
The BACK BENCHER



Central District of Illinois Federal Defenders

Vol. No. 34

David B. Mote Memorial Edition

DEFENDER'S MESSAGE

DAVID B. MOTE: THE HAPPY WARRIOR

In memory of our friend and colleague, we issue this Memorial Edition of *The Back Bencher*, in honor of Assistant Federal Public Defender David B. Mote, who passed away on October 11, 2003, from complications arising from his quintuple bypass surgery. We miss him terribly.

I first met David almost by accident. I had just been sworn in as the Federal Public Defender for the Central District of Illinois, after having passed the FBI and IRS field checks. I was starting to organize the office, literally from the ground up, *i.e.*, entering into leases, buying furniture, choosing the color of the office walls, and selecting carpeting, etc. More importantly, I was looking for the special kind of people who had the aptitude to work long, hard hours on behalf of indigent citizens with determination, but in a civil way and within the Rules of Professional Conduct.

During this time frame, I was invited to lunch in Springfield by Judge Richard Mills to discuss the many matters and tasks before me and to seek his counsel. As usual, I was early. Judge Mills was in trial, and, as I waited for him, I sat in his courtroom while the trial was in progress. A panel attorney sat alone with his client at counsel table while the U.S. Attorney, with the assistance of two Assistant United States Attorneys and a case agent, were beating the brains out of the lone lawyer and his client, with all the might and money available to the government. This lone courageous panel attorney was David Boyd Mote.

Observing him, I had an immediate feeling of camaraderie, having been in that same unenviable situation myself as a panel attorney of many years. Thus, at the break, I went up to David, talked with him, and offered him encouragement. At lunch, I asked Judge Mills about David. Judge Mills, whose opinion I valued, told me that David had been his clerk and recommended him to me without reservation. Hearing this and having seen David in action, I thought he would be a good candidate to consider for the Springfield office, believing that I could teach an intelligent person knowledgeable in federal law how to be an aggressive defense lawyer. I was right.

About a week later, my fledgling staff and I traveled to the Federal Defender's office in the Southern District of Illinois to see how their office was organized and operated. My staff at the time consisted of only Brenda Childs as Administrative Officer, George Taseff as the only other attorney in the office, and two investigators, Don Espinoza and Phil Geier. On our way back to Peoria from East St. Louis, I arranged for all of us to eat dinner with David at Saputo's in Springfield, hoping to get to know him better and get my other colleague's opinion of him. After the dinner with David, we were unanimous in our high opinion of him, and the next day I offered him the opportunity to head-up the Springfield Office. He accepted, and what followed was over eight years of hard work, fun, and friendship.

During our first year working together, I had the opportunity to get to know David very well. At the time, the entire caseload of the office was divided among me, George Taseff, and David. George covered the Rock Island and Peoria Divisions, David covered the Springfield Division, and I covered the Urbana Division, as well as part of the

Peoria and Springfield Divisions, in addition to my administrative duties. Given the newness of the office and the relative inexperience of David, I spent at least one or two days each week in Springfield with him, trying cases and writing appellate briefs. As any trial lawyer knows, working closely on cases builds a special bond between lawyers and that certainly occurred between me and David.

One case of particular note where this bonding occurred was *O'Sullivan v. Boerckel*, a case which David brought to the office from his days as a panel attorney. After David won this case in the Seventh Circuit (no small achievement in itself), the United States Supreme Court granted *certiorari*. David and I therefore, over the course of many weeks, prepared the briefs and traveled to Washington several times to moot argue the case. Specifically, the law firm of Sidley and Austin mooted the argument for us, the firm having associates who had clerked for all of the Supreme Court justices. Likewise, Defender Services mooted the case with us twice. We then finally appeared in the United States Supreme Court, and I know it was one of the highest points in David's career, as it was in mine. Did we always agree -- of course not. Did we argue -- of course we did. Did we admire and respect one another -- you betcha. Needless to say, sharing this experience together brought us even closer.

Over these years of working with David, I also learned a lot about him which you may not know. David attended Bloomington High School for two years before graduating from University High in Normal, Illinois, in 1976. While in high school, David obtained a brown belt in Karate. He graduated from Illinois State University with a Bachelor of Arts in 1980 and graduated *summa cum laude* from Southern Illinois University School of Law in 1990. While in law school, David was on the Board of Editors of the *Law Journal of Southern Illinois University* and was awarded the Order of the Coif. After graduating, David clerked for Judge Richard Mills and then, after a brief period in private practice, came to work for my office in October of 1995. Among the many trials and appeals David litigated, he argued to an *en banc* Seventh Circuit in *United States v. Childs*, and, as already noted, also argued before the United States Supreme Court in *O'Sullivan v. Boerckel*. David

also served on the Board of Visitors of the Southern Illinois School of Law and on the Board of Directors of the Illinois Association of Criminal Defense Lawyers. David was a chess master since his college days, and a life member of the United States Chess Federation. At the Chicago Open in 1998, he played American Grandmaster Sergey Kudrin to a draw.

David was an excellent writer, and among his many duties as an Assistant Federal Defender, he contributed to *every* issue of *The Back Bencher*. His contributions demonstrate his commitment to assisting other attorneys, for *The Back Bencher* is my office's publication distributed to the panel attorneys throughout the Seventh Circuit, as well as nationwide via the Defender email network and the Seventh Circuit's website. In no small part due to David's contributions, our newsletter has garnered praise from many different quarters.

For example, *Punch and Jurist* (a nationally known criminal law journal) has praised *The Back Bencher* as the best newsletter of its kind, as have two D.C. based think tanks. Recently, I received the following email of praise about our latest edition:

Dick,

I think "The Back Bencher" is a truly great public service. Thank you for it. And, I really appreciated your comments comparing the current attempts to short-circuit the Constitutional protections afforded to defendants in criminal cases to what the U.S. Government did to the Dakota Indians following the civil war. I think it is very valuable to be reminded of how we have made such mistakes in the past, as encouragement to not make them again. Unfortunately, with probably all of us who read your comments, you are "preaching to the choir." Your words deserve a wider audience – maybe the Chicago Tribune?

Again, thanks for your efforts.

Joe Downey
Chief, Program Assessment
& Operations Branch
Defender Services Division

This praise must be shared by me with David, as well as the other contributors to *The Back Bencher*.

As a final tribute to David, I have collected his contributions to *The Back Bencher* in this Memorial Edition, as well as articles and letters from Defenders and admirers from across the country in an Editor’s Note, in fond memory and praise of our fallen colleague. His articles spanned a broad spectrum, including reporting events, legal analysis of issues, and broad commentary on current events. As you will learn from reading them, they are as relevant, informative, and helpful today as when originally written by David. Never one to be tied to rigid formulas, David’s last contribution to *The Back Bencher* was lyrics which can be sung to the Beach Boys’ song “Kokomo.”

Through all of the trials and travails of being a defender, David never lost his sense of humor, dry wit, compassion, or the defender’s desire to assist the underdog. He will forever have a special place in my heart.

Needless to say, David’s sudden and untimely death leaves us both deeply saddened and, as a practical matter, struggling to fill his very large shoes.

Yours very truly,

Richard H. Parsons
Federal Public Defender for the
Central District of Illinois
Acting Federal Public Defender for the
Southern District of Illinois

Table Of Contents

Judge Richard Mills’ Eulogy 3
Editor’s Note 4
Position Announcement 6
David’s Articles 6
Attachment

Judge Richard Mills’ Eulogy

This has been a heartbreaking week and a half and we all share this deep sadness with Martha, Robert, Karen, and members of Dave’s family.

David has been gone for such a short time. Yet, we keenly feel the magnitude of his loss as we struggle for the simplest of words to make sense of God’s mysterious and inexplicable decision to take David when He chose to do so.

God has taken him - with but the slightest warning, without our having been able to tell him goodbye, without our being able to tell him how much we respected and loved him, and how much we will miss him as we try to carry on in his absence.

Yet David would surely tell us that we must accept this divine decree and continue with life as we know it.

Dave graduated from Southern Illinois University School of Law in the top rank of his class, summa cum laude - with highest honors - and was Student Articles Editor of the SIU Law Journal. His top academic credentials, of course, served him well when he applied to me for a clerkship in my chambers. And I remember my interview of him vividly. And this was because I was intrigued with three additional factors: First, his undergraduate degree from Illinois State University was in mathematics; second, his experience with computers, models, programming, and analysis; and, third, the fact that he was a master chess player. This was a great combination as our court moved into the age of technology and as we came “on line”, Dave’s expertise would prove to be invaluable.

Needless to say, Dave got the job and served me summa cum laude for two years - the normal span of my clerkships. During his time in my chambers, he also served with fellow law clerks Tom Wilson, John Childress, and Deanne Fortna Jones. Later, when Dave went to the Federal Defender’s staff, he worked with another law clerk, Tom Patton, who is still with the Defender’s Office in another district. They all formed close friendships that have become everlasting.

One of the finest decisions that our Federal Public Defender Richard Parsons has made in his office was to ask David to join his staff. David has brought his enormous talents and criminal defense to our court and to the private attorneys at our federal bar who appear in criminal cases. His expertise on the U.S. Sentencing Guidelines became a bottomless well of support that he shared with the court, privately retained attorneys, and attorneys appointed under the Criminal Justice Act by our court. In sum, David was a consummate criminal defense

counsel.

David Mote was a splendid lawyer and an extremely talented attorney. John W. Davis, President of the American Bar Association in 1923, said of lawyers, "True, we build no bridges; we raise no towers. We construct no engines; we paint no pictures ... But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens; and by our efforts we make possible the peaceful life of men in a peaceful state."

And Lord Rawlinson of Ewell, formerly Her Majesty's attorney general, upon his retirement from practice after 39 years, said: "Above all, I am glad to have followed a profession, a profession with rigid standards of conduct. Ours is a profession. It is not a trade. We deal, alas, generally with people's problems and difficulties; people in trouble, in despair, in fear. If we ever think of ourselves as merely providing some service as in a service industry and forget the raw material of our service, if ever we forget that we serve justice, then we should go away and sell insurance or manufacture pots and pans, and leave the law to those who love and respect it."

As Justice Cardozo once wrote in a New York State opinion: "Membership in the bar is a privilege burdened with conditions." And probably the most significant and cardinal of those conditions was discussed by Justice Frankfurter in Schwartz v. Board of Bar Examiners, where he said that the lawyer stands, "as a shield ... in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have throughout the centuries, been compendiously described as "moral character."

And David possessed that "moral character" in aces, spades and trumps.

