The Defense Never Rests

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IN THIS ISSUE:

WELCOME NEW PANEL MEMBERS

We would like to extend a warm welcome to the newest additions to the CJA Panel. They are:

Walter Becker served as First Assistant United States Attorney in this district and is currently a partner in Chaffe, McCall, Phillips, Toler & Sarpy. His experience includes Associate Independent Counsel in Washington, DC and Assistant District Attorney in Orleans Parish.

W. Keith Hurtt practices predominately criminal law in Jefferson, Orleans and St. Tammany Parishes. He has extensive trial experience and is currently a state public defender in Orleans Parish.

Brian Jackson served as United States Attorney in the Middle District of Louisiana and is now a partner in Liskow and Lewis. In addition, he was an Associate Deputy Attorney General in Washington, DC and has extensive experience in the area of immigration law.

Robert Jenkins has been engaged in the active practice of criminal law since 1988 as a solo practitioner. He teaches in Tulane Law School's Trial Advocacy Program. He is presently a state public defender in Orleans Parish Criminal District Court and has an extraordinary amount of trial experience.

Vincent Miceli is a solo practitioner in St. John the Baptist Parish who practices exclusively criminal law. He has practiced in state court as well as federal court since 1994.

Warren Montgomery was an Assistant United States Attorney in this district for several years. He is fluent in both Spanish and French. He is presently a member of the conflict panel for the St. Tammany Parish Public Defender's Office.

We are adding attorneys to the panel who will enhance the quality of representation afforded our clients. We hope that you will enjoy working with them.

MIDDLE DISTRICT ENJOINS NEW BOP POLICY ON HALFWAY HOUSES

Until recently, defense counsel could work out guilty pleas with sentences that fell in Zone C of the Guidelines Sentencing Table but involved no jail or prison time. Pursuant to U.S.S.G. § 5C1.1(d)(2), Eastern District Judges would order half the sentence served at a halfway house and recommend to the Bureau of Prisons that the other half be served at a halfway house as well. But in December 2002, the BOP reversed a 14-year-old policy and decided that it did not have statutory authority to designate a halfway house as the place of confinement for the portion of the Zone C sentence that is to be "satisfied by imprisonment."

But in two recent rulings, District Judge James J. Brady of the Middle District granted a preliminary injunction against enforcement of the new policy, faulting both the procedure by which it was adopted and its substance. **Howard v. Ashcroft**, Civil No. 03-123 (Feb. 24, 2003); **Ferguson v. Ashcroft**, Civil No. No. 03-122 (Feb. 24, 2003). The change originated with a memo from the Office of Legal Counsel (OLC) to the President, which was followed by a memo from the BOP director to federal judges, announcing the "policy" change. However, Judge Brady held that the policy was a new rule that must go through the public notice and comment rulemaking procedure in the Administrative Procedure Act.

The court also held that the new BOP position conflicted with 18 U.S.C. 3621(b), which permits BOP to designate "any available penal or correctional facility" as the place of imprisonment. Halfway houses, also known as community correctional centers, are penal and correctional facilities, the court held, noting that the halfway house inmates are subject to the exhaustion requirements of the Prison Litigation Reform Act. The OLC memo relied on U.S.S.G. § 5C1.1(d)(2), requiring that at least half of a Zone C sentence be satisfied "by imprisonment." But the court held that the Guidelines constrain judges, not the BOP. In any event, the court did not agree that "by imprisonment" excludes halfway houses.

Effective March 15, 2003, the cost of court transcripts increased 10%. Regular transcripts increased from $3.00 per page to $3.30 per page. Expedited transcripts increased from $4.00 per page to $4.40 per page.

FPD PARTICIPATES IN TULANE SYMPOSIUM ON COURTS AND WAR ON TERROR

Incommunicado detention of a U.S. citizen suspected of planning or aiding terrorism is permissible under the President's war powers, Patrick Philburn, a lawyer with the Office of Legal Counsel to the President, asserted at the February 21st Tulane Law School symposium on the Judiciary and the War on Terror. But Robin Schulberg with the Federal Public Defender's Office won a grudging concession from Philburn that *Zadvydas v. INS* requires habeas review not only of citizens so detained but also aliens apprehended inside the U.S. The key issue for the courts, she said, is what level of scrutiny to apply. A New York district court is requiring the government to present only "some evidence" to justify its detention of Jose Padilla, a U.S. citizen suspected of plotting to set off a "dirty" bomb, but Schulberg noted that the Supreme Court traditionally applies "strict scrutiny" to physical restraint. The third panelist, Eugene Fidell, President of the National Institute of Military Justice, reminded Philburn of the regrets that have followed each wartime infringement of civil liberties.

