The Defense Never Rests

Volume 5.3 | Published by the Federal Public Defender's Office for the Eastern District of Louisiana | October, 2003

BIG WINS

United States v. Mercadel

In *United States v. Mercadel*, No. 02-30976 (July 1, 2003), a divided Fifth Circuit panel refused to overturn Judge Barbier's credibility call and affirmed his grant of a motion to suppress. At the suppression hearing, the arresting officer testified that he saw marijuana on Michael Mercadel's living room table by standing tiptoe on a two-inch ledge so he could peer over a curtain covering the front door. Judge Barbier did not believe him and found no probable cause for the ensuing entry. In addition, the Judge found lack of exigent circumstances. The government filed a motion for reconsideration, which Judge Barbier denied.

The government appealed. Gary Schwabe, of this office, argued that the Court could not reach the issue of exigency unless it first found probable cause, and it could not find probable cause without overturning Judge Barbier's credibility call. The Fifth Circuit declined to do so in light of the deferential standard of review. "Unfortunately for the government," the panel majority said, "many of its arguments on appeal bear little resemblance to the facts testified to by [the officer] at the suppression hearing."

United States v. Hayes

James Hayes came to us on appeal of his conviction for conspiracy to distribute more than 50 grams of crack cocaine. The conspiracy supposedly consisted of two sales with his brother to a CI. But James was in jail at the time of the second sale and there was nothing to indicate that he knew anything about it.

The case law about arrest as withdrawal was equivocal at best, Robin Schulberg cleverly argued insufficient evidence that James agreed to participate in a conspiracy beyond the single (less than 50 grams) sale. The Fifth Circuit agreed and reversed the conviction. We're going back for resentencing on a 5-to-49-gram conspiracy. *United States v. Hayes*, No. 02-30793 (Aug. 6, 2003).

Still unresolved: if withdrawal would cut off the conspiratorial liability of a particular defendant at a lesser offense, must the government bear the ultimate burden of proving that withdrawal did not occur in light of *Apprendi*?

In This Issue

PANEL MEMBER RECIEVES *STEPHEN T. VICTORY MEMORIAL AWARD*

BRYAN DE TRAY

CJA panel member Bryan DeTray was the recipient of the 2003 Stephen T. Victory Memorial Award which was presented at the Louisiana State Bar Association's Annual Meeting. The award recognizes writing achievements in the Louisiana Bar Journal. Bryan received the award for his article, "Fun With Civil Law: Appellate Fact-Finding in Louisiana State and Federal Courts." The article was published in the April/May 2003 issue. Bryan graduated *cum laude* from Tulane Law School in 1993 where he served on the Tulane Law Review. After law school, he served as a staff attorney for the United States Fifth Circuit Court of Appeals. He is currently appellate counsel to the firm King, LeBlanc and Bland, where he primarily works on federal and state appeals. Bryan is an active member of the board of directors of the Federal Bar Association, New Orleans Chapter, and served as the chair of the chapter's Young Lawyers Division. Through his innovative leadership he has proposed the mentoring program which appears on our "Message Board."

PROTECT ACT OF 2003

Section 3E1.1 Acceptance of Responsibility altered by PROTECT Act effective April 30, 2003.

The PROTECT Act of 2003 has changed how a defendant qualifies for the third point of reduction for acceptance of responsibility under Guidelines § 3E1.1. Now, in order to garner the full three-point reduction for acceptance, the Government must make a motion to the court "stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial..." It is not yet clear whether *ex post facto* considerations found in Guidelines § 1B1.11(b)(1) would preclude application of this provision to offenses committed prior to April 30, 2003. Thus, if you have an offense which was committed prior to April 30, 2003, one should suggest to the court that the pre-PROTECT version of 3E1.1 applies due to *ex post facto* considerations, thereby leaving the third point of acceptance up to the court's discretion, instead of dependent upon Government motion. Finally, in light of the uncertainties of *ex post facto* protection, it would be a good policy to assure, prior to any guilty plea, that the Government intends to move for the extra point for acceptance by the time of sentencing.