In Act 5, Scene 2, of "Henry V," Shakespeare gave us that immortal measure of a man: "But a good heart is the sun and the moon, for it shines bright and never changes, but keeps its course truly."

We here honor David's memory, and express our deep gratitude for his life, his love, and his "good heart."

David, my friend, Godspeed.

EDITOR'S NOTE

The following articles and letters were received in response to the notice of David's death. We thought that in sharing them with you, they would shed a little new

light about David's career with the Federal Public Defender's office.

--As you read above, Judge Richard Mills gave a heartfelt eulogy at David's funeral on October 16, 2003, and he also wrote the following letter to the Editor of the State Journal Register, which was published the same day:

Dear Editor,

The legal and judicial community of Mr. Lincoln's prairie has lost one of its brightest and best. Deputy chief federal public defender David B. Mote tragically passed away this past weekend at the age of 44, taking with him an outstanding legal mind. He was a superb law clerk, a compassionate but realistic public defender and a brilliant expert on the U.S. sentencing guidelines.

He willingly shared his criminal defense talents with his colleagues at the federal bar – an extremely valuable resource for our privately retained attorneys.

David Mote has left us a legacy of legal ability in federal criminal law seldom matched. His many admirers at the bar and bench will long remember him and his many contributions to criminal justice in the Central District of Illinois.

"God's finger touched him, and he slept."

* * * * *

--Seventh Circuit Judge Ilana Diamand Rovner sent to Mr. Parsons the following gracious letter, which demonstrates the respect David earned through his appellate work:

Dear Mr. Parsons:

I just wanted you to know how sad I was to learn of the untimely death of David Mote. I remember him so well, and the fine job he did, particularly in the *Childs* case. What a tragedy, not just for his family and friends, but for all those who care about the pursuit of law in its finest embodiment.

I send my sincere condolences.

* * * * *

--The following article, entitled "Late public defender eulogized by friends," was published in the State Journal Register on October 17, 2003:

Friends, co-workers and court-room advocates and associates this week eulogized deputy chief defender David Mote as the consummate "good guy."

Mote, 44, died Saturday after having had heart bypass surgery two weeks earlier.

“He was not only well respected, I loved him like a son,” said federal public defender Richard Parsons of Peoria, who hired Mote as his assistant in charge of the Springfield office when a full-time public defender’s office was started in the 46-county Central District of Illinois in 1995.

“We’ve tried cases together and created a bonding,” Parsons said. “I can count on one hand the number of lawyers I know who have argued cases before the United States Supreme Court, and Dave is one of them.

“He was a great lawyer and a wonderful friend.”

Mote, who was admitted to the bar in 1990, was a mathematics graduate of Illinois State University and a summa cum laude graduate of Southern Illinois University of Law. He also was rated a chess master and won the 2001 Springfield Chess Club Tournament, among others.

He clerked for U.S. District Judge Richard Mills from 1990 to 1992, and Mills called Mote “clearly one of the brightest, most talented lawyers I’ve ever been associated with.”

Mills, at a memorial service for Mote Thursday, said Mote’s expertise on sentencing guidelines “became a bottomless well of support that he shared with the court, privately retained attorneys and attorneys appointed under the criminal justice act by our court.”

“In short, David was a consummate defense counsel,” Mills said.

He quoted former U.S. Supreme Court Justice Felix Frankfurter, who discussed the “moral character” a lawyer must possess.

“David possessed that moral character in aces, spades and trumps,” Mills said.

“We are all obviously very shocked and saddened to hear about David’s passing,” said U.S. Attorney Jan Paul Miller. “He was very well liked and respected by everyone in the office here. He fought very hard for his clients and was a very good lawyer.”

Miller said Mote was “professional, collegial and civil in how he conducted himself, which isn’t always the case in the legal profession.”

“You could have a hard-fought case against him in court and still be friends and colleagues afterward,” Miller said.

Parsons said other federal defenders have divided up Mote’s cases and will continue to handle them until a Springfield defender is named.

He said Mote’s death has been particularly difficult for others in the office.

“It is hard on them,” he said. “Our federal defenders truly are a family.”

Mote is survived by his wife, Martha; two stepchildren; his parents; and two brothers.

* * * * *

--Mr. Parsons received the following email messages in response to the notice he sent via email to all the Federal Defenders in the country regarding David’ passing:

“This is so sad. Thanks so much for the eloquent notice that you sent. Coincidentally, I just came across some pictures of you, David and me that were taken when you were in DC for the argument. You did a fine thing by letting him argue the case. My heartfelt condolences.”

By Carmen D. Hernandez, Attorney Advisor, Defender Services Division Training Branch

* * * * *

“That is terribly sad news. I am so sorry. He was a wonderful lawyer, and, more importantly, a wonderful person. He was always a delight to be around and to talk to and to see. In a system that needs good people, he was one of the best, and he will be deeply missed by me and everyone else. My deepest sympathy goes out to his family, the office, and to you. I cannot imagine how tough this must be. My thoughts are with you.”

By A. J. Kramer, Federal Defender for the District of Columbia

* * * * *

“I am so sorry about David's death. I grieve from afar with you, your office and David's family.”

By Henry Martin, Federal Defender for the Middle District of Tennessee.

* * * * *

“I am so sorry to hear that. I liked David very much. He was perennially in a good mood and always had something nice to say.”

By Alex Bunin, Federal Defender for the Northern District

of Massachusetts and for Vermont.

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“Sincere condolences from all of us in the Defender's office in the District of South Dakota. We will never have enough colleagues like the good man you describe. Keep fighting the good fight!”

By Jeff Viken, FPD District of South Dakota

* * * * *

“Our office extends our sympathy to your staff on David Motes' passing. He was obviously an accomplished attorney and respected coworker. We know the pain of the loss of a coworker, colleague and friend, and our thoughts are with all of you.”

By Christine Freeman, Middle District of Alabama

* * * * *

--Carol Brook, the President of the National Association of Federal Defenders, sent a beautiful bouquet along with the following note:

The National Association of Federal Defenders extends deepest sympathy to everyone at the defender's office for the terrible loss of Dave Mote.

POSITION ANNOUNCEMENT

Due to David's passing, we are now in need of an Assistant Federal Public Defender in the Springfield, Illinois office. If you are interested and believe you are qualified, please see the "Position Announcement" located at the back of this issue for qualification requirements and application information.

Volume 33 - October 2003

Remembering Guantanamo Bay

By: David Mote
Deputy Chief Federal Defender

Last month, attention was focused on the two-year anniversary of the brutal attacks of September 11, 2001. It is appropriate that we remember what happened and the Americans who were lost on that day. It is also appropriate to remember that during the following two years, significantly more than 600 citizens of more than

forty nations have been detained by American forces and held captive in Guantanamo Bay, Cuba. None have yet been tried. Last month, Secretary Rumsfeld made it clear that putting the detainees on trial was not a priority. "Our interest is in not trying them and letting them out," he said. "Our interest is in – during this global war on terror – keeping them off the streets, and so that's what's taking place." The Pentagon has asserted the right to hold the combatants (whom it contends are not prisoners of war with rights under the Geneva convention) until the end of the hostilities. It is acknowledged, however, that the war on terrorism could go on for decades. Reflecting on the situation in Guantanamo Bay, the classic, catchy Beach Boys' tune *Kokomo* came to my mind. Despite the seriousness of the subject, I thought satirical lyrics to that Beach Boys' classic might kindle a little awareness to the situation in Guantanamo Bay, so, without further ado, your musically-stunted writer presents the following:

Guantanamo

Lyrics by David Mote @ 2003

(to the Beach Boys tune, *Kokomo*)

Afghani, Iraqi ooh I wanna take you
Las Tunas, Matanzas you'll never see your mamas
No trials, appeals baby why don't we go Havana
Outside the law
There's a place called Guantanamo
That's where you gonna go to get away from it all
Bodies in the sand
Tropical drink in your capture's hand
He'll interrogate you
To the rhythm of a oil drum band
Down in Guantanamo
Afghani, Iraqi ooh I wanna take you
To Las Tunas, Matanzas you'll never see your mamas
No trials, appeals baby why don't we go
Ooh I wanna take you down to Guantanamo
We'll get there fast And then we'll sweat you slow
That's where we wanna go
Way down to Guantanamo

Past Martinique, with that Muslim mystique
We'll put out to sea And we'll perfect our chemistry

By and by we'll defy a little bit of sanity

Afternoon sunlight
Truth serum and muggy nights

That foreign look in your eye
Give me a tropical contact high

Way down in Guantanamo

Afghani, Iraqi ooh I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo
We'll get there fast
And then we'll sweat you slow

That's where we wanna go
Way down to Guantanamo

Self-anointed prince, I wanna catch a glimpse

Everybody knows
A little place like Guantanamo

Now you are gonna go
And get away from it all

Go down to Guantanamo

Afghani, Iraqi ooh I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo

We'll get there fast
And then we'll sweat you slow

That's where we wanna go
Way down to Guantanamo

Afghani, Iraqi I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo

Volume 31 - January 2003

Interesting Times For Criminal Defense Lawyers

By: David B. Mote
Deputy Chief Federal Defender

The wish "May You Live In Interesting Times" has often been reported as an ancient Chinese Curse. While that attribution appears to be wrong (apparently the first verifiable use of the phrase is a 1950 science fiction story by Eric Frank Russell, writing under the name of Duncan H. Munro), it also seems appropriate. Interesting times are frequently trying times.

Criminal defense lawyers are now in "interesting times." The "war on terrorism" has changed the legal landscape dramatically. While the vast majority of criminal defense lawyers have not represented a client accused of terrorism, the majority of us will represent clients who will be affected by changes made in the "war on terrorism."

One development of the "war" is revival of the concept of an "enemy combatant." The concept was apparently adopted from a Supreme Court case in 1942, *Ex Parte Quirin*, 317 U.S. 1(1942), which used the term to describe saboteurs trained in Germany after the declaration of war between Germany and the United States and captured on United States soil. Prior to last year, few people would have anticipated that the "enemy combatant" designation, and the deprivation of constitutional rights that go with it, would be applied to United States citizens, such as Yaser Esam Hamdi, who surrendered in Afghanistan, let alone to an American citizen arrested on U.S. soil, such as Jose Padilla. As "enemy combatants" Hamdi and Padilla are entitled to neither the rights afforded to defendants in our criminal court system nor to the rights afforded to Prisoners of War under the Geneva Convention. They are in a legal "no man's land" in which they can be held indefinitely without ever being charged.