The symposium was sponsored by a broad array of Tulane student groups. Chief Judge Helen G. Berrigan was the keynote speaker, and the panel in which Schulberg and Philburn participated was moderated by Judge Lance M. Africk. Dean Edward Sherman moderated a second panel on international law. **For more information, please consider attending our May 1st & 2nd CLE where Ms. Schulberg will speak.**

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FEDERAL BAR ASSOCIATION YOUNG LAWYER'S DIVISION MENTORING PROGRAM

The New Orleans Chapter of the Federal Bar Association has proposed that CJA members agree to associate with members of the young federal lawyers' division in a mentoring program. The young lawyers would agree to co-counsel CJA appointments (in an unpaid capacity). The lack of new blood in the federal criminal defense community is disturbing. Perhaps this proposed mentoring program would reinvigorate, rejuvenate and remotivate us in the practice of federal criminal law. *Anyone wanting free help by licensed attorneys to "second chair" cases, please advise.*

FEDERAL EXECUTIONS SINCE REINSTITUTION OF THE FEDERAL DEATH PENALTY

The federal government's death penalty machinery is now open for regular business. On March 18, 2003, the Bureau of Prisons executed Louis Jones, Jr., for a kidnapping and murder that began on a military institution in Texas. Jones was the third federal prisoner executed since the 1994 reinstitution of the federal death penalty, following the June 2001 executions of Juan Garza, a drug kingpin, and Oklahoma bomber Timothy McVeigh.

After his direct appeal, McVeigh did not resist the efforts of the Government to execute him. Garza and Jones, however, pursued all avenues of relief. Jones was a Gulf War veteran whose allegations in post-conviction litigation included claims that his violent acts were, in part, the result of exposure to Iraqi nerve gas. **Professor Timothy Floyd, who represented Mr. Jones, will speak at our May 1st & 2nd CLE.**

In both contested cases, the time from sentencing to execution was approximately eight years. Jones was convicted in November of 1995. The United States Supreme Court had reviewed and affirmed his case on direct appeal. Garza was sentenced in August of 1993 and executed June 19, 2001, only 8 days after McVeigh.

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FEDERAL DEATH PENALTY DEBATE

On February 12, 2003, Assistant Federal Public Defender John Craft and Assistant United States Attorney Mike McMahon met with 26 international visitors to discuss the pros and cons of the death penalty. The visitors were touring the United States under the auspices of the Bureau of Educational and Cultural Affairs and the Department of State, studying current social, political and economic issues. The group included parliament members, cabinet secretaries and journalists from the European Union as well and Georgia, Romania and Serbia-Montenegro.

According to John Craft, the visitors were well-prepared and had lots of questions. "They were quite curious about the degree of discretion that prosecutors have in deciding whether or not to seek the death penalty," John said. "The concept of dual sovereignty seemed to trouble a number of them. They were bothered that federal prosecutors could decide to seek the death penalty in cases where the local prosecutors haven't." **This topic will be more fully developed by Mr. Craft at the May 1st & 2nd CLE.**

NEW CASE LAW DEVELOPMENTS

IN THE SUPREME COURT . . .

COA must be granted for debatable issue, even if it appears that petitioner ultimately will lose.

Miller-El v. Cockrell, No. 01-7662 (Feb. 25, 2003): Reversing the Fifth Circuit in a death case, the Supreme Court repeated that the test for a certificate of appealability (COA) of the denial of a habeas petition is whether the petition raises an issue debatable among reasonable jurists, *not* whether the petitioner will prevail. "Indeed, a claim can be debatable even though every jurist of reason might agree, after . . . the case has received full consideration, that petitioner will not prevail."

Using a proper test, the Court had "no difficulty concluding that a COA should have issued" on Miller-El's *Batson* claim of racial discrimination in the use of peremptories. The prosecution used 10 of its 14 strikes to exclude 91% of the eligible African-Americans from the jury. Some of its proffered race-neutral rationales applied to white jurors who were not challenged. The ADA questioned African-Americans in a manner more likely to elicit doubts about the death penalty, and "shuffled" juror cards to push African-Americans to the back. Finally, the Court gave "some weight" to evidence that in the past, the DA's office "was suffused with bias against African-Americans in jury selection."

Supreme Court upholds California three-strikes law.