St. Charles Parish Jail

The U.S. Marshals Service is now housing federal inmates at the St. Charles Parish Jail. The jail staff has advised our office that attorney visits are allowed at any time; however, they warn that at lunch (11:00 AM) and shift change (2:00 PM.), you may have a longer wait. To get there, take I-10 West to I-310 South; from there you will cross the Hale Boggs Bridge; take Exit 10 (the second exit); then take La. 3127 North. Travel approximately seven miles until you see the Nelson Coleman Correctional Center on the left. The telephone number is (985) 783-1164.

COST OF INCARCERATION AND SUPERVISION

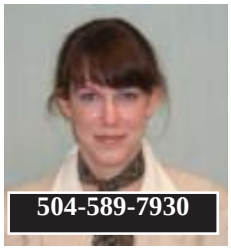
This chart updates the figures used for determining a criminal fine pursuant to U.S.S.G. §5E1.2(d)(7) and 18 U.S.C. §3572(a)(6). The costs of incarceration and supervision imposed become part of the court-ordered fine; funds collected are sent to the Crime Victims Fund.

Federal Prison Facilities		Community Correction Centers		Supervision	
Daily	$61.69	Daily	$48.51	Daily	$9.31
Monthly	$1,876.61	Monthly	$1,475.67	Monthly	$283.23
Annually	$22,519.32	Annually	$17,708.09	Annually	$3,398.79

New Federal Public Defender Staff

Photo Line-Up

George Chaney, Jr.
Asst. Federal Public Defender



Heather Crain
Financial Administrator

Charlotte Jarreau
Executive Secretary

Christina Wood
Computer Systems Administrator

George W. Chaney, Jr.

We are pleased to introduce George Chaney, Jr., Assistant Federal Public Defender, as an addition to our staff. George is a 1991 graduate of Tulane Law School. He has practiced law for twelve years, and has spent the last ten years specializing in criminal law. George has practiced in both Minnesota and Louisiana. In Minnesota, he served as an Assistant City Attorney and an Assistant Public Defender. In Louisiana, he served as a faculty teaching fellow at Tulane Law School. He has been practicing criminal defense work as a sole practitioner since 1993. He was also a member of the Orleans Parish Indigent Defender Capital Conflicts Panel and was a member of the Criminal Justice Act Panel. George has tried over 150 jury trials and will be a welcome addition to the Office of the Federal Public Defender.

Heather Crain

Heather Crain joins us as a financial administrator. Heather holds a Masters in Business Administration and recently graduated *summa cum laude* from Southeastern Louisiana University. She has extensive background knowledge of financial and accounting procedures. Heather will work directly with both our Administrative Officer and CJA Panel Administrator in procurement, budgeting, and the processing of CJA vouchers.

Charlotte Jarreau

Charlotte Jarreau will serve as the Executive Secretary to the Federal Public Defender. Charlotte has over ten years of professional experience including stints as a Legal Assistant to the managing partner of a local, AV-rated corporate defense firm and as an Executive Secretary to former mayor Marc Morial. Her interests include organization, research, and writing.

Christina Wood

Christy Wood joins the staff as the Computer Systems Administrator. She has a broad range of experience with computers and networks with background experience in large industries such as gaming, advertising, and naval architecture. Her educational achievements include a Baccalaureate as well as a Master's degree in Computer Science. She is also a Certified Microsoft Systems Engineer in Windows NT 4.0 and holds an A+ Certification in general PC hardware and software.

BRADY v. MARYLAND

Graves v. Cockrell, No. 02-41416 (Aug. 15: 2003)

Suppression of exculpatory evidence may excuse failure to raise Brady claim earlier.

Anthony Graves was convicted of capital murder and sentenced to death based on the testimony of co-defendant Robert Carter. But the night before trial, Carter told the district attorney that Graves was not involved. The district attorney did not disclose Carter's statement until a media interview six years after the trial.