It is unclear what standards the government is using to decide whether to designate someone as an "enemy combatant" or prosecute them in normal court system. For

example, it is unclear why John Walker Lindh and Zacarias Moussaoui were not designated as “enemy combatants” while Hamdi and Padilla were so designated. Moussaoui is not a United States citizen, but presumably the 600 or so detainees being detained in Cuba as “enemy combatants” are not United States citizens either, though nothing is certain since the government will not even release the names of those detained.

The “war on terrorism” has not been formalized by a Congressional declaration of war, of course. The enemy in this “war” is not a country, but a terrorist organization. Still, we should not forget the Constitution’s assignment of the right to declare war to the legislative, rather than the executive, branch. A declaration of war represents not only a change of status for our country, but also a change in the status of all of this country’s citizens.

Before the rights of the citizenry of this country are altered, the Constitution prudently requires that the elected representatives of the People concur. An act of Congress requires that the People’s elected representatives agree both on the identity of the enemy and that the proper solution is war, rather than diplomacy. An Act of War, by its very nature, also serves the purpose of providing the citizenry with notice of the enemy’s identity and that the restrictions governing aiding or abetting an enemy in a time of war apply. The discussions about what powers should be granted to the President in a time of war have largely ignored this important point.

We have, of course, been involved in armed conflicts in the past without a formal declaration of war, including Korea and Vietnam. The “war on terrorism” may, however, be closer to the “war on drugs” than it is to a normal war. Wars between countries end. One country may surrender, or a truce may be called, or, if the countries do not neighbor, one country may withdraw. Frustrated and fanatical individuals who wish this country harm will always be with us, just as the “war on drugs” has proven that there will always be someone willing to sell drugs to make more money than they can make lawfully for the same effort. Granting war-time powers to the executive branch for as long as it takes to resolve a permanent problem amounts to a permanent increase in power for the executive branch and a permanent decrease in the rights of the People.

In the wake of September 11, 2001, the Congress passed the USA Patriot (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act. The act amends fifteen different federal statutes and grants new powers to law enforcement

and intelligence agencies. The changes affect immigration law, privacy (remember reading about how the FBI had been given the authority to find out what books an individual checked out from a public library and the requirement that the library not tell you about the inquiry, or the “TIPS” program, a government plan to recruit civilians in service jobs to keep the government informed of suspicious activities of their fellow citizens?), Fourth Amendment law (a provision makes it easier for the federal government to conduct a search without giving prior, or perhaps any, notice) and information sharing between government agencies.

Just as most of the cases affected by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) involved neither terrorism nor the death penalty, the plethora of changes that have occurred and continue to occur to the law in the name of the “war on terrorism” will affect people in this country who have neither committed nor been accused of committing terrorism.

Since the beginning of the “war on terrorism,” thousands of immigrants to this country have been rounded up based on what had previously been treated as minor immigration violations, such as over-staying a visa or taking less than a full class load when admitted on a student visa. In many cases, the government has at least temporarily refused to say who had been detained or even how many people had been detained. In a substantial number of cases, people detained on immigration charges have been transported to other states. One fact that came out following hundreds of arrests for minor immigration violations was that the INS had millions of pages of unprocessed applications. They reportedly did some catching up after September 11, 2001, approving visa applications for two of the hijackers six months after the attacks had taken place. The Attorney General insists the government has the right to close certain deportation proceedings to the public. The courts have divided on the issue. *Compare North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (declining to second guess the Attorney General’s national security concerns), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

Rules published in the Federal Register require visitors and immigrants from 20 mainly Muslim countries to Register with INS. In California, hundreds of individuals who came in voluntarily to register were arrested. Males over the age of sixteen from 13 additional countries are required to register in January and February of 2003. (There are different deadlines for people coming from different countries.) The Attorney General has made it clear that he considers it completely appropriate to use detention on immigration as a tool to fight the war on terrorism. Thus, anyone charged

with an immigration violation may be affected by the “war on terrorism.”

Another development in the “war on terrorism” is the Orwellian “Total Information Awareness” project. The goal of the project is to develop a super-database of personal information including credit card purchases, telephone records, e-mails, medical records, passports, driver’s licences, school records, magazine subscriptions and gun purchases, in order to identify suspicious patterns that could lead to the detection of possible terrorists.

The project is currently headed by retired Admiral John Poindexter, convicted of numerous felony counts of lying to Congress in 1990, but successful in having his convictions overturned because information given under immunity was used against him in his trial.

Following September 11, 2001, television commercials have been running which equate buying illegal drugs to supporting terrorism. Isn’t Osama Bin Laden wealthy because he inherited a share of the estate of his billionaire father who made his fortune in construction during the Saudi oil boom? If so, would it be more appropriate to run commercials for conservation arguing that turning up the thermostat or driving a gas guzzler supports terrorism?

Other changes since September 11, 2001 have included increased airport security measures, including randomly selecting travelers for additional screening and proposals to arm airline pilots. Of course, it would be a good idea if pilots who drank before flying, as additional security measures have occasionally discovered, were not armed. And if a pilot or co-pilot decided to intentionally crash a plane, as the NTSB concluded a co-pilot may have done in a 1999 EgyptAir crash, a securely locked cabin and gun could make it easier for that person to succeed.

Everyone in our society is affected by the changes made in the war on terrorism, from immigrants who came here on student visas and dropped a class to American-born U.S. citizens who must plan for longer delays at airports and consider how their government will view their choice of reading material or credit card purchases. It is not yet clear what changes will eventually be implemented or what the eventual results will be from the changes already implemented.

Criminal defense attorneys deal with people’s rights to due process, legal representation, and to be free from unreasonable searches and seizures. We should be contemplating the changes that have and continue to take

place. Will drug dealers some day be charged with treason because drug trafficking supports terrorism? Would a search warrant based on personal information from the Total Information Awareness database violate the Fourth Amendment? Does it raise questions under the Ninth Amendment and the right to privacy? Does a search warrant instigated based on what books someone checked out from the public library violate the Fourth Amendment? Does it violate the First Amendment? Does a registration requirement applied to males over the age of sixteen from predominantly Muslim countries violate equal protection? The changes adopted in the name of the “war on terrorism” are not merely matters of national security and politics. They affect the rights of individuals and those on the margins of our society, the origin of most criminal defendants, are the first to truly experience it when our rights are diminished. It is not too early to begin contemplating how the changes made and proposed in the “war on terrorism” have affected individual rights. Someone in the government is obviously thinking about all these changes and their effects before they are even proposed, so we are behind already and there is much to think about.

We do indeed live in interesting times. Let’s hope for our sake and the sake of our clients, that they don’t get too interesting.

Volume 30 - September 2002

The Fourth Amendment And A Public Education

By: David B. Mote
Deputy Chief Federal Defender

Unfortunately, but inevitably, the official end of summer has arrived once again. Schoolchildren have already returned to their classrooms to fidget until the weather is cool enough to pay attention. Grade school children, in fifth or sixth grade, will get their first formal exposure to the Constitution and the Bill of Rights. High school upperclassmen will study for the Constitution test they are required to pass to get a high school diploma. And outside of the actual classroom setting, they will learn that the Fourth Amendment now means less than it says.

More years ago than it seems like it should be. I recall

conversations about what had been taught in a class that day about the Bill of Rights and, particularly, the Fourth Amendment. Perhaps, as lawyers, we are especially impressed when our children tell us how they have learned of the “right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.” I found it more than a little ironic when I learned that during the time period that the class was covering the section on the Bill of Rights, the students were told that they could not go into the hallways while drug dogs were taken through the hallways to sniff everyone’s lockers for drugs.

Some would point out that drug-sniffing dogs going through the hallways sniffing the lockers while the students are in class is not intrusive. Still, if you are a student who can’t get an urgently needed hall pass to go to the bathroom because of the canine activities in the hallways, or if a dog decides to mark its territory as it passes your locker, it might seem more of an imposition. In 1995, the Supreme Court allowed schools to go beyond dogs sniffing lockers for the smell of drugs, allowing schools to require students participating in athletics to submit to suspicionless drug tests. See Vernonia School District v. Acton, 515 U.S. 646 (1995). In that case, the Court relied on the fact that the sports programs were voluntary, that there was a demonstrated connection in the case between drugs and sports, that there was a special risk of drug use and special dangers resulting from drug use by athletes, and that athletes had diminished expectations of privacy, mentioning specifically the communal undress common in sports.

This year, in a 5-4 decision, the Court has further diminished the Fourth Amendment rights of students. In Board of Education v. Earls, No. 01-332, ___ U.S. ___ (June 27, 2002), the Court upheld a drug testing requirement for participation in any extracurricular activity. Earls’ extracurricular activities included show choir, marching band, academic team and National Honor Society. Relying on Vernonia, the Court noted that extracurricular activities are voluntary and can involve off-campus activities and communal undress. The Court opined that the way drug testing was performed, stationing someone outside the bathroom stall to listen for normal sounds of urination and accept the sample, the intrusion on the students’ privacy was “negligible.” (Ms. Earls, who reportedly passed her drug test, considered it humiliating.) On the other hand, the school’s interest in preventing drug use by students was an important government concern. Neither probable cause nor even individualized suspicion is required to demand the student submit to a drug test.

Unfortunately, one result of the Supreme Court’s decision

may be that some idealistic students may decide to forego extracurricular activities rather than submit to suspicionless testing they find unreasonable and/or humiliating. Since studies show that students who are involved in extracurricular activities are less likely than other students to use drugs, suspicionless drug testing programs could actually result in more drug use among bright, idealistic teenagers.

Another result of the Supreme Court’s decision and suspicionless drug testing programs in public schools is to teach students that the Fourth Amendment means nothing if the object of the search, in this case evidence of drug use, is important enough.

As criminal defense attorneys, of course, we do not deal with school drug testing. Nonetheless, we should pay attention to such issues because the schools, even as they teach the content of the Bill of Rights in the classroom, are taking desperate measures in the hallways to try to keep drugs and other problems in check. If we, as criminal defense attorneys, “Liberty’s Last Champions,” don’t teach people about the importance of the Fourth Amendment and its true meaning, it will become meaningless.



Volume 29 - June 2002

Trees on the Slippery Slope of Appeal Waivers

By: David Mote

Deputy Chief Federal Defender

The increasingly trodden slope of appeal waivers has become more hazardous with use. Two recent cases from the Seventh Circuit illustrate a large hazard to those heading down that slippery slope.