Ewing v. California, No. 01-6978 (Mar. 5, 2003): In a 5-to-4 decision, the Supreme Court upheld California's three-strikes law in a case involving a sentence of 25 years to life for theft of three golf clubs by a defendant with five prior felony convictions, four for burglary and one for robbery. The California statute permits a judge to treat an offense such as theft as a misdemeanor that does not trigger a three-strike sentence, but here the judge declined to do so. The statute also permits a judge to vacate allegations of prior crimes if justice requires. The Court upheld the statute as a means of incapacitating repeat offenders to protect public safety, and found that the Eighth Amendment did not prohibit that legislative policy choice. Proportionality review invalidates sentences only in the most extreme cases, for example, a life sentence for overtime parking. In Ewing's case, "the gravity of his offense was not merely shoplifting three golf clubs. Rather, Ewing was convicted of

felony grand theft . . . after previously having been convicted of at least two violent or serious felonies."

Connecticut's sex offender registration law survives procedural due process challenge.

Connecticut Dept. of Public Safety v. Doe, No. 01-1231 (Mar. 5, 2003): Connecticut's "Megan's Law" requires all persons convicted of a sex offense to register with the Department of Public Safety upon release, and requires DPS to post a list of registrants on an Internet Website. Doe challenged the law as a denial of procedural due process because it did not require a hearing about whether he was currently dangerous. The Court held that dangerousness was not a criteria for registration or publication; rather, all persons convicted of certain offenses had to register, regardless of dangerousness, as the introduction to the website stated. Accordingly, a hearing was not necessary. Doe expressly disclaimed a substantive due process challenge.

Alaska's sex offender registration law is regulatory, not punitive.

Smith v. Doe, No. 01-729 (Mar. 5, 2003): The Supreme Court rejected an *ex post facto* challenge to Alaska's sex offender registration law by classifying the law as regulatory rather than punitive, even though offenders are notified of the registration requirement in the guilty plea colloquy or judgment of conviction. The purpose of the law is to protect the public, not punish the offender. The registration law's superficial resemblance to colonial "shaming" punishments is misleading because the registration law merely requires dissemination of truthful information and nothing more; publicity and resulting stigma are not part of the law itself. The humiliation attendant to Internet posting of registrants is merely a collateral consequence of the process of notifying the public for its own safety.

Hung jury on predicate aggravator does not preclude second penalty phase after appeal.

Sattazahn v. Pennslyvania, No. 01-7574, 2003 WL 104841 (Jan. 14, 2003): The jury hung at the penalty phase of this Pennsylvania death case and the judge imposed a life sentence, as required by the Pennsylvania statute. Sattazahn appealed his conviction, won, was retried and after a second penalty phase, was sentenced to death. On appeal, he claimed that a second death penalty proceeding violated double jeopardy. The Supreme Court disagreed, distinguishing *Bullington v. Missouri*, where the jury acquitted at the penalty phase. In a part of the opinion joined only by a plurality, Justice Scalia justified the decision on *Apprendi* grounds. If proof of an aggravating factor that qualifies a defendant for death is an element of the offense, per *Ring. v. Arizona*, then a jury's inability to reach a verdict on the aggravator is inability to reach a verdict on the enhanced offense. Retrial following a hung jury does not violate double jeopardy. O'Connor and Kennedy refuse to join Part III (*Apprendi*). Concurring, O'Connor would decide the case on ground that Sattazahn's jury did not decide that prosecution failed to prove its case.

Cert granted to consider whether drugs in car permits arrest of passenger.

Maryland v. Pringle, No. 02-809 (Mar. 24, 2003): The Supreme Court granted cert to review a Maryland decision that discovery of drugs in a car does not create probable cause to arrest the passengers. After conducting a traffic stop, police found $ 763 in the glove compartment and 5 baggies with cocaine inside a backseat armrest. They arrested the driver-owner of the car and his two passengers, including Pringle, who sat in the front seat and soon after confessed that the cocaine was his. The Maryland Court of Appeals threw out the confession and reversed the conviction for lack of sufficient indicia of knowledge or control to justify the arrest. Decision below, 805 A.2d 1016 (Aug. 27, 2000).

Supreme Court will consider whether criminal defendant may raise First Amendment overbreadth challenge.

Virginia v. Hicks, No. 02-371 (below, 563 S.E. 2d 674 (Va.. 2002)): The Supreme Court granted cert in a Virginia case to review whether a criminal defendant may use the First Amendment overbreadth doctrine to challenge the Housing Authority trespass regulation under which he was convicted.

