historical piece compiled from actual film footage of Clarence Earl Gideon and the attorneys who litigated his case.

The Federal Public Defender, Virginia Laughlin Schlueter, provided a comprehensive legislative history of the Criminal Justice Act in 1964, which provides the funding necessary to compensate CJA lawyers. In Fiscal Year 2003, CJA lawyers represented 143,600 federal criminal clients at a rate of \$90 per hour. Ms. Schlueter, the Membership Chair of the second largest Chapter of the Federal Bar Association, urged active membership and participation in the Federal Bar Association by the panel. She noted that the FBA began as an association of lawyers who practiced primarily in Federal Court. John Craft of the Federal Public Defender's Office



Speakers: Dr. Sarah DeLand, Jim Englemann, Marie Campbell and John H. Craft

discussed the development of federal criminal law and the expansion of interstate commerce jurisdiction.

In keeping with this year's theme, the day was capped off with an evening cocktail party for the psychiatrists, psychologists and most importantly, the lawyers who provide their services to indigent defendants who could not otherwise afford their fees. (see photos) The celebration



CJA Representative
Herb Larson Lectures

was sponsored in part by the Criminal Law Section of the Federal Bar Association. The event was attended by over 50 people, including Judges Carl Barbier, Lance Africk and Jay Zainey, members of the Criminal Justice Act Judicial Committee, who individually commended the attorneys appointed under the Criminal Justice Act for their dedication, commitment and excellence in the representation of their clients.

In addition, on February 28, 2004, the Federal Bar Association, together with its New Orleans Chapter, will again host the Representatives of all the Criminal Justice Act Panels across the United States in a combined effort to increase FBA interest, membership and participation by members of the criminal defense community generally, and the Criminal Justice Act specifically.

NATIONAL CAPITAL MITIGATION SEMINAR TO BE HELD IN NEW ORLEANS April 15-17, 2004

Defender Services is presenting training in capital mitigation in New Orleans. The seminar was prompted by *Wiggins v. Smith*, a recent Supreme Court decision finding ineffective assistance of counsel due to inadequate investigation at the penalty phase. *Wiggins* addressed professional standards in 1989. This seminar will teach you professional standards today. It will take place April 15-17. More information will be available soon at www.capdefnet.org.

Criminal Justice Act Seminars and Workshops

**SENTENCING ADVOCACY WORKSHOP
MARCH 11-13, 2004
SAN ANTONIO, TEXAS**

This workshop is developed to present a comprehensive approach to sentencing advocacy. Attendees will learn a process for the development of a persuasive, fact-based sentencing theory, and the advocacy skills necessary to advance the theory in writing and during sentencing hearings. Topics include: using mitigation specialists, storytelling, persuasive writing, and using courtroom technology.

**WINNING STRATEGIES SERIES
SANTA FE, NM, APRIL 22-24, 2004
BOSTON, MA, MAY 20-22, 2004
MEMPHIS, TN, JULY 29-31, 2004**

The Winning Strategies seminars will be configured so that individuals will have a choice of topics and smaller classes. Newer CJA participants will be able to be exposed to sessions to give them the information they need to build an effective federal practice. Topics include: fifth amendment case law and suppression motions, statements issues in multiple defendant cases, the role culture can play in a client confessing, using a mental health expert and advance mental health issues at trial and sentencing, evidentiary issues in cross-examination, case law surrounding affirmative defenses, defending gun and immigration cases, the chemistry and law around methamphetamine cases, handling presentence interviews, recent Guideline amendments, Supreme Court update, etc.

**TRIAL ADVOCACY WORKSHOP
JUNE 24-26, 2004
WILLIAMSBURG, VIRGINIA**

The Trial Advocacy Workshop will be developed around the use of courtroom technology to advance the persuasiveness of witness examination and argument skills. Participants will enhance their cross-examination, direct examination, and closing argument skills by applying courtroom technology, such as Trial Director and Power Point.