United States v. Hare, 269 F.3d 859 (7th Cir. 2001) involved public policy arguments challenging the waiver of the right to appeal in the plea agreement. Not only did the Seventh Circuit reject defendant’s arguments and dismiss his appeal, it concluded that Hare had breached his plea agreement by attempting to appeal and granted the prosecution 14 days to decide whether it wanted to reinstate the charges dismissed pursuant to the plea agreement. Subsequently, in United States v. Whitlow,



287 F.3d 638 (7th Cir. 2002), a defendant who had reserved the right to appeal on one issue raised additional issues in his appeal brief late. The Seventh Circuit found that this breached the plea agreement, remanded on the issue the defendant was entitled to raise, and invited the prosecutor to reinstate any dismissed charges and suggested that Whitlow’s breach of his promise not to appeal, along with the fact that the defendant had received an enhancement for obstruction of justice, made it “exceptionally hard to justify” the reduction for acceptance of responsibility at the resentencing. In both Hare and Whitlow, the conclusion that the defendant had breached the plea agreement was premised on the perhaps arguable idea that waiving the right to appeal was synonymous with promising not to try to appeal.

Perhaps emboldened by the Seventh Circuit’s enthusiastic position towards enforcing appeal waivers, we now have prosecutors trying to extract even more onerous conditions from criminal defendants. Recently, these have included pushing for an agreement that the attorney will not argue for a downward departure on any basis other than cooperation. It may easily be argued that such a condition requires the attorney to refrain from providing effective assistance of counsel. Such restrictions on defense counsel may themselves give rise to a challenge to the defendant’s conviction or sentence. See United States v. Jones, 167 F.3d 1142 (7th Cir. 1998)(finding a waiver of the right to file a post-collateral challenge did not bar a claim that counsel was ineffective in negotiating the agreement containing the waiver). Plea agreements with such conditions raise serious questions, including what the trial court should do if the defendant wants to accept the agreement and signs it and defense counsel refuses to sign on the basis that the condition constitutes an agreement to provide ineffective assistance of counsel. It seems unlikely that the trial court should appoint new counsel who has no objection to agreeing not to vigorously represent the defendant at sentencing.

Because defense counsel has an obligation to fight for the best result for each, individual client, defense counsel is in a more difficult position than the prosecution which has only one client, a non-person, that is never facing prison time. It is clear, however, that both the defendant and defense counsel should seriously consider what the defendant surrenders in agreeing to a waiver in a plea agreement. The deference the Seventh Circuit gives to such waivers may be illustrated by the language of United States v. Josefik, 753 F.2d 585, 588 (1985):

No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing

to accept.

Fortunately, some courts have opined that the appellate courts retain the inherent power to relieve the defendant of an appeal waiver to avoid a “miscarriage of justice.” See, e.g., United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001). Cf., United States v. Black, 201 F.3d 1296, 1302-03 (10th Cir. 2000)(once the district court has approved a plea agreement with an appeal waiver, it cannot negate the appeal waiver absent certain exceptional circumstances). Clearly, however, the best course of action is to be mindful of the obstacles that loom ever larger as one hurtles down the slippery slope of appeal waivers and, unless the defendant is offered something more significant than an agreement not to oppose the reduction for acceptance of responsibility, choosing the clearer path of entering an open plea.

Volume 27 - February 2002

Basic Expert Advice

By: David Mote

Deputy Chief Federal Defender

As with many other aspects of trial, defense counsel must be more creative, and harder working, than the prosecution in order to limit the damage done by the government’s witnesses and get the most out of the opportunity to call their own experts.

Of course, as a starting point, defense counsel should be familiar with the various rules relevant to expert testimony.

Fed. R. Crim. P. 16(a)(1)(D) entitles the defense to “inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments” upon request of the defendant. Fed. R. Crim. P. 16(a)(1)(E) requires the government to “disclose to the defendant a written summary” of the expert testimony the government intends to introduce. The rule says that the summary provided “shall describe the witnesses’ opinions, the bases and the reasons for those opinions, and the witnesses’ qualifications.” Thus, the standard disclosure that an officer or agent will testify about methods of drug distribution and distribution amounts “[b]ased on his experience, knowledge and training” is insufficient. United States v. Miller, 199 F.3d 416 (7th Cir. 1999). But, as stated above, these are things you are entitled to on request. Request them! If, as in Miller, despite repeated objections by the defense to the sufficiency of the notice and directions by the trial court to give more specific notice, the prosecution never gets the notice right, the

expert testimony may be excluded or stricken.

Title 18 U.S.C. § 3006A(e) allows appointed counsel to request authorization to “obtain investigative, expert or other services necessary.” This request can be made by ex parte motion. It is advisable to read subsection (e) carefully before making any request of the court or commitment to retain such services.

Other important rules related to experts are the “700 series” of the Federal Rules of Evidence. It should be noted that Fed. R. Evid. 702, Testimony by Experts, was amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and its progeny. Daubert discussed four things regarding scientific evidence: 1) whether the technique can be, and has been, tested; 2) whether the technique has been subjected to peer review and publication, 3) the known or potential error rate and the maintenance of standards controlling the techniques operation, and 4) whether the technique is generally accepted as reliable in the relevant scientific community.

Fed. R. Crim. P. 12.2 (requiring the defense to give written notice of an insanity defense or expert testimony of the defendant’s mental condition), is obviously important in cases involving an insanity defense.

When preparing for the government’s expert witnesses, it should not automatically be assumed that they are legitimate experts. Worse yet, it cannot even be assumed that the witness is honest.

Johnny St. Valentine Brown, Jr., is a perfect example. He is estimated to have testified in 4,000 trials and is at the center of what has been described as “the biggest perjury scandal in the history of the D.C. criminal courts.” As a police drug expert, he had additional credibility because he had “been a board-certified pharmacist since 1968.” But he had no such degree. His undoing, after thousands of criminal trials, was the result of routine checking by a civil lawyer who, after a deposition in which Brown had asserted that he was familiar with the gang known as the “Rough Riders” – a fictitious gang a lawyer had made up to test Brown’s veracity – called Howard University with Brown’s name and social security number to verify his degrees. Mr. Brown is now a convicted felon himself, having pled guilty to perjury and been sentenced to two years imprisonment.

Fred Zain worked for the West Virginia State Police where he testified as a forensics expert in hundreds of criminal

cases. He became a star, sought after by prosecutors. His success there led to a job as the chief of physical evidence for the medical examiner in Bexar County Texas. After DNA analysis led to freedom for a defendant that Zain had testified had the “identical” blood type as the perpetrator, an investigation of Zain’s work was ordered by the West Virginia Supreme Court. The report concluded that the actual guilt of 134 people was substantively in doubt because their convictions were based on Zain reports and/or testimony.

Oklahoma City Police Department Joyce Gilchrist was placed on paid administrative leave while her work is investigated. The FBI retested evidence in six cases where she had testified and found that she had engaged in inaccurate forensic analysis and given false or misleading testimony. Two appellate courts have concluded that Gilchrist gave false testimony. In a case where the defendant was executed, Gilchrist testified that samples from the murder victim’s bedroom showed sperm consistent with his blood type. Re-examination of the evidence by another chemist, Laura Schile, resulted in a finding of “spermatozoa is not present.” Gilchrist has testified that she did forensic work in 3,000 to 4,000 cases.

Jack Patterson, a State Crime Laboratory analyst in Milwaukee, was charged after it was discovered that he skipped steps in his fingerprint analysis that he thought were unlikely to reveal prints, but reported having done the full examinations. Patterson’s misconduct came to light as the result of a random quality-control exam of evidence he had processed. A re-examination of evidence from 210 cases in which he had processed evidence revealed 345 fingerprints, 31 palmprints, and 34 impressions that he missed.

In Illinois, DNA testing resulted in four men convicted for the 1986 rape and murder of Lori Roscetti being freed after DNA tests excluded them as the source of semen recovered from the victim’s body and clothing. At trial, Chicago Police Crime Analyst Pamela Fish had testified that semen recovered from Roscetti’s body and underwear could have belonged to three of the defendants. More recent DNA testing excluded all four men as the source. DNA expert Dr. Edward Blake labeled Fish’s testimony in case as scientific fraud. A judge then ordered additional testing of all of the victim’s clothing. An examination found 22 semen stains on the victim’s jogging pants and coat. In 1986, Fish purportedly examined the items and reported finding no semen stains.

These cases show that dishonest conduct on the part of government experts, particularly those on the government

payroll, is not an isolated occurrence. A check of the case law shows that these cases are not even the tip of the iceberg. There are at least scores of cases where witnesses who testified as government experts have been charged criminally as a result of perjured testimony about what test they performed, what results they obtained, and even their basic credentials. Perhaps as disturbing as the widespread misconduct is the fact that the experts who have been revealed to be the biggest liars were favorite witnesses of the prosecutor's offices and the fact that there were frequently colleagues or superiors who knew of the misconduct and did nothing about it. These problems do not occur in a vacuum. They occur because prosecutors appreciate and use expert witnesses who come up with strong and certain results and because there is a culture within the law enforcement community that prevents those who know of misconduct by "one of their own" from going public. Honest forensic experts who blow the whistle often pay a heavy price, as happened when the FBI forced out Frederick Whitehurst for speaking up about intentional misconduct within the renowned FBI lab. The FBI later reached a settlement with Whitehurst.

The lesson of the scandals discussed above is that it pays to verify credentials, check on an expert's history and talk to other lawyers who have dealt with the expert. If an expert is incompetent or worse, there is probably a colleague who knows it.

Even if the government's experts don't have the kind of problems discussed above, there are things that you should delve into on cross-examination. One issue is who is paying the expert and whether the expert is really independent. A forensics expert from a law enforcement agency's laboratory who is used as an expert in a criminal case should be viewed the same as an in-house physician for an insurance company in a case against the insurance company; the witness is obviously not independent and the defense needs to point that out. In addition to who is paying the witness, and how much, there is the issue of whether the witness always testifies for the prosecution and the issue of whether the witness's findings have ever been refuted or rejected by a jury or a court.

In general, Daubert has made it somewhat easier to have expert testimony admitted, but at the same time, some time-honored subjects for expert evidence may be subject to attack. In United States v. Plaza, Crim. No. 98-362-10 (E.D. Pa. 01/07/2002), Judge Pollack prohibited the prosecution from eliciting testimony about whether two prints were a "match" because the science of fingerprint examination does not meet the standards of Daubert. Fingerprint examiners often look for "points" on the ridges

that the latent prints and the rolled prints have in common. The problem is that there is no standard before a match can be declared. England requires a 16-point minimum to declare a match, Australia requires a 12-point minimum, but the F.B.I. dropped any minimum standard in the 1940s. Judge Pollack also noted that fingerprint experts tend to be "skilled professionals who have learned their craft on the job and without any concomitant advanced academic training." He concluded that "it would thus be a misnomer to call fingerprint examiners a 'scientific community' in the Daubert sense." It should be noted that the Seventh Circuit affirmed a district court's contrary conclusion a year earlier in United States v. Havvard, 260 F.3d 597 (7th Cir. 2001). The district court in Havvard had also acknowledged that fingerprint analysis lacks a unified standard for determining when a latent print is adequate to allow a comparison. Obviously, this kind of information can be very useful in cross-examination even if the evidence is not excluded.