The district court found the resultant *Brady* claim procedurally barred because Graves did not raise it in state court until his third application for post-conviction relief and the Texas courts rejected it as abuse of the writ. The Fifth Circuit granted COA and remanded for a hearing. The Court held that jurists of reason would find it debatable whether the suppression of Carter's statement constituted cause for Graves's failure to raise his *Brady* claim earlier. On the merits, the Court found an arguable *Brady* claim because the suppressed statement would have provided powerful ammunition for cross-examination of Carter at trial.

EVIDENCE

United States v. Jackson, No. 01-51108 (July 21, 2003)

Improper admission of Rule 404(b) evidence requires reversal of conviction.

Jeffrey Jackson was charged with transporting and conspiring to transport stolen jewelry in interstate commerce. The government's case was relatively weak; Jackson was arrested in a car with participants in a jewelry heist, 16 hours after the event, and one of the participants implicated him. Jackson denied involvement. At trial, the government introduced evidence of his prior conviction for theft of watches, and Jackson was convicted.

The Fifth Circuit held that the prior conviction should not have been admitted. It was relevant to intent, always at issue in a conspiracy case, and hence satisfied the first prong of the *Beechum* test. But it failed the second prong in that the risk of unfair prejudice outweighed probative value. The government had other evidence of intent, to-wit, the co-defendant's testimony that Jackson participated in the robbery. Participation implied intent. Moreover, Jackson did not present a "lack of intent" defense. Rather, he denied any involvement at all. Hence, the contested issue was identity, where the risk of a prohibited propensity inference is particularly great.

Finally, the error was not harmless because the case was close. The prosecution depended entirely on the co-defendant's credibility.

INEFFECTIVE ASSISTANCE OF COUNSEL

Guy v. Cockrell, No. 01-10425 (Aug. 13, 2003)

Fifth Circuit orders hearing on adequacy of investigation in capital case where court-appointed investigator developed relationship with victim

Joe Lee Guy kept watch outside a grocery store while his co-defendants shot the proprietors. As planned, he ran into the store after he heard the gunshots and snatched the cash registers. One of the victims survived and all three participants were arrested. Guy was the first tried; he was convicted and sentenced to death. His co-defendants, clearly more culpable, received life sentences. On habeas, Guy claimed that his court-appointed investigator failed to investigate mitigation evidence because of a conflict of interest. The investigator developed a relationship with the surviving victim, who named him sole beneficiary of her estate only six months after Guy's trial. Neither side presented live testimony at the scheduled hearing but rather submitted the case on the paper record. The district court granted summary judgment to the prosecution. Although the investigator admitted a conflict of interest in two of his four affidavits, the district court held that Guy failed to prove that this conflict influenced the development of his mitigation case.

The Fifth Circuit granted COA and reversed. It found the paper record contradictory, particularly with respect to what information was known to the investigator. Without knowing what information the investigator knew, the Court could not decide whether his decision not to investigate further was reasonable. Influenced by the lack of live testimony in either state or federal court, the Fifth Circuit reversed and remanded for an evidentiary hearing.

SEARCH AND SEIZURE

United States v. Brigham, No. 02-40719 (Aug. 18, 2003)

Traffic stop unreasonably extended when officer delays computer check to question about drugs without reasonable suspicion.

The Fifth Circuit previously has held that police may not extend the length of a traffic stop with questions about drugs, absent reasonable suspicion of drug activity. In the previous cases, the improper questioning occurred after completion of the computer check of the driver's license and registration. In *Brigham*, the sequence was reversed. The officer questioned the driver and occupants about drugs for eight minutes before beginning the computer check. Still, a divided panel held that the stop was unduly prolonged so the drugs that ultimately were discovered should have been suppressed.

SENTENCING

United States v. Floyd, No. 01-10340 (Aug. 13, 2002)

Probation officer's unsworn testimony insufficient to support sentencing enhancement.