**IMMIGRATION CRIMES SEMINAR
AUGUST 26-28, 2004
SAN DIEGO, CA**

The Immigration Crimes Seminar will be a comprehensive training on effective advocacy in the defense of clients charged with immigration offenses. Topics include: motions, trial and sentencing in illegal re-entry cases, alien smuggling cases, and documents cases, as well as the immigration consequences of criminal convictions.

MARK YOUR CALENDAR!

En banc oral argument in **United States v. Brigham**, No. 02-40719, regarding the permissible scope of a traffic stop, is scheduled for **Thursday, January 22, 2004, at 9:00 am**. In previous cases, the Court held that the stop must end when the computer check is finished. But here, the officer delayed starting the computer check to ask questions unrelated to the traffic violation. A divided panel held the prolonged detention unlawful.

APPEAL - PRESERVING ERROR

United States v. Johnson, No. 03-30152 (Nov. 24, 2003)

Fifth Circuit remands for requisite findings on obstruction of justice sentencing enhancement, even though the defendant failed to object to the lack of findings below. The Court could not review the propriety of the enhancement without the findings and "it was the district court's duty in the first instance to make the findings in support of the enhancement."

DEATH PENALTY

Lewis v. Dretke, No. 02-11007 (Dec. 23, 2003)

Fifth Circuit reverses denial of habeas relief in a Texas death case, holding that trial counsel was ineffective for failing to investigate childhood abuse as mitigation evidence. Lewis's three sisters testified at the habeas hearing that their father beat all four siblings viciously on numerous occasions, and that they were present at trial but counsel failed to talk with them. The Fifth Circuit found the lack of investigation prejudicial; it was obvious, the Court said, that the level of abuse visited on Lewis would have affected the sentencing decision of at least one juror.

FIREARMS

United States v. Walters, No. 02-50847 (Nov. 12, 2003)

Single use of same bomb supports only one count of conviction under 18 U.S.C. § 924(c).

United States v. Darrington, No. 03-20052 (Nov. 18, 2003)

Equal protection challenge to 18 U.S.C. § 922(g)(1) fails; the Fifth Circuit's decision in *Emerson*, recognizing individual constitution right to bear arms, does not require strict scrutiny.

GUILTY PLEAS

United States v. Powell, No. 02-21211 (Dec. 17, 2003)

At arraignment, the district court must advise the defendant of restitution due under Mandatory Victims' Restitution Act. Failure to do so will invalidate the plea if the defendant is sentenced to pay more than she was advised of at the plea colloquy.

JURY

United States v. Peters, No. 02-41176 (Oct. 31, 2003)

Ex parte meeting between judge and jury foreperson constituted reversible error because conversations drifted beyond why foreperson wanted to resign – a topic to which counsel had consented – to judge's hope for a unanimous verdict, how long he expected it to take, and also to substantive law.

MULTIPLE OFFENDER PROCEEDINGS:

United States v. Thomas, No. 02-20977 (Oct. 10, 2003)

A district court's failure to hold a § 851 colloquy as to whether the defendant admits or denies the prior convictions alleged in a multiple offender bill is harmless error, unless the defendant has filed a denial of the prior convictions or shows what challenges he is prepared to level.

SENTENCING

United States v. Vargas-Duran, No. 02-20116 (Jan. 8, 2004) (en banc)

Clients with a previous conviction for a crime of violence routinely face possible sentence enhancement. In an *en banc* decision, the Fifth Circuit holds that a prior conviction qualifies as a crime of violence due to the "use, attempted use, or threatened use of force" only if the use of force was intentional. At issue was the definition of "crime of violence under U.S.S.G. § 2L1.2(b)(1)(A). Kudos to AFD Tim Crooks who represented Mr. Vargas-Duran.

United States v. Conley, No. 02-20889 (Oct. 30, 2003)

Sentencing for § 1956 conspiracy was plain error where judgment specifies § 371 conspiracy; counsel was ineffective for failing to object.