Handwriting, document, hair and fiber analysis are all candidates for the type of challenge that succeeded in Plaza. Police officers and agents tendered as experts on gangs, drugs and other matters have been successfully challenged in some cases. Police officers are often offered as experts based on some on the job experience and less formal training time than required for a single college class. These areas tend to lack clear standards, call for subjective judgments and have little formal training requirements. The "expert credentials" of witnesses on these kind of topics should frequently be challenged.

In addition to challenging the government's experts, the defense can, of course, seek the appointment of its own experts. It is worth thinking about calling experts on scientific matters the prosecution would rather have us ignore. These include experts on the factors that influence the reliability of eyewitness identification and the phenomenon of false confessions. Experts on eyewitness identification can explain to the jury the counterintuitive notion that there is little correlation between the witness's professed certainty in an identification and the reliability of the identification as well as what factors can subconsciously alter the witness's recollection and certainty. Experts on false confessions can educate the jury on the fact that people do confess to things they did not do and the factors that may lead to a false confession. Expert testimony on these topics can be critical in some cases, but it can be a struggle to get such expert testimony admitted.

Sometimes, the defense doesn't really need an expert. The defense could just use some "expert testimony" from an unsuspecting government witness. For example, when an

officer or agent testifies that your client, or a cooperating witness, had a drug problem, it may be productive to question him about his familiarity and experience with drug addicts and their reliability, honesty and veracity. This can all be done without ever stating that you are treating the witness as an expert and will seldom draw an objection. Similarly, the officer or agent who was working with a confidential source (CS) who made undercover drug buys can be your best witness on the lack of reliability of such witnesses. After all, they search the CS for both drugs and money both before and after the purchase and try to observe and control the CS's movements and activities. These are partly to protect the evidence, but most agents also have had experience with CS's stealing money, skimming drugs, using drugs, and lying.

In conclusion, you will serve the interests of your client if you: 1) make the government give you the information you are entitled to regarding their expert; 2) do not make the assumption that the government's experts are truthful or reliable; 3) bring out the biases of their experts; 4) seek your own experts, including experts in areas where the government does not use expert testimony; and 5) squeeze some favorable expert testimony out of the government's witnesses when you have the opportunity.

Volume 26 - October 2001

Immigration, Deportation and Acceptance of Responsibility

By: David Mote

Deputy Chief Federal Defender

After the terrible events of September 11, 2001, many people have called for a review of our immigration policies. Any system as complex as our immigration laws could be improved through a thoughtful process of review and modification. We should keep in mind, of course, that "bad facts make bad law" and in September, the facts were very bad. Thus, it is especially important to resist overhauling the legal system based on the emotions of the moment.

One topic discussed on the news shows has been our screening, or lack of screening, of the people entering this country from foreign lands. That issue needs to be addressed. The Statue of Liberty has an inscription inviting other countries to give us their poor; it does not invite them to give us their criminals.

A criminal conviction can bar someone from obtaining admittance to this country. If an immigrant is in the

country legally, a criminal conviction may make them deportable. In the case of an adult who comes to this country and embarks on a life of crime, it is appropriate to rescind our welcome. Those who are deported and reenter without permission face serious criminal penalties. Unfortunately, the law does not currently limit deportation following a criminal conviction to aliens who come here as adults.

In *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998), the defendant had been brought to this country by his mother at the age of twelve. He attended public schools in New York through high school and married a U.S. citizen with whom he had five children. His mother and siblings are U.S. citizens. At the age of thirty-five, Lipman was deported after being convicted of several offenses. After it was discovered that he was back in the country, probably because of the fact he had been arrested for another offense, he was charged with the federal offense of unlawful reentry after deportation. He was sentenced to twenty-one months. After his sentence was served, he would again be deported.

In *United States v. Pacheco*, 225 F.3d 148 (2nd Cir. 2000), the defendant was admitted to the United States as a permanent resident at the age of six. Between the ages of twenty and twenty-seven, he was convicted of numerous misdemeanors and subsequently deported. When he was caught attempting to reenter the United States, he was charged with illegal reentry. In the Never-Never land of immigration, some of his misdemeanors qualified as "aggravated felonies" for immigration purposes, and he received a sentence of forty-six months. After service of his sentence, he will be deported again.

Our office's experience with similar cases includes two defendants with American fathers and non-citizen mothers. In such cases, if the parents are not married, citizenship is not automatic for the child. One was born in Nuevo Laredo, Mexico. His mother was living with his father in Texas at the time, but had gone back across the border for a day of shopping when he made his early arrival into this world. His sister was born a year later in Laredo, Texas, making her a U.S. citizen. He married a U.S. citizen with whom he has three children. After a felony conviction, he was deported. His illegal reentry earned him a sentence in excess of six years.

Another was born in Thailand. His father was an American soldier, but the parents never married. Before he reached age two, his mother immigrated with him to the United States. As a young man, he was convicted of a federal drug offense and received a ten-year sentence.

Upon his release, he will be deported to Thailand where he does not speak the language or know anyone.

Assuming for the moment that these individuals would continue to be a burden on society when they are released from prison, and that the hardship their deportation causes to their families in this country is less important than relieving ourselves of that burden, other questions remain. Whose criminals are they? If it is reasonable for us to refuse to accept criminals from other countries into our own, is it appropriate for us to deport our criminals to other countries? When someone legally immigrates to our country before he is old enough to talk, lives in our communities, is educated in our public schools, grows up in our culture, and turns out to be a criminal, isn't he our criminal? And if we accept responsibility for that criminal as a product of our society, should we impose the burden of that criminal on the country where the person happened to be born? Clearly, if the criminal has no family in the country where he was born and does not speak the language, his chance of becoming a productive citizen of that country is minimal. In re-examining our immigration laws, we should review not only whether we should change the rules on whom we allow into our country, but also whether we should change the rules on whom we deport to other countries.

Volume 24 - January 2001

SEVENTH CIRCUIT APPRENDI UPDATE

By: David B. Mote
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The Supreme Court's decision in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), had more impact on criminal defendants than any case in the last several years. At this point, there should be few in the criminal defense bar who do not have some knowledge of the decision. The majority's holding was actually fairly narrow:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi, 120 S.Ct. at 2362-63.

Despite the limited scope of the majority's opinion

optimists among the criminal defense bar and criminal defendants saw hope for a broader interpretation, particularly in Justice Thomas' concurrence. Justice Thomas stated:

... I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence But it is equally true that his expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum 'entitles the government' ... to more than it would otherwise be entitled Further ... it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous cases ... the aggravating fact raised the whole range--both the top and the bottom. Those courts, in holding that such a fact was an element did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Apprendi, 120 S.Ct. at 2379 (Thomas, J. concurring).

Three views have emerged of the future application of Apprendi. The strict view is that Apprendi will only apply when a factor, other than a prior conviction, increases the sentence above what would otherwise be the statutory maximum. A second view, consistent with Justice Thomas' concurrence, is that factors which narrow the range of possible punishment by triggering a statutory mandatory minimum will also need to be charged in the indictment and submitted to the jury. A recent decision from the Sixth Circuit has adopted that position and U.S. Attorneys' offices seem to be drafting their indictments and jury instructions in contemplation of the possibility of this view being adopted. A third, wildly optimistic view, popular among criminal defendants, is that the federal sentencing guidelines, which base the sentencing range on the decision of the judge applying a preponderance of the evidence standard, are in jeopardy.

Since the Apprendi decision, the federal courts have been busy addressing the questions left unanswered in that decision. Significant cases in the Seventh Circuit addressing Apprendi issues are discussed below.

In United States v. Smith, 223 F.3d 554 (7th Cir. 2000), the Seventh Circuit held that there was no Apprendi problem with the judge determining factors that called for

a mandatory life sentence in a continuing criminal enterprise case because life was the maximum possible sentence under the statute. The fact that the judge's finding made the maximum possible sentence of life mandatory did not require it to be submitted to the jury under Apprendi. Thus, the Seventh Circuit has determined that Apprendi will be applied narrowly. In doing so, the Seventh Circuit acknowledged that it rejected the broader positions of the concurrences of Justices Scalia and Thomas in Apprendi, not discussed by the other justices in the majority, on the basis that it was unlikely the rest of the majority would have accepted the broader position.

In Hernandez v. United States, 226 F.3d 839 (7th Cir., 2000) and Talbott v. Indiana, 226 F.3d 866 (7th Cir., 2000), the Seventh Circuit held that Apprendi would not be applied retroactively until and unless the Supreme Court stated it was to be applied retroactively.

In United States v. Cavendar, 228 F.3d 792 (7th Cir. 2000), the Seventh Circuit left undecided the question of whether circuit precedent that drug quantities were sentencing enhancements, rather than elements of the offense, should be reconsidered in light of Apprendi, concluding that the reference in the indictment to "multiple kilograms of mixtures containing cocaine base" and the presentation of supporting evidence to the jury made any possible error harmless.

In United States v. Nance, 2000 WL 1880629 (slip op., 7th Cir. 2000), the Seventh Circuit finally overruled its precedent that stated that drug quantities under 21 U.S.C. § 841(b) are always a sentencing factor. However, the Nance court found the failure to charge a quantity of more than five grams of crack or to submit the issue of drug quantity to the jury was not plain error since there was "simply no way on this record" that the jury would have found the amount of crack was less than five grams. Similarly, in United States v. Jackson, 2001 WL 21355 (slip op., 7th Cir. 2001), the Seventh Circuit, considering the case following remand from the Supreme Court in light of Apprendi, found that it was not plain error for the defendant to be sentenced to thirty years, despite the fact that the drug amount that increased the statutory maximum from twenty to thirty years had not been charged or submitted to the jury, since plain error requires a showing of prejudice and the evidence that the drug amount exceeded five grams was "overwhelming."

In United States v. Scott, 116 F. Supp. 2d 987 (C.D. Ill., 2000), the district court found that the failure to submit the question of drug quantities to the jury where the quantity affected the statutory maximum was subject to a harmless

error analysis.