AND IN THE FIFTH CIRCUIT . . .

CARJACKING: Court reverses carjacking conviction for failure to prove interstate commerce nexus.

United States v. Burton, No. 02-60428 (5th Cir. Mar. 12, 2003): The Fifth Circuit reversed a carjacking conviction because government failed to prove that the car traveled in interstate commerce. Common knowledge that no Nissans were manufactured in Mississippi does not satisfy the government's burden of proof.

DEATH PENALTY: En banc Court holds "quantity and quality" of childhood abuse evidence does not require supplemental instruction in pre-1993 Texas death penalty case, so Penry II does not require reversal.

Robertson v. Cockrell, No. 00-10512 (Mar. 14, 2003) (en banc): This capital case comes to the Court on remand from the Supreme Court in light of *Penry II*. Until 1993, the Texas death penalty statute required imposition of a death sentence upon an affirmative jury finding of two special issues: deliberateness and future dangerousness. In *Penry I*, the Supreme Court held that the statute did not permit the jury to give mitigating effect to evidence of childhood abuse and mental retardation. In a second penalty phase, the trial judge instructed the jury to answer one of the special issues "no" if it thought that mitigating evidence warranted life. The Supreme Court held that the supplemental instruction did not cure the problem.

Mark Robertson received the same supplemental instruction as John Paul Penry. Like Penry, he presented evidence of childhood abuse, but not of mental retardation or organic brain damage. In an opinion by Judge Jones, the en banc Court found that Richardson's childhood abuse evidence was not of the same quality or quantity as Penry's mitigating evidence, and therefore, the jury was able to consider it in answering the two special issues. The distinction turned on factors such as the permanence *vel non* of the handicap, and Judge Higginbotham, concurring, argued that permanence was for a properly instructed jury, not the court. Judges De Moss, Stewart and Dennis dissented. Although the three wrote separately, they agreed that the *Penry* critique of the special issues did not turn on the quantity or quality of the childhood abuse evidence; if there was mitigating evidence of childhood abuse, the special issues were not adequate and the supplemental instruction did not solve the problem.

DA's intervention application in Texas death case after AG confessed error does not create non-justiciable political question.

Saldano v. Cockrell, No. 02-41208 (Feb. 18, 2003): At the penalty phase of Saldano's capital trial, the DA presented a clinical psychologist who identified various factors purportedly relevant to sentencing. Among them was race, which the psychologist correlated with future dangerousness. Defense counsel did not object. On writ of certiorari to the Supreme Court after imposition and affirmance of a death sentence, the Texas Attorney General took over representation of the case from the DA, confessed error, and waived procedural default. The AG took the same position when the case was remanded to the Texas Court of Criminal Appeals, but the Texas court invited the DA to participate. The DA argued procedural default, and the Texas court agreed, affirming the death sentence. Saldano sought habeas review in federal court, the DA again confessed error and the DA moved to intervene as of right. The district court held that the application for intervention presented a non-justiciable political question: whether the State of Texas would prefer to preclude the federal court from considering the merits of Saldano's constitutional claim. On appeal by the DA, the Fifth Circuit reversed.

The Court noted that the intervention application did not raise an issue committed to another branch of government, nor were manageable standards lacking to decide the application. Whatever the political overtones of the DA's application to intervene, its resolution did not require the court to make policy determinations. Finally, the Court noted that the political question doctrine was developed to address the federal judiciary's relationship to other branches of the federal government, a consideration not present here.

Also of note:

Johnson v. State, 59 P.3d 450 (Nev. Dec. 18, 2002): Nevada statute allows imposition of death penalty upon finding of aggravating circumstance and no mitigating circumstance sufficient to outweigh the aggravator. Johnson's jury found aggravators but deadlocked in the sentence. Per the statute, a three-judge panel conducted a second penalty phase and imposed the death penalty. The Nevada Supreme Court held that *Ring v. Arizona* prohibits this procedure because weighing is a prerequisite for death and hence must be done by the jury. It matters not that the jury found the facts proving the aggravators during the guilt phase.

EVIDENCE: FBI agent may not testify as "overview" witness before the government's evidence is admitted.