United States v. Bell, No. 03-20194 (Nov. 20, 2003)

PROTECT Act requirement of *de novo* review of factors underlying departures applies retroactively. The Court interpreted the Act narrowly, reverting to abuse-of-discretion review after finding one of the three criteria for a permissible factor satisfied. At the sentencing hearing, the district court had expressed concern that incarceration would interrupt the defendant's mental health treatment, but failed to include that factor in its written reasons for the downward departure. The omission did not disqualify the factor as a basis for the departure because the court cited it at the hearing.

Supreme Court Updates

Illinois v. Lidster, No. 02-1060 (Jan. 13, 2004)

A police roadblock to solicit information about a hit-and-run does not violate the Fourth Amendment. The Court distinguished *Indianapolis v. Edmund*, where it prohibited roadblocks designed to ferret out crime by the occupants of the cars stopped. Here, by contrast, the police asked drivers whether they knew anything about a crime committed by someone else. The court found the stop reasonable because the government interest in finding the killer was high, but the intrusion on privacy minimal.

Maryland v. Pringle, No. 02-809 (Dec. 15, 2003)

Police had probable cause to arrest all three occupants of a car in which they found five plastic baggies of cocaine behind the back-seat armrest and \$763 in cash in the closed glove compartment. On the scene, none of the three men admitted ownership. Writing for the Court, Justice Rehnquist said, “[W]e think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which the dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.” The Court repeated, however, that each case must be decided on its own facts.

United States v. Banks, No. 02-473 (Dec. 2, 2003)

Waiting 15 to 20 seconds without a response to their knock-and-announce was long enough to permit the police to break down the door with a battering ram. The officers were executing a search warrant that they obtained based on information that Banks was selling cocaine from his home. Banks was in the shower and heard nothing until the door crashed down. The test, according to the Court, was not how long it might take the occupant to reach the door, but whether it was reasonable for the police to suspect that the cocaine might be flushed down the toilet if they waited any longer. Although it was a close case, Justice Souter wrote, “15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.”

Castro v. United States, No. 02-6883 (Dec. 15, 2003)

District courts must warn *pro se* litigants before they recharacterize a post-trial motion as a § 2255 motion, thereby relegating any future motions to the restrictions on “second or successive” § 2255s. The court also must advise the prisoner of the consequences of such a recharacterization and give him a chance to withdraw the motion or to amend it.

CERT. GRANTS

United States v. Benitez, No. 03-167

To establish reversible plain error in a guilty plea colloquy, must the defendant show that he would not have pleaded guilty if the violation had not occurred?

Banks v. Dretke, No. 02-8286

The Supreme Court granted cert on three issues in this Texas death case on collateral review: (1) did the Fifth Circuit err in rejecting Banks’s **Brady** claim on the ground of procedural default, even though defense counsel could not have discovered the suppressed information earlier, and in finding the suppressed information immaterial; (2) did the Fifth Circuit err in assessment of **Strickland** prejudice when it rejected Banks’s ineffective assistance of counsel claim; (3) does Fed. R. Civ. P. 15(b), permitting amendment of a pleading to conform to the evidence, apply to habeas proceedings?

HABITAT FOR HUMANITY

In the Spring of 2004, the Bench and Bar Project will build a second Habitat home in partnership with a hard working, deserving low-income family. Support is sought in two equally important aspects: funding and volunteers. Approximately \$55,000 is needed to provide the zero interest permanent financing to our partner family. The house will be built on Fridays and Saturdays over six weekends. The new home, located at 2429 Marais Street, in New Orleans, will be finished and dedicated by May 1st, Law Day.