The law is in a state of flux on Apprendi-related issues and the decisions are not uniform from one circuit to the next. Thus, even if the Seventh Circuit appears to have closed the door on an issue, it may be worth raising, with acknowledgment of controlling contrary authority from the Seventh Circuit, to preserve the issue for appellate review in the future.

Volume 23 - August 2000

Why Johnny Can't Phone?

By: David Mote

Deputy Chief Federal Defender

Normally, when we consider procedural issues in our criminal cases, we are concerned with the rules of criminal procedure or proper courtroom procedure. Unfortunately, however, even the procedure required for a telephone call with your client can be an ordeal.

The Illinois Department of Corrections (I.D.O.C.) now requires a written request faxed or mailed at least 24 hours ahead of time to request that a defendant be allowed to call his attorney. That call will, of course, be collect and, as discussed below, inordinately expensive. That request for a call from the client must explain, according to I.D.O.C., what the attorney and client will discuss and an explanation of why the attorney can't make a personal visit to the prison to discuss the matter with his client. (A district court in Texas took a contrary view, cutting the voucher submitted by court-appointed counsel because it was not "reasonable" for court-appointed counsel to repeatedly visit his client at the remote jail where he was housed, since routine matters could be "handled more expeditiously and economically by the intelligent use of the telephone." United States v. Smith, 76 F. Supp. 2d 767 (S.D. Tx. 1999)) A committee of the Illinois Association of Criminal Defense Lawyers has decided to look into this burdensome and intrusive procedure but, for now, defense counsel must simply cope with this impediment to conversing with incarcerated clients by telephone.

Should counsel be able to speak with his or her client, however, it will not be cheap. One of the many inmate phone systems that our office takes calls from charges, according to the automated recording "\$2.85 for the first minute and .40 for each additional minute." If an inmate makes 30 cents per hour in prison, he could work 8 hours and he still couldn't afford a one-minute call home. Of course, it is not the inmate who pays for a collect call. It is the person being called

The inmate normally has no choice of whether to call collect or which telephone carrier to use. In our local jail, all calls must be collect through the jail's contract inmate telephone provider. While security requirements may justify higher than normal rates for inmate calls, there is also a huge mark-up involved. Class action suits filed in Illinois, Indiana, Ohio, New Mexico, New York, New Hampshire and Wisconsin are challenging deals where state and county governments receive as much as .60 of every dollar charged on collect inmate calls. An article in the Sante Fe New Mexican reported that New Mexico's Department of Corrections awarded a three year contract to the company that offered to pay the Department of Corrections the highest commission. According to an Associated Press article, a spokeswoman for Central Management Services indicated that Illinois received about half the money inmates spent on calls. According to that article, last year Illinois received \$12 million in revenue from state pay phones.

Inmates are, of course, literally a captive audience. When the state prison or county jail restricts phone access to the use of pay phones that allow only collect calls a single carrier with whom the government has negotiated an arrangement involving a 100% mark-up over the actual costs to be kicked-back to the government, the inmate has no choice. Nonetheless, not everyone is sympathetic. My local paper had a piece on the lawsuits on the op-ed page. In short, their opinion was "if you don't have the dime, don't do the crime." (Actually, they didn't phrase it that eloquently.) Reading their article, one would suppose that it is only crimes committed by poor people that they find objectionable. The article in the local paper, and I suppose the reaction of the public at large (pun intentional) misses three important points. First, it is not only prisons that are gouging inmates on calls. County jails, housing pre-trial detainees, do it as well. Thus, people who have not been convicted of any crime and are, at least in theory, presumed innocent, are being stuck with these outrageous costs too. Second, people are sentenced to serve time as a punishment. They are not sent to jail or prison for the guards or the phone system to punish them. Finally, as mentioned above, it is not the inmate who pays for the collect call. It is the inmate's family, often already impoverished by the imprisonment of the family primary breadwinner, who pays. And it is also the inmate's counsel, often court-appointed and handling the case at a reduced rate that may not even cover the costs of office overhead, who pays.

It is time to change a procedure in which the contract is awarded to the company that marks up the costs the most and kicks-back the money to local government at the cost of a captive audience, their families and their attorneys.

Volume 22 - May 2000

Questioning Consistent Police Reports

By David Mote

Deputy Chief Federal Defender

Generally speaking, police reports are inadmissible hearsay. While the police reports themselves are seldom admitted into evidence, the police reports normally portend and lock in the officer's testimony. If the reports of the police officers are all consistent, then their testimony is likely to be consistent. If several officers give consistent testimony, their consistency makes them appear credible unless you can explain how they could be both consistent and wrong. One wonders about the sometimes surprising consistency of police reports. Is it because they are all incredibly attentive to detail and have their watches synchronized? Probably not.

In a recent case, I had the opportunity to delve a little bit into local procedure regarding police reports. The results were interesting. I share them in the hope that information I gained from this foray into local procedure may give you some new ideas for cross-examination of police officers regarding their reports and report-writing methods.

I had received discovery in a drug case in which a purported drug house was searched after midnight pursuant to a warrant. None of the police reports mentioned a "knock and announce" and neither my client, nor his co-defendant who was already cooperating, had heard the police knock and announce. Accordingly, I filed a motion to suppress on the basis of the apparent failure of the police to "knock and announce." This generated some digging by the case agent who located more than a half-dozen additional reports, several of which discussed the "knock and announce." Interestingly, however, while all the reports initially turned over listed the "time of occurrence" as 11:45 p.m., only one of the reports in the second batch gave the same time, the rest all listing the time of occurrence as 12:40 a.m.

In questioning the case agent about the reports, I allowed myself to take a detour into another way of recording events, namely videotaping:

◆ Okay. Did you discuss with him what is their standard practice – when they make a tape, what is their standard practice to tape and not to tape?

◆ I know from past experience that they will attempt to make a tape after the residence is secure and the tactical team exits. Before they go in to do a search, they will use the video camera to walk through the house, videotape the condition of the house when they entered; and then after the search, they will again walk through the house in roughly the same pattern to show the house at the time that they leave to show the difference in condition or that, in fact, there was no damage done or if there was damage done to show that also.

Trans. at 14-15.

This was an interesting exchange as no videotapes had been mentioned in any of the police reports.

In response to questions I had raised regarding the times listed on the reports, the prosecutor sought to clarify the source of the different times in the different batches of reports:

Q. In fact, the reports that you received first were the reports of the various members of the search team rather than the reports of those members who only participated in the execution of the warrant as part of the ERT team, is that correct?

A. Correct.

Q. And the reports that you got from – the supplemental reports that you received in the second batch were those reports of members of the ERT team who did not participate in the search as members of the search team, is that correct?

A. Yes, it is correct.

Q. Now, the first group of reports generally indicated a date of occurrence of May 5th at 11:45 p.m., is that right?

A. Yes.

Q. The second group of reports, those of the ERT team [(Emergency Response Team)], indicate a date of occurrence of May 6th at 40 minutes after midnight, the morning of May 6th, is that right?

A. Yes, with one exception of Paul Carpenter who was on both the drug narcotics investigation group and was part of the emergency response team. His report was completed – or the date at the top and time was the initial time that you mentioned, which was May 5th at 11:45 p.m.

Other than that, all of the search team reports differed from the entry reports in that the search team had the reports time prior to when the search warrant was actually executed.

Q. Now, you've talked to Paul Carpenter, is that correct?

A. Yes.

Q. He's also the person who prepared the evidence log relating to the search that night, is that correct?

A. Yes.

Q. And Officer Carpenter indicated to you that the evidence log recorded accurately the time in and time out of the search team. The time they actually entered the residence, and the time they actually left the residence, is that correct?

A. Yes, that's correct.

Q. And the time in reflected on the evidence log was 40 minutes after midnight on May 6th, is that right?

A. Yes.

Q. Now, the other date, the May 5th at 11:45, that was the time you learned from speaking to the officers involved that was used when they called in and got this – when the case was initiated or when they were preparing to make the entry, is that correct?

A. Yes.

Q. Is there anything about that that differs from the standard practice of the Springfield Police Department in your experience?

A. No.

Trans. at 17-19.

In re-direct, I explored why the reports were consistent with their differing times of occurrence:

Q. Do officers normally – do officers who are involved in an incident normally talk to one another before or while preparing their reports?

A. Yes, they do. They make sure – they discuss who's going to cover what angle. There has been instances where one report would be sufficient to explain what happened and other times when someone might have been in back of the house and, therefore, could have had no knowledge of what happened in the front of the house, so they might have to prepare a separate report on their own. So, yes, they discuss who is going to document what facts.

Q. Do they talk about what time they – in a case

of a search warrant, what time they entered? Do they talk about that?

A. Not generally, no. Generally, you – the caption at the top of the report is just kind of a fill-in-the-blank format. And you commonly will – somebody will write it on a chalkboard. They call it the file and time. That's the file number and the time the report was generated.

And, technically, Springfield Police protocol is to record that at the top of the report. Even if the report you're writing is generated six days later, you would put that in the body of the report technically to document what time you performed whatever function you're documenting. And then at the top of the report, it would have the exact date and time of the original generation of the case.

Q. Okay. On the reports, there's a place for time of the occurrence with the date and time, correct?

A. In the top left corner area?

Q. Yes.

A. Yes. (Nodding head up and down.)

Q. If officers working together have the time of occurrence identical to the minute, would that indicate to you that they had talked about – talked about what happened when they went in prior to writing their reports?

A. Either that or else, like I said, *they write it on a big piece of paper on a chalkboard* so that everybody knows when they write their reports this is the case number of the file number and this is the date and time of when it was generated. That is most usually how it's done. *It's just common. Everybody knows where to look to.*

Trans. at 20-22.

My questioning of another officer revealed that it was not just date, time and file number being posted for the officers' use in preparing reports:

Q. When you prepared your report, was there information put on the blackboard for everybody to put in their reports?

A. Yes, sir. *They always put kind of a brief – you know, like a little bit of criminal history, who we may be dealing with. They draw the house where it's at and the street and some things that might be of help to us.*

Q. Okay. So that information is provided. Everybody has access to it as they write up their reports.

A. Yes, sir.

Trans. at 103.

In addition to exploring how things end up so consistent among the reports of numerous officers, I also summarized the information I then knew that was *not* in the reports:

Q. You wrote a report of this incident, correct?

A. That's correct, sir.

Q. Your report doesn't indicate any knock or announce, does it?

A. No, it does not.

Q. Nor does it indicate that any type of a flash grenade was thrown in the residence.

A. That's correct.

Q. And it doesn't indicate that the officers, including yourself, who did the initial entry were wearing masks and dark clothing.