United States v. Griffin, No. 01-20368 (Mar. 10, 2003): In a complicated conspiracy to defraud case, the government presented an FBI agent as its second witness to give an "overview" of its case in the form of an account of the FBI's investigation. The Fifth Circuit distinguished his testimony from that of a summary witness who testified to evidence already admitted, and rejected the use of "an overview witness." "We unequivocally condemn this practice as a tool deployed by the government to paint a picture of guilt before the evidence has been introduced." However, the Court found the error harmless.

FEDERAL PROCEDURE: New trial motion claiming ineffective assistance must be filed within 7 days of verdict.

United States v. Villarreal, No. 01-40392 (Mar. 6, 2003): The Court lacked jurisdiction to hear appeal of denial of motion for new trial insofar as it was based on claim of ineffective assistance of counsel. A motion for a new trial based on any grounds other than newly discovered evidence must be filed within 7 days after the jury verdict, but Villarreal's motion was filed three months after.

FIREARMS:

United States v. Shelton, No. 01-20938 (Mar. 18, 2003): Texas law makes it a misdemeanor to intentionally, knowingly or recklessly cause bodily injury to another, including a spouse. That statute is a sufficient predicate for § 922(g)(9), prohibiting firearm possession following a misdemeanor conviction for domestic violence. The bodily injury requirement necessarily requires the use or attempted use of physical force. It matters not that Texas statute does not require a relationship between the victim and the defendant. The Court also rejected Shelton's due process argument that the indictment was defective because it did not allege that he knew his conduct violated the law; knowledge of the law generally is not necessary and § 922(g)(9) does not fall within the *Lambert v California* exception for wholly passive conduct.

HABEAS CORPUS: Brecht remains test of harmless error after AEDPA.

Robertson v. Cain, No. 01-31223 (Mar. 5, 2003): This § 2254 petition claimed the jury instructions did not require a finding of specific intent to kill, an element of second degree murder under Louisiana law. The instruction was virtually identical to one invalidated by the Fifth Circuit in 1986, and the Court held it was contrary to clearly established federal law, to-wit: *In re Winship* and *Sandstrom v. Montana.* But habeas relief is not available if the error was harmless. Robertson claimed that AEDPA abrogated the *Brecht v. Abrahamson* test of harmless error – whether the error had substantial and injurious effect on the verdict – and that the AEDPA test was whether the state court's decision was contrary to the *Chapman* "harmless beyond a reasonable doubt" inquiry. The Fifth Circuit disagreed and joined other circuits to hold that the *Brecht* test still applies. Finding strong evidence on both sides on the intent issue, the Court was left with "grave doubt" about the harmlessness of the error and hence held that the district court erred in denying habeas relief.

ILLEGAL RE-ENTRY: Fifth Circuit rejects challenge to improper refusal to consider alien for discretionary relief from deportation.

United States v. Mendoza-Mata, No. 01-51147 (Feb. 20, 2003): The defendant tried unsuccessfully to withdraw his guilty plea to illegal re-entry, arguing that his deportation was improper because he had not been considered for discretionary relief due to retroactive application of statutory changes, prohibited in *INS v. St. Cyr.* The Fifth Circuit affirmed, finding that he failed to show a reasonable likelihood that he would have been granted discretionary relief had he been considered.

Revocation sentence triggers offense level enhancement.

United States v. Compian-Torres, No. 02-50211 (Feb. 18, 2003): Two-year sentence imposed upon revocation of probation counts as prior term of imprisonment that triggers 16-level increase in offense level for illegal re-entry.

MAIL FRAUD: Unawarded tax credits are not property under mail fraud statute.

United States v. Griffin, No. 01-20368 (Mar. 10, 2003): Griffin held a state government position in which she recommended and voted on award of federal tax credits to residential developers who set aside units for low-income persons at reduced rents. She also was charged with secretly participating in a development project to which she voted to award credits. Two counts charged mail fraud with respect to use of the mails to apply for the tax credits. The Fifth Circuit reversed the convictions on these two counts under *Cleveland*. Like the yet-to-be-awarded riverboat licenses at issue there, yet-to-be-awarded tax credits had no value in the hands of the state and therefore were not property until they had been issued. The Court also found plain error when the district court charged the jury on deprivation of an intangible right of honest services when that theory of mail fraud was not alleged in the indictment.

PROSECUTORIAL MISCONDUCT: Court finds AUSA argument improper.

United States v. Ramirez-Velasquez, No. 02-40208 (Mar. 17, 2003): The Court finds improper the AUSA's response to defense attack on credibility of DEA agent. "The AUSA was entitled to argue in response to the defense attack that [the agent] had no reason to lie, but she went too far in arguing that, as a rule, federal law enforcement agents appear in court and tell the truth." Improper defense

argument that the government knew his client was innocent did not excuse the remarks. But the remarks were not so prejudicial as to warrant reversal in light of substantial independent evidence of guilt.