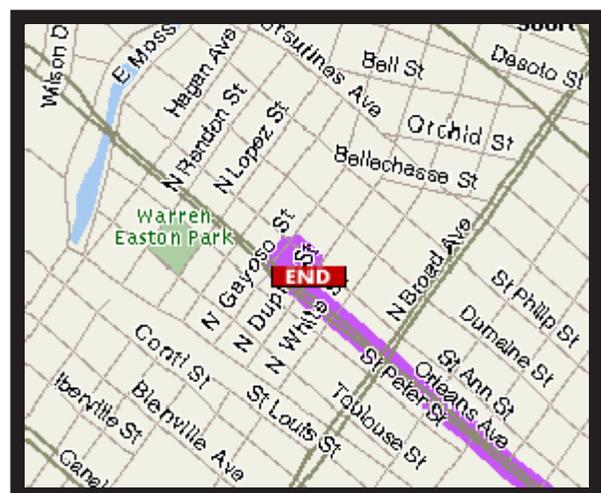
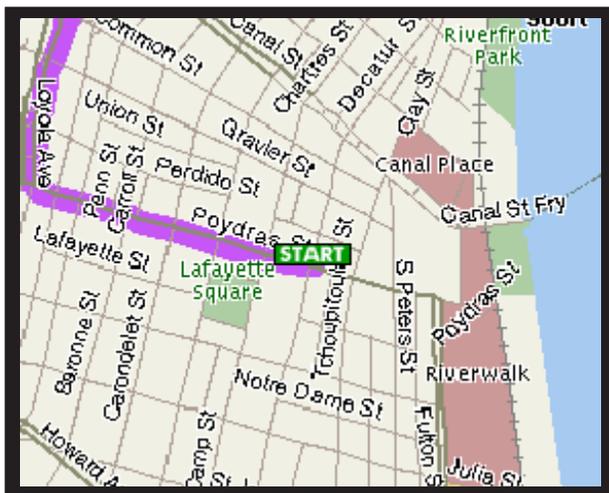
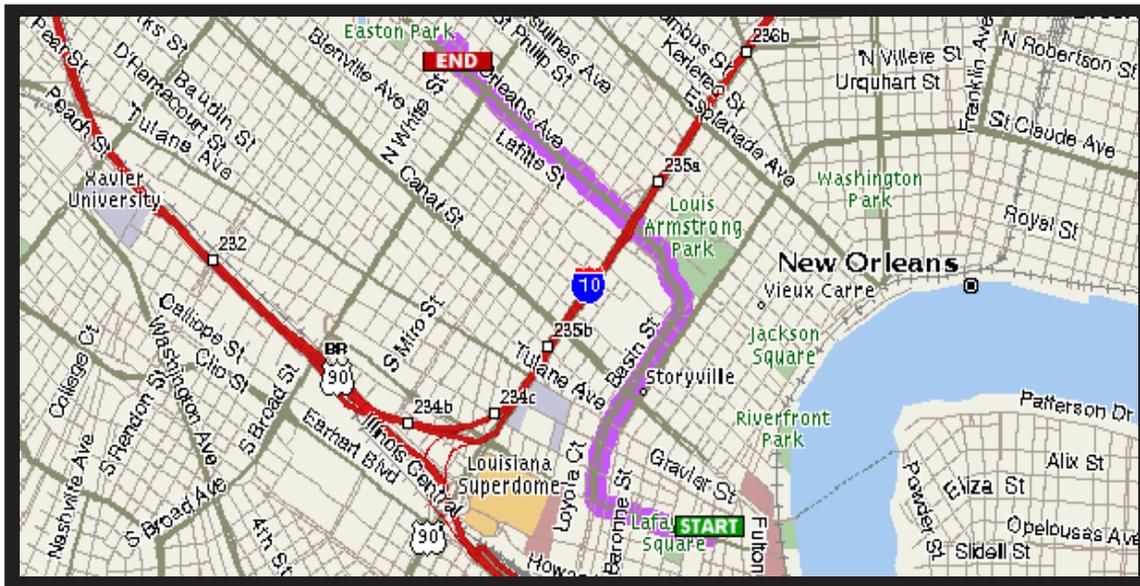
Last Spring, approximately forty federal and state court judges joined with numerous attorneys, court personnel and members of the legal community to build a house from ground up. The building this year will be completed before the hot weather arrives in New Orleans. A total of 30 to 35 workers will be needed each day. You and your firm or office are encouraged to sign up for one of the weekend days in March and April. It is a lot of fun and you get to stand back and admire your handiwork. Skilled labor is not a requirement.