A. That's correct.

Trans. at 113

From my experience with this case, I would offer the following practice tips:

1. Remember that consistency on minute details among police reports (in this case, to-the-minute agreements on the "time of occurrence") may be as deserving of further inquiry as inconsistencies;

2. Inquire about whether any information was posted or otherwise provided for the use of the officers in preparing their reports;

3. If information was provided for the officers use, inquire about whether the information included dates, times, addresses, alleged statements, criminal history, pictures or diagrams;

4. If a location was searched, inquire about whether any videotapes were made before, during or after the search;

5. If a location was searched, ask about whether a flash grenade (innocently referred to as a "distraction device") was used, what kind of clothing the officers were wearing, and what each member of the entry team was wearing. (Because flash grenades can start "small fires,"

one member of the response team in our case was carrying a fire extinguisher!);

6. Highlight the fact that information that may be good for the defense was omitted from the police reports.

Volume 21 - February 2000

Defending the Defense Against Post-Moratorium Fallout

By: David Mote

Deputy Chief Federal Defender

The defense is under attack. The defense stands accused of being too incompetent to allow the citizens of Illinois to exact the ultimate price from those who commit murder.

Illinois' governor, George Ryan, has declared a moratorium on the execution of the death penalty while the problems revealed by the exoneration of thirteen men on death row since Illinois reinstated the death penalty in 1977 are examined. Governor Ryan stated "There is no margin of error when it comes to putting a person to death."

While the mistakes involving the death penalty in Illinois have garnered much attention, there is no reason to think the death penalty process here is less reliable than in other states. Indeed, what distinguishes the states that carry out the most executions while acknowledging the least mistakes is their refusal to provide any meaningful review of criminal cases. Virginia has one of the shortest time limits for presenting newly discovered evidence of any state in the country. Texas has a separate court of appeals to handle criminal cases. The judges on the criminal court of appeals are elected. Candidates campaign with promises that they won't reverse convictions or set aside death sentences. Judges who look at cases, see errors and seek to correct them are voted right out of their robes. The people of Texas want blood. Sadly, they get it.

Many courageous men and women deserve thanks for the role they played in bringing a halt to executions in Illinois. Chief Justice Harrison of the Illinois Supreme Court has been an outspoken critic of the death penalty. He praised Ryan's decision, saying "It may prevent some innocent people from being executed." And Governor Ryan has shown true leadership in declaring the moratorium. Chicago Tribune reporters Steve Mills and Ken Armstrong wrote an outstanding series of investigative reports

documenting problems in death penalty cases last November. But the real soldiers in the fight to stop innocent people from being executed in Illinois have been defense lawyers, newspaper reporters and an exceptional group of journalism students working with professor Lawrence Marshall at Northwestern University.

In the wake of Governor Ryan's declaration of the moratorium, however, one could easily read the newspaper and conclude that the only problem with the death penalty in Illinois is the incompetence of the defense bar. One cartoon showed a man being strapped down for his execution while his lawyer lay down to rest up too. Newspaper articles have quoted law professors and practicing lawyers commenting on the problem of ineffective representation in death penalty cases.

It is true that many defendants on death row had ineffective counsel. Mills and Armstrong's series in the Tribune reported that often death penalty defendants and their families have very little to spend on counsel. In one death penalty case, the lawyer's fee was reported to be \$200. (That's not a typo: \$200). Another lawyer who handled a death penalty case reportedly handed out fliers saying "Any case. Any where. [sic] Maximum fee--\$1,500." Obviously, a successful, experienced attorney is unlikely to accept a major case requiring extensive investigation and prolonged litigation for a few thousand dollars. The fact that you can't hire a good criminal defense attorney to handle a capital case for a few thousand dollars does not mean most defense attorneys are incompetent. No one would assume that the fact that you can't hire a good plumber for minimum wage means most plumbers are incompetent. Nonetheless, some lawyers have provided woefully deficient representation in death penalty cases. Still, the known errors involving the death penalty in Illinois are not limited to the defense bar.

An investigator for the Chicago Police Department's Office of Professional Standards concluded that Police Commander Jon Burge and his detectives engaged in "methodical" and "systematic" torture. Allegations of misconduct by Burge and his detectives include punching suspects, putting guns to their heads, shocking them and putting plastic bags over their heads to coerce confessions. Ten men "investigated" by Burge and his detectives now sit on death row. Allegations about Burge and his detectives have been around for years, but defendants' allegations were not readily accepted. Now the police department has acknowledged the problem and Burge has been fired. I have yet to hear of concerns about a case because of defense counsel torturing witnesses.

Another problem identified in the series of Tribune articles was the use by prosecutors of unreliable hair and fiber analysis. Eighteen people have reportedly been cleared by DNA evidence after the prosecution obtained convictions based on hair analysis. Unlike DNA evidence, hair analysis is based on a visual comparison of hairs and is subjective. Unfortunately, prosecutors regularly overstate the significance of the evidence and juries give it too much weight. Similarly, fiber analysis has proven unreliable. Last year, the FBI claimed fiber analysis implicated a group of drug users in three murders at Yosemite National Park. A hotel handyman's subsequent confession to the murders revealed the unreliability of that evidence. So far as I know, no one has been wrongly convicted as a result of the defense's use of junk science.

One recurring theme in cases in which an innocent person is sentenced to death is the jailhouse informant who testifies that the defendant confessed to the crime. Jailhouse informants have an agenda. They are looking for a way to lessen their own punishment and are willing to say anything to help themselves. When one considers the fact that these are jail inmates, it should hardly be surprising that they regularly prove to be dishonest. Jailhouse informants are not normally defense witnesses. They testify for the prosecution to obtain shorter sentences or get charges dropped. The defense is not allowed to reward witnesses. That would be considered witness tampering and bribery. But it is an accepted and court approved practice for the prosecution to reward witnesses. Of course, the prosecutor will only be willing to reward an informant for truthful evidence that turns out to be helpful. The problem is that the prosecutor can more easily tell if the jailhouse informant's story is helpful than if it is true.

As the Tribune series noted, such informants have little to lose by making up evidence for the prosecution; they are rarely charged with perjury. And informants can pick up details of the crime from newspapers, police, prosecutors, phone calls with people on the outside or even the defendant's own legal papers to put together a convincing confession.

Innocent people are convicted by jurors who set the threshold for "beyond a reasonable doubt" too low. They are convicted because the public does not really believe in the presumption of innocence. A juror who would not trust a convicted felon to clean his or her house will find the same felon worthy of belief beyond a reasonable doubt when the convicted felon testifies for the prosecution in a criminal case and admits he is hoping for a lower sentence.

And how many of those thirteen men who walked off Illinois' death row saw their convictions vacated by the first appellate court to review the case? At the federal level, Congress has put more restrictions on the ability of persons convicted of crimes to have their convictions and sentences reviewed. Congress also eliminated the death penalty resource centers.

The public wants the defense bar to be effective if ineffectiveness interferes with executions. Otherwise, the demand for effective defense counsel is not always as great. I know a former county public defender. He was fired because he won too many acquittals. Another former county public defender I know was not re-appointed after he raised the fact that the county was not paying the public defender the minimum percentage of the State's Attorney's salary set by state law. They upped the salary, but replaced the defender who made them pay the salary the law required. The new defender started out with a lawful salary. But when the State's Attorney's salary was increased, the public defender's salary was left unchanged. But it is no secret that elected officials and the public would rather pay for law enforcement and prosecutors than for defense counsel.

It is good that the media and the public have been forced to rethink the death penalty in Illinois after it has been proven unreliable thirteen times. It is unfortunate that instead of considering all the problems that led to innocent people being sentenced to death, the media and the public find it easier to blame everything on inadequate defense counsel. Competent, dedicated, and usually uncompensated defense counsel have been essential in correcting the system's mistakes.

Governor Ryan is correct. "There is no margin of error when it comes to putting a person to death." If we accept that "to err is human," we must wonder how many errors, in the form of the innocent, are among the more than three thousand people on death row in this country.

Volume 20 - December 1999

**Flash-Bang We're Home:
The Citizen's Castle Under Siege**

By: David Mote
Deputy Chief Federal Defender

Once upon a time, in a less politically-correct age, there

was a saying: “A man’s home is his castle.” Today, the phrase might be viewed as quite chauvinistic. Nonetheless, most would agree with the notion it entails that a person’s home should be a sanctuary from the outside world.

Regardless of whether it’s a man’s castle, a woman’s castle, or the family castle, it is now subject to siege in the most literal sense. In the infamous “war on drugs” the police have employed tactics reminiscent of the S.S. in Germany during the 1930s and 1940s. Drug raids are often executed in the middle of the night by agents in dark clothing wearing masks. Sometimes the police “knock and announce” their presence and give the citizen perhaps ten seconds to answer the door before a battering ram smashes through the door. Other times, the police enter without knocking and announcing based on either a “no-knock warrant” or “exigent circumstances.” In many places, police officers are routinely armed with semi-automatic pistols capable of firing 15 rounds in succession before reloading. One of the more recent developments in the “war on drugs” is the use of the flash-bang grenades in storming the castles of America’s citizenry.

“A flash-bang or noise-flash device is a diversionary tool used by law enforcement officers. ... The device emits a bright light and a loud noise. It causes psychological confusion to those near it.” United States v. Kingsley, 1998 WL 295577 (D. Kansas 1998)(unpublished). A flash-bang device is sometimes referred to as “distraction device.” United States v. Stowe, 100 F.3d 494, 496 (7th Cir. 1996), illustrates the atmosphere of the raids in which such devices are used:

Later that same morning, at about 5:25 a.m., the emergency response team of the Springfield Police Department weapons drawn and dressed in masks, hoods, and dark clothing, executed the search warrant. A single blow from the team’s steel battering ram broke down the door. A “distraction device”—a type of grenade that creates a temporarily blinding flash of light and a loud explosion—was thrown into the apartment. More than ten police officers entered and quickly secured the apartment.

The same atmosphere is evident in United States v. Myers, 106 F.3d 936, 939 (10th Cir. 1007):

“[A]t approximately 6:09 a.m., agents of the [Kansas Bureau of Investigations], dressed completely in black and wielding automatic machine guns, knocked on

Mr. Myers front door and announced that they had a search warrant. The agents waited ten seconds, then battered down the door and rolled a Deftec Model 25 distraction device, also known as a “flash bang,” into the living room. The device exploded, and the agents then stormed the house, finding Mr. Myers, his wife, nineteen-year-old stepson, nine-year-old stepdaughter, and seventeen-month-old daughter.”