The Fifth Circuit vacated Milena Floyd's sentence because of insufficient evidence of the prior conviction used to enhance her criminal history category. The PSI stated that Floyd had pled guilty to forgery in California, but Floyd denied the conviction was hers. At the sentencing hearing, the probation officer said she had a mug shot of the defendant in the California case and thought it resembled Floyd. But she did not bring the mug shot or any supporting documentation to court. The Fifth Circuit held that the probation officer's unsworn testimony was not enough to prove the forgery conviction was Floyd's.

United States v. Fullwood, No. 02-10840 (Aug. 8, 2003)

Fifth Circuit cautions against overuse of organizer enhancement.

U.S.S.G. § 3 B1.1 provides for a four-level enhancement if the defendant was an organizer or leader of criminal activity that involved five or more persons or was "otherwise extensive." In this fraud case, the PSI counted people fooled by the scam to satisfy the "otherwise extensive" requirement. The Fifth Circuit declined to find clear error, but said the case came close to the outer limits. The enhancement is for defendants who profit more from criminal enterprises, pose a greater danger to the public, or are more likely to recidivate. It is not a plea bargaining tool, nor is it to be applied automatically.

United States v. Sanders, No. 02-41514 (Aug. 18, 2003)

District court overstates amount of loss in sentencing for bank fraud.

Cecil Allen Sanders was convicted of bank fraud and false statements for understating his indebtedness in his application for an SBA-guaranteed loan of $75,000. The loan was approved and disbursed. But the district court sentenced Sanders on the basis of $232,000 in intended loss. That was the amount of an earlier loan that Sanders had sought with the same false loan application. The larger loan was approved, but the underlying business deal fell through so Sanders did not borrow the money. Instead, he put together a smaller deal for which he obtained the $75,000 loan.

A divided panel of the Fifth Circuit vacated the sentence, finding the district court should have pegged the amount of loss to the $75,000 loan. Although the commentary to § 2F1.1 of the Sentencing Guidelines directs the use of intended loss if greater than actual loss, the Court read the Guidelines to define "intended loss" as the loss resulting from an attempt or conspiracy for which the defendant was charged and convicted. Sanders' indictment was based on the $75,000 loan only and did not charge a larger inchoate offense. Furthermore, the Court held that there was no basis on which the trial court could have found the bank at risk for more than $75,000. Hence, its determination of a $232,000 loss was clearly erroneous.

WITNESSES

United States v. Fullwood, No. 02-10840 (Aug. 8, 2003):

Fifth Circuit limits government use of law enforcement officers as summary witnesses.

In a fraud prosecution, the government called the FBI agent in charge of the investigation as its last witness in its case in chief and in rebuttal as well. Both times, he testified as a summary witness. The district court instructed the jury that the testimony of a summary witness is not proof of facts, and the defendant did not claim the agent's testimony was inaccurate. But he challenged the agent's rebuttal testimony as improper for the first time on appeal.

Applying plain error review, the Fifth Circuit declined to grant relief. But it noted that the rebuttal testimony might have gone too far because the agent, without justification, merely recapped substantial parts of the government's case. A summary witness should not be used in a non-complex case to summarize the government's evidence just before the case goes to the jury. "Summary witnesses," the Court said, "are not to be used as a substitute for, or a supplement to, closing argument."

PENDING EN BANC REVIEW:

United States v. Gould, No. 02-30629:

The Court will reconsider circuit precedent limiting protective sweeps of a house to those incident to an arrest.

United States v. Parsons, No. 01-50464:

A criminal conviction pending on direct appeal abates ab initio with the death of the defendant. But under circuit precedent, unpaid restitution orders do not. Noting a circuit split, the Court will reconsider its position. CJA panel member Herb Larson represents Parsons' estate on appeal.

United States v. Reyna, No. 01-41164:

The Court will reconsider its rule that denial of the right of allocution at sentencing requires automatic reversal, even if the defendant did not object below.