SEARCH AND SEIZURE: Search incident to arrest does not permit search of car that defendant exited before police stopped him.

United States v. Green, No. 01-31359 (Mar. 11, 2003): After intercepting phone conversations about drug trafficking, the police followed Green to his house. They pulled into the driveway and announced themselves after Green got out of his car and reached the front steps. Green ran, but police tackled him, placed him face down on the ground and handcuffed him. While four officers surround him, other officers searched his car, 6 to 10 feet away, and found a gun. The government invoked the search incident to arrest exception to the warrant requirement, but the Fifth Circuit held that the gun should have been suppressed as the search was beyond the scope of *New York v. Belton.*

Consent to search truck permits opening boxes taped shut.

United States v. Mendoza-Gonzalez, No. 01-51147 (Jan. 10, 2003): Border Patrol agents obtained consent to search back of commercial truck at immigration checkpoint. That includes consent to open boxes taped shut. Opening boxes that are taped is more like opening a bag whose top was rolled up (*Florida v. Jiminez*) than breaking into a locked briefcase because the police did not ruin the container.

Drug dog alert provides reasonable suspicion to investigate further.

United States v. Outlaw, No. 01-51142 (Jan. 27, 2003): Drug dog alert provides individualized reasonable suspicion sufficient to prolong check of citizenship status at a secondary inspection checkpoint.

SENTENCING: Special conditions can't be added after sentencing hearing.

United States v. Vega, No. 01-41019 (Mar. 17, 2003): The Court vacated a special condition of supervised release requiring drug testing that was not included in the oral pronouncement of sentence but added later to the written judgment. The defendant has a constitutional right to be present at sentencing so the sentencing court should include all special conditions when it imposes sentence at the sentencing hearing.

Only losses resulting from criminal conduct may be included in loss computation.

United States v. Griffin, No. 01-20368 (Mar. 10, 2003): The Court held that the district court erred in quantifying loss in a conspiracy-to-defraud case involving bribery of a state official who voted to award tax credits to a project in which she secretly held an ownership interest. The general contractor bought the land to be used for the project at $2,000 per acre, and sold it to the developer for $15,000 per acre. The developer consisted of two partners: Roberts, who managed the project, and Mitchell, who fronted the money. Roberts also was a secret partner in the general contractor, and hence shared in the $13,000 profit. The district court was wrong to include that profit in the loss. "Roberts' act of making a profit off of his own business partner may be unethical and possibly actionable in a civil lawsuit; but it was not a crime and we do not believe it can be included within the scope of the bribe."

Single use of gun supports only one § 924(c) enhancement.

United States v. Phipps, No. 02-10102 (5th Cir. 1/15/03): Pointing a gun at the driver of a car in the course of committing carjacking and kidnaping is single use of a gun that permits only one § 924(c) enhancement.

Burglary of building not crime of violence under Guidelines.

United States v. Rodriguez-Rodriguez, No. 02-20697 (Feb. 27, 2003): Texas crimes of burglary of a building and unauthorized use of a motor vehicle are not crimes of violence under the Guidelines definition. "Although violent confrontations may occur in the course of each offense, neither *requires* the actual, attempted, or threatened use of physical force as a necessary element."

Refusal to help the government does not support obstruction enhancement.

United States v. Ahmed, No. 02-51350 (5th Cir. Mar. 10, 2003): Three Pakistani sailors jumped ship and went to Waco, where Ahmed, an uncle, rented them a motel room. The FBI tracked the sailors to Ahmed, and asked whether he knew them. Ahmed said no. But other information led the

agents to the motel, where they found the sailors. Ahmed was charged with harboring illegal aliens and pled guilty.

The district court enhanced his sentence for obstruction of justice, but the Fifth Circuit reversed because his denial did not significantly impair agents' investigation, for example, by sending them on a "wild goose chase." The government argued that the agents had to spend extra time and effort finding the sailors, but the Court said that obstructing requires more than refusing to help. The Court did not reach the question whether Ahmed's statement went beyond mere denial of guilt, which cannot be used for an obstruction enhancement.

Actual harm not required for reckless endangerment enhancement.