Please contact Roma Kent at 589-7930 or Geneva Marney of New Orleans Area Habitat for Humanity at 504-861-2077 or by email at genevam@habitat-nola.org for more details.

Volunteers of America Halfway House

Start: 501 Magazine Street
New Orleans, LA 70130

End: 2929 St. Anthony Street
New Orleans, LA 70122



The Year In Pictures



Virginia Schlueter presents at 2003 CLE.



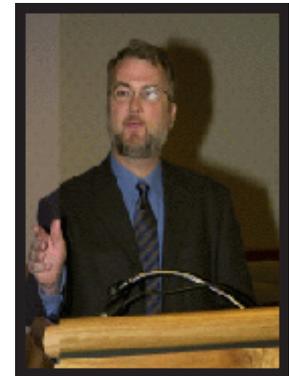
FPD Staff at 2003 CLE.



Judy Clarke, Bruce Ashley, Gina Recasner, George Chaney, Bob Barnard, Paul Rashkind, and Robert Fleming at the Gideon Coctail Party.



Chief Judge Berrigan speaks at the 2003 CLE.



Robert Owen presents his argument at the moot



Attorneys Listen Intently at Capital Appellate CLE.

There's A New Sheriff in Town

There's a new sheriff in Mid-City. Before leaving his long-time post of Orleans Parish Criminal Sheriff to assume his new position as Louisiana's Attorney General, Charles Foti named William C. Hunter, the Director of the Intake and Processing Center, as his chief deputy. When Foti's resignation became effective, Hunter became sheriff and will serve until an election can be held to replace Foti. The election will be held in September, timed so that any necessary runoff will be held with the Presidential election on November 2, 2004.

According to information from the sheriff's office, Sheriff Hunter is a 25-year veteran deputy sheriff. He has a Masters degree in political science from Tulane University and has completed all the course work for a doctorate. He served in the Marine Corps and is a veteran of the Vietnam War. Foti's original choice for the position, Col. Nathaniel Hall, died of a heart attack on New Year's Day.

Immediately upon the change in office, the pictures on the sheriff's office's website (www.opcso.org) were changed to show the new sheriff. The website contains extremely helpful links to Criminal District Court docket masters as well as information about current inmates.

Message Board

Attention CJA Panel Attorneys

Our present CJA Panel allows for a maximum of 90 lawyers, and our panel is currently full. However, many attorneys are interested in becoming panel members and have filed applications for membership. If you were unable to take a case in 2003 and you anticipate not being able to do so in 2004, you may wish to take inactive status to allow other attorneys to become members. Simply call Barbara Daigle at 504-589-7930.

CJA Representatives Conference

The annual CJA Representatives Conference will be held in New Orleans on February 29th and March 1st. As you know, Herbert V. Larson, Jr., is the panel representative for the Eastern District of Louisiana. If you have any questions or concerns which you would like addressed at the conference, you can contact Herb at (504)528-9500 or at hlnola@aol.com.

My Little Red Rules Book

The updated version of the My Little Red Rules Book will soon be available. If you would like to order this publication, send a check to Federal Defenders of Eastern Washington and Idaho, 10 North Post #700, Spokane, WA 99201. The cost is \$5.50.

E-Mail Addresses and Phone Numbers

Do we have your e-mail address? If not, you are missing out on valuable information circulated electronically. "Times they are a changing" and if you now use a cell phone as a means of communication, please provide our office with your cell phone number. Time is of the essence in obtaining counsel for new appointments.

New Mileage Rate

Effective January 1, 2004, the mileage rate is 37.5 cents per mile for automobiles.

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