United States v. Vargas-Duran, No. 02-20116:

*The Court will consider whether the definition of crime of violence in U.S.S.G. § 2L1.2 requires that the use of force be intentional. The Court previously held that similar language in 18 U.S.C. § 16(b) required intent. But a divided panel in **Vargas-Duran** held that the § 2L1.2 definition did not. Assistant Federal Public Defender Tim Crooks of the Southern District of Texas argued the case to the en banc court.*

GUIDELINE AMENDMENTS REQUIRED BY THE PROTECT ACT ARE EFFECTIVE OCTOBER 27, 2003

The changes in the guidelines governing downward departures demanded by Congress last Spring have been written and are effective as of October 27, 2003. As the supporters of the PROTECT ACT intended, these new amendments greatly reduce the discretion of sentencing judges to fashion sentences outside of the strictures of the Guidelines.

In the PROTECT ACT, Congress gave the United States Sentencing Commission 180 days to promulgate specific amendments to the Guidelines. Because these amendments were specifically demanded by Congress, their effective date is earlier than the traditional November 1 date for amendments which follow the usual procedure. In fact, there are other amendments following the traditional pattern of promulgation which would have affected some of the same parts of the guidelines.

The PROTECT ACT directed the Commission to amend the guidelines to substantially reduce the incidence of downward departures. Congress also directed the Commission to restrict the policy of light sentences for "fast track" immigration cases in overburdened border districts. The Commission was faithful to its instructions.

The intent of the new amendments is to deter downward departures. That intent is most evident in the new requirement that the grounds for all downward departures must now be stated "with specificity in the written judgment and commitment order." New §5K2.0(e).

Throughout the amended sections, the Commission has removed the words labelling a sentence as being "outside" or "below" the applicable guideline range. Instead, all variations from the guidelines are clearly labelled "downward departures." As a result, there can be no question that new restrictions apply whenever a judge applies some factor to arrive at a sentence other than that which a strict reading of the guidelines requires.

Some individual provisions are of special interest. The amendments clearly tell us that "Addiction to gambling is not a reason for a downward departure." §5H1.4. The defendant's role in the offense, while still appropriate for consideration in the limited ranges of minor or minimal participant, cannot otherwise be a basis for departing. §5H1.8. In the area of diminished capacity, the new amendments adopt what is already the rule in the Fifth Circuit that a downward departure is acceptable only if and to the same extent that the reduced mental capacity contributed to the commission of the offense. §5K2.13.

Departures on the grounds that the criminal conduct represented aberrant behavior have been seriously limited. The departure is only available now if there was a single criminal transaction committed without significant planning and if the crime represents a marked deviation from "an otherwise law-abiding life." §5K2.20. To that end, the amendment requires the court to consider "significant prior criminal behavior" which may not be reflected by a conviction. §5K2.20(c)(4).