United States v. Jiminez, No. 02-40490 (Feb. 28, 2003): The Court affirms enhancement for reckless endangerment during flight where the defendant led police on a high speed chase through business and residential neighborhoods. It rejects defendant's argument that the enhancement is limited to more egregious circumstances such as those in which actual harm results.

Filing motion to suppress and preserving right to appeal its denial does not permit denial of third point for acceptance of responsibility, unless motion filed for purposes of strategic delay.

United States v. Outlaw, No. 01-51142 (Jan. 27, 2003): The Court vacated a sentence and remanded for further explanation where the district court refused to grant a third point for acceptance of responsibility. The defendant entered a conditional plea of guilty, reserving his right to appeal denial of his motion to suppress. The parties agreed that the district court based its decision to deny the third point on the motion to suppress. But the question was whether the district court reasoned that the motion to suppress demonstrated insufficient contrition or whether it thought Outlaw used the motion to suppress to strategically delay in giving information about his involvement or in giving notice of his intent to plead guilty such that the government had to fully prepare for trial. Denial of the third point would be proper in the latter circumstance but not the former.

Fifth Circuit refuses to correct erroneous denial of third point for acceptance of responsibility because defendant filed sentencing objections late.

United States v. Wheeler, No. 02-40076 (Feb. 19, 2003): A defendant who exhibits contrition sufficient to get two points for acceptance of responsibility is entitled to a third point if his offense level is 16 or more, and if he assists the government by either providing timely information about his own involvement or timely notifying authorities of his intent to plead guilty. But the district court denied Wheeler the third point because of delays at sentencing. The Fifth Circuit held that this was not valid grounds for denying the third point but refused relief because Wheeler did not raise the error until the day before sentencing.

STATUTE OF LIMITATIONS: Fifth Circuit dismisses indictment as time-barred.

United States v. Wilson, Nos. 00-20041, 01-20833 (Feb. 13, 2003): The Fifth Circuit reversed Wilson's conviction for a money-laundering conspiracy, finding the indictment time-barred. The government argued that the limitations period had been tolled by a court-order applicable to offenses then under investigation. But the government failed to prove that it mailed the discovery request that constituted its investigation of Wilson. Government failed to produce the lawyer who wrote the letter or her secretary, even though they still worked for the government. The Court relied on inference that a party's failure to call available witnesses or produce evidence that would clarify disputed factual issues can give rise to a presumption that the evidence, if produced, would be unfavorable.

For a complete Supreme Court and Fifth Circuit Update, consider attending our May 1st & 2nd Continuing Legal Education Program.

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Registration Fee of $100.00 includes 2 days of CLE, all materials, validated parking, continental breakfast and lunch at the Plimsoll Club.

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Federal Bar Association
New Orleans Chapter

presents the

Eleventh Annual Judge Alvin B. Rubin Symposium

an annual panel discussion on aspects of federal law or federal practice held as a living memorial to Judge Rubin's contribution to the Federal jurisprudence and legal scholarship.

TOPIC: Leave it Outside - Professionalism and Ethics in Practice
Ethics and Professionalism Credit Hours (2.0 hours total)

PANELISTS: District Judge Sarah Vance, U.S. District Court, Eastern District of Louisiana
Magistrate Judge Daniel Knowles, U.S. District Court, Eastern District of Louisiana
Shaun Clarke, Liskow & Lewis
A. Remy Fransen, Jr., Fransen & Hardin

MODERATOR: Magistrate Judge Sally Shushan, U.S. District Court, Eastern District of Louisiana

THURSDAY, MAY 8, 2003, 2:00 - 4:00 P.M.
Federal District Court, Eastern District of Louisiana
500 Camp Street, Ceremonial Courtroom, 5TH Floor

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OF PLACES_____(CJA & FBA MEMBERS $20 EACH) (NON-MEMBERS $30 EACH)

PLEASE RETURN THIS FORM AND REMITTANCE TO:

INGE HAMIDJAJA, ATTORNEY CONFERENCE CENTER
HALE BOGGS FEDERAL BUILDING, ROOM 364
501 MAGAZINE STREET
NEW ORLEANS, LA 70130
PHONE: (504)589-7990

MAKE CHECKS PAYABLE TO THE FBA.

The FBA often offers CLE to our panel members as a good will gesture designed to both recognize your contribution and commitment, as well as to familiarize you with the FBA's commitment to ethics, professionalism, and improving the quality of legal representation in our Federal Court community.

PROPOSED RULE CHANGES

The committee on codes of lawyer and judicial conduct is seeking public comment regarding proposed rule changes to 1.4 and 7.2(e).

Proposed Rule 1.4

(a) **(a)** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform new and existing clients, in writing, if the lawyer does not have malpractice insurance. A lawyer shall inform the client, in writing, any time the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for five years from the conclusion of the client's representation.

(d) The requirements in (c) does not apply to full-time members of the judiciary or full- time, in-house counsel or government lawyers, when representing the entity by whom they are employed.

Proposed Rule 7.2(e)

(e) **(e)** A lawyer shall, in any advertisement or communication, disclose the absence of professional liability insurance, using the following specific language, either that:

"This lawyer is not covered by professional liability insurance" or "This firm is not covered by professional liability insurance."

*Please furnish comments to Cheri Cotogno Grodsky, **cgrodsky@lsba.org** (504) 619-0107or William N. King, **bking@lsba.org** (504) 619-0108.*

CJA Judicial Committee Chair Judge Carl Barbier, Federal Public Defender Virginia Schlueter, and EDLA CJA Representative Herbert Larson objected to the proposed amendments opining that the question of malpractice insurance has no place in the relationship between client and counsel, may encourage frivolous litigation and could undermine the attorney client relationship.

CHANGES TO THEFT/FRAUD GUIDELINE

By now, as most of you are aware, the U.S. Sentencing Commission has eliminated the old fraud guideline of Section 2F1.1 and consolidated it into the new Section 2B1.1 Theft/Fraud Guideline. The new Section 2B1.1 guideline has done away with the old "more than minimal planning" enhancement which seemed to apply in every case. However, there has been a concerted effort to increase punishment for "identity theft" crimes. If you have a theft/fraud case, you need to identify when the theft/fraud occurred. If it occurred before November 1, 2001, you should calculate the guidelines as you would under the old pre-November, 2001, Guidelines. You should also calculate the same guidelines under the new Section 2B1.1. The "good news" is that, given ex post facto considerations, our local probation office will utilize the result which is most favorable to your client (either under the new or old guideline computations). If the offense occurred after November 1, 2001, then you will utilize the new Section 2B1.1 to compute the guidelines for theft or fraud cases. Finally, you should note that there was an emergency amendment to Guidelines Section 2B1.1, effective January 25, 2003, which increases offense levels for officers and directors of publicly traded companies who commit fraud. (Perhaps a Congressional response to the Enron debacle.) The most current version of Section 2B1.1, as well as the complete Guidelines manual, can be found on line at www.ussc.gov.

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FEDERAL BAR TO PARTICIPATE IN HABITAT FOR HUMANITY 2003 BENCH-BAR HOUSE

Habitat for Humanity, a non-profit organization that builds homes for and with deserving, low-income, new homeowners, will begin construction of the first-ever **New Orleans Habitat Bench-Bar House**. Led by Judge Ivan Lemelle and Magistrate Judge Karen Roby, approximately 30 federal judges and magistrate judges, along with support staff, have enthusiastically volunteered four-hour blocks of time on Fridays and Saturdays to build the Bywater area home. In addition, employees of the Clerk's Office, Probation, Pretrial and the Federal Public Defender's Office have agreed to participate. State court judges are also signing on to the event, which will start with a "Wall-Raising" on Law Day, May 1, 2003. The house will take six weeks to complete. Criminal Justice Act Panel Members and their staffs are welcome to sign on to the construction schedule. Anyone interested in contributing or volunteering should contact Andy Lee at 504-582-8664 or alee@joneswalker.com. For information about Habitat visit http://www.habitat.nola.org.

MARK YOUR CALENDARS & SIGN UP NOW!

Our annual two-day CLE seminar will be held May 1-2, 2003.

Please see page 9 for details and registration information.

FREE LEXIS TRAINING - APRIL 1, 2003

The Federal Public Defender's Office has arranged a training session for panel members focusing on the following:

- ☞ Basic Techniques
- ☞ News
- ☞ Public Records
- ☞ Advanced Search Techniques
- ☞ Legislative History

1 HOUR OF CLE CREDIT WILL BE GIVEN FOR THIS SESSION!!!

The session will be held in the Fifth Circuit Court of Appeals Training Room - Basement, 600 Camp Street, New Orleans, Louisiana, on April 1, 2003 at 11:00 a.m. Lunch will be served following the session.

Seats are limited to the first 12 people.
Please call Heidi Rousselle at (504) 589-7930
to reserve your seat.

Office of the Federal Public Defender
Eastern District of Louisiana
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New Orleans, Louisiana 70130