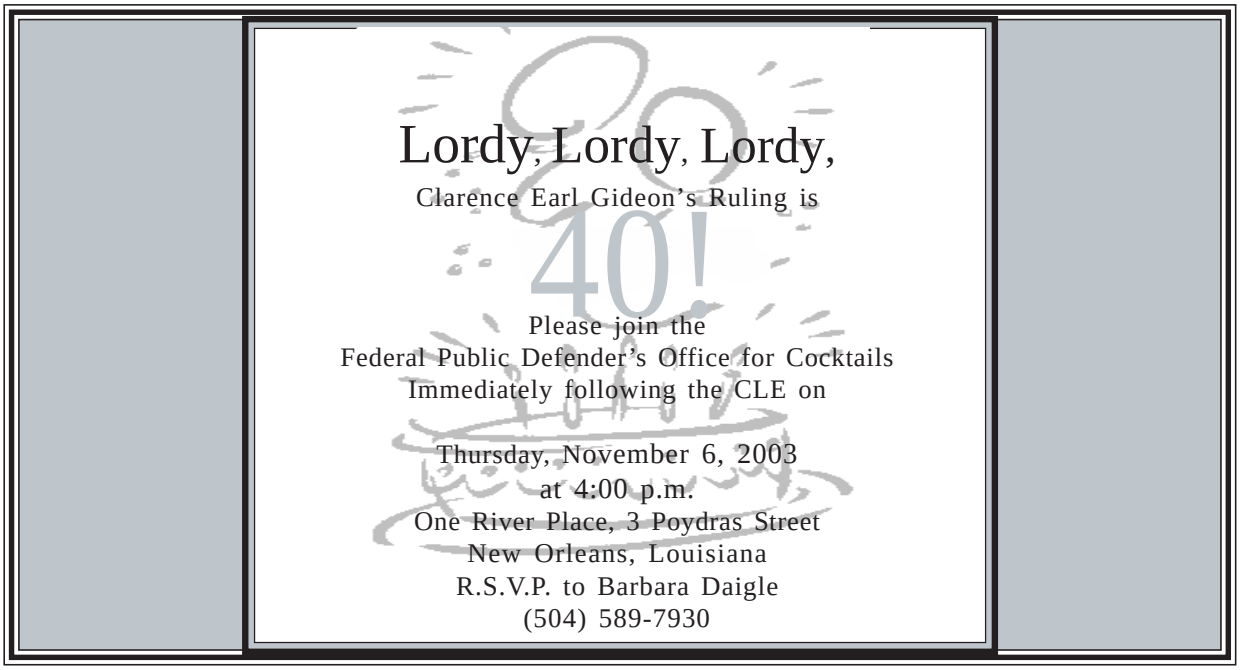
Although the "fast track" programs in border districts have been the product of actions taken by the Department of Justice to reduce the congestion cause by run of the mill border crossing cases, the PROTECT ACT ordered the Sentencing Commission to rein them in. New §5K3.1 restricts such downward departures to no more than four levels.

The Safety Valve provisions, allowing first offenders to plead guilty and receive sentences below otherwise applicable mandatory minimums, have also been altered by these amendments. The restriction of the Safety Valve to those defendants having no more than one criminal history point has been changed. The Safety Valve's application can now be affected by a determination that the defendant's criminal history is now adequately reflected by the guidelines. §5C1.2.

The amendments are quite broad in scope and range. This subject will be dealt with in greater detail in the CJA CLE session on November 6 and 7, 2003.

You can find a complete set of the amendments in pdf form at the Sentencing Commission's website. http://www.ussc.gov/FEDREG/departoctfr.pdf

The other amendments in the pipeline for an effective date of November 1, 2003, are also available on the web in .pdf form. http://www.ussc.gov/2003guid/2003amendments.pdf



Message Board

Attention All Writers

We would like to increase the number of appellate Criminal Justice Act panel attorneys. Appellate appointments are a great way to be creative. Anyone interested in being assigned an appellate case, please contact our office. In the future, we hope to present several short continuing legal education programs designed specifically to hone appellate skills. If you would like to be notified of upcoming research and writing workshops, please contact Barbara Daigle at 589-7930 or by e-mail Barbara_Daigle@fd.org.

Fifth Circuit Oral Argument?

If you have been granted Fifth Circuit oral argument, the Office of the Federal Public Defender will schedule a moot of your case. We can electronically forward your briefs to the attorneys and law clerks in our office. It is strongly recommended that you schedule a moot and that you do so as soon as the oral argument is set. There will be a moot of a capital case at 8:00 a.m. on Wednesday, November 19, 2003. You are invited to participate. For assistance in scheduling a moot, please contact Research and Writing Specialist Robin Schulberg at 589-7942 or by e-mail Robin_Schulberg@fd.org.

Young Lawyer's Division

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 Virginia Schlueter at 589-7930 or by e-mail Virginia_Schlueter@fd.org.

E-Mail Addresses

Do we have your e-mail address? If not, you are missing out on valuable information circulated electronically.

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