In Myers, the court expressed concern: “The use of a ‘flashbang’ device in a house where innocent and unsuspecting children sleep gives us great pause. Certainly, we could not countenance the use of such a device as a routine matter.” Id. at 940. Nonetheless, the use of flash-bang grenades is more routine than the Myers-court may have wished. “In practice, the [Kansas City Police Department] has used the device in about one-half of the cases where a search warrant is executed at a place where drug activity is suspected.” United States v. Kingsley, 1998 WL 295577 (D. Kansas 1998)(unpublished).

Myers is by no means the only case in which children were present when such a device was used. In Shepard v. Allen, 1997 WL 150049 (D. Kansas 1997)(unpublished), “[t]he search began with one of the agents throwing a distraction device into the residence. The plaintiff, three of his stepchildren, and one other individual were in the house at the time.”

It is indisputable that the used of these explosive devices is dangerous for the occupants of the residence being bombed. Kirk v. Watkins, 1999 WL 381119 (10th Cir. 1999)(unpublished), begins with the now familiar, military-style raid, but with more serious consequences:

“The next morning at approximately six a.m., the [Special Response Team] pulled into the driveway of the Kirk residence and drove to the east side of the house. Officers blasted the lock off the door to the residence. Meanwhile, Watkins went to the bedroom window with a flashbang device, cut the screen and threw the device through the window (breaking it) and into the bedroom.”

“Unbeknownst to Watkins, the Kirks had moved their bed from against the wall to a location beneath the window. The flashbang device landed on the bed and started a fire which burned the Kirks, who were lying nude on top of the bed.”

“Despite the fact that the district court found that Watkins’ action of throwing the flashbang device into a room into which he had not first looked violated both Watkins’ training and the instructions on the use of the device, the court of appeals found he was entitled to qualified immunity “because his actions did not violate clearly established law.”

Means v. United States, 176 F.3d 1376 (11th Cir. 1999) also involved an explosion that did more than startle the occupants of the residence. In that case, “County law enforcement officers used a flash bang device to enter the Means residence.” After a search of the residence, Wendell Means was arrested. “The flash bang device burned Debra Means’s leg, fractured her left small toe, and blew the nail off a toe. Debra Means remained in the hospital for two days and incurred medical expenses in excess of \$3,500.”

There are also cases that reflect how the use of these explosive devices may increase the risks to the officers. In Jenkins v. Wood, 81 F.3d 988 (10th Cir. 1996), the Jenkins’ sued after police, executing a search warrant at 11:40 p.m., threw a flash-bang grenade through the second story entrance. “As it turned out, there was no upstairs apartment At the time the Topeka Police officer threw the ‘flash bang’ through the upstairs entrance, Mr. Jenkins was making his way up his home’s internal staircase. As he reached the top of the stairs, the explosion knocked him down the stairs. At this point, Mr. Jenkins became ‘aware that these people were all around everywhere shooting and carrying on.’ ... Upon hearing the commotion and not knowing who was in his home, Mr. Jenkins ran to grab a shotgun he kept in his bedroom.” Although summary judgment for the defendants was affirmed, Judge Henry, concurring, observed that: “The governmental interests served by this commando approach are not apparent.” Judge Henry also stated that the defendants “would do well to evaluate their policies (or lack thereof)—whoever makes them and whatever they are—regarding the use of such tactics in the execution of search warrants.”

Another example of the increased danger to officers is found in footnote one of the unpublished decision Garcia v. Datillo, 1997 WL 408067 (10th Cir. 1997):

“Officials had targeted plaintiff’s brother in a drug investigation and obtained an arrest warrant for the brother and a search warrant for plaintiff’s mother’s home where both plaintiff and his brother were staying the night of the raid. Defendant alleged that the defendant deputies

attempted to execute the warrant without an adequate plan or training. The deputies shot barking dogs at the residence, and used a “stun” or flash grenade, prompting plaintiff’s brother to shoot and injure two of the deputies. The deputies then allegedly beat plaintiff before they arrested him.

It also appears that the use of an explosive device increased the danger to all concerned in Shepard v. Allen, 1997 WL 150049 (D. Kansas 1997)(unpublished). The plaintiff was in his bedroom wearing a bathrobe when the device exploded. According to the plaintiff, he came out of the bedroom to check on the explosion and encountered agents in the living room. Plaintiff claimed he had not heard any “knock and announce” and did not know the intruders were police. He further claims that the police shot him twice, and then he charged an officer and grabbed his gun and yelled for someone to call the police. Defendants claim they knocked and announced. Defendants, particularly the officer involved in the shooting, claim that the officer entered the plaintiff’s bedroom after kicking in the door and that plaintiff rushed him, grabbed his gun, and was shot twice in the ensuing struggle. Under either scenario, it is hard to conclude that the initial explosion made the subsequent entry into the residence safer for anyone.

In United States v. Baker, 16 F.3d 854 (8th Cir. 1994), the court found that the use of a “distraction device” was warranted because the officers had encountered a barricaded front door in a previous raid on the house and informants reported that there were two Doberman Pinschers inside the house. It seems unclear, however, that large, aggressive dogs will be less of a threat after such a device goes off. If the explosion upset the dogs, they might be more dangerous both to the police and the occupants inside the residence.

One would hope that explosive devices which can start a home on fire would be used only in extreme circumstance. Unfortunately, that is not the case. In United States v. Green, 1994 WL 201105 (10th Cir. 1994)(unpublished), the court demonstrated little concern for the danger involved in the use of flash-bang grenades:

“As to Defendant’s assertion regarding the execution of the warrant, there is no evidence in the record to support Defendant’s position that use of a “flash-bang” diversionary device in the present instance was excessive force rendering the search unreasonable. No one was injured. No children were present.”

In *Kirk v. Watkins*, 1999 WL 381119 (10th Cir. 1999)(unpublished)(the case in which the couple lying on their bed were burned after the flash-bang device set the bed on fire), the court stated that “[t]he use of a flashbang device is neither per se objectively reasonable nor unreasonable.” For now it seems as if the limits of the Fourth Amendment’s reasonableness requirement, and of qualified immunity will continue to be litigated as explosive devices continue to be tossed into residences, defendants challenge the reasonableness of the tactic and citizens attempt to sue over the resulting injuries.

Volume 19 - October 1999

NACDL & IACJ: The Benefits of A Coordinated Defense Bar

By: David Mote

Deputy Chief Federal Defender

I originally entitled this article “The Benefits of An Organized Defense Bar” but it occurred to me that such a title would be a bit self-contradictory. Defense lawyers, as a group, are strong individualists who share a certain spirit of anarchy. Consequently, they are not inclined to be organized. As Dick Parsons, Chief Federal Public Defender for the Central District of Illinois, puts it, “managing defense lawyers is a lot like herding cats.” Nonetheless, there is clearly a benefit to defense lawyers in coordinating their efforts. One of the key benefits to belonging to an association of defense lawyers is the opportunity to attend seminars devoted to topics of interest to the criminal defense lawyer.

On November 3-6, 1999, the National Association of Criminal Defense Lawyers (NACDL), with the co-sponsorship of Illinois Attorneys for Criminal Justice (IACJ), is holding a major seminar in Chicago, Lawyering on the Edge: Pushing the Limits of Aggressive Advocacy. The topics to be covered include connecting with jurors, motions, dealing with problem judges, challenging accepted prosecution tactics, cross-examination, opening statements, closing arguments, arguing to conservative judges and jurors, obtaining *Kyles/Brady* material from recalcitrant prosecutors, defending health fraud cases, extra-judicial statements and ethics, arguing around instructions, gaining an edge at trial and sentencing. In other words, virtually every aspect of criminal trial practice is covered at this seminar. The presentations are being made by outstanding speakers from all over the country. I have only been able to attend one NACDL seminar before and it was outstanding. Rates differ for NACDL

members, non-members, public defenders, new lawyers and professors, and law students. A special rate is available for those joining the NACDL and registering for the seminar. For further information, you can contact Danielle Famularo at NACDL: (202) 872-8600 ext. 236.

If the primary focus of your practice is criminal defense, you should consider the National Association of Criminal Defense Lawyers your primary national bar association. Membership includes a subscription to *The Champion*, an outstanding magazine devoted to criminal defense issues, access to a brief bank and the members-only section of their web-site (www.criminaljustice.org), and legal assistance if you are ever charged with contempt of court. In addition to providing these benefits to members, the NACDL lobbies for fairer criminal laws and adequate funding for criminal defense, files amicus briefs and is involved in litigation to improve the quality of criminal justice, such as the lawsuit that led to the release of the report on the investigation of the FBI laboratory.

The co-sponsor of this seminar, as indicated above, is Illinois Attorneys for Criminal Justice (IACJ), a state affiliate of the NACDL. The IACJ is sponsoring the welcoming reception on Wednesday, November 3, 1999. Thus, not only can you attend an excellent seminar on criminal law from November 3-6, 1999, you can meet representatives of both your state and national criminal defense organizations.

Last month, the IACJ co-sponsored a seminar with our office (the Federal Public Defender’s Office for the Central District of Illinois) in Bloomington. Dick Parsons, our Chief Federal Public Defender, arranged for speakers from numerous states, made site arrangements and provided more than 1,000 pages of handouts per attendee. Illinois Attorneys for Criminal Justice provided publicity for the seminar and sponsored the social events. Despite a hurricane that forced three speakers to cancel on approximately 24 hours notice, the seminar went smoothly, as other speakers bravely stepped in or took on additional responsibilities to take up the slack.

Arrangements are now underway for the IACJ to co-sponsor a similar event next year with the Defender’s Office for the Northern District of Illinois. In addition, the IACJ is planning to host a seminar on the controversial practice of racial profiling (with the Cook County Bar Association as co-sponsor) to be held on Martin Luther King Day.

In addition to hosting seminars, the IACJ produces a newsletter for its members and lobbies on behalf of the criminal defense community. Recently, several IACJ members have spoken to legislators on the proposed death penalty moratorium as well as ways to reduce injustice in the death penalty. (The invitation to speak on death penalty issues specified that the committees were only interested in hearing suggestions on how to improve the death penalty process; they did not want to hear arguments for the abolition of the death penalty.) Suggestions by IACJ representatives included the following:

1) Revising death penalty jury instructions to advise the jury to use caution in evaluating the testimony of jailhouse informants (as juries are currently advised regarding the testimony of accomplices) and to simplify the instruction on death-penalty qualification;

2) Making residual doubt a statutory mitigating factor;

3) Allowing the defense to take depositions in death penalty cases (the State already gets to take the testimony of witnesses under oath before trial via the grand jury process);

4) Requiring a proportionality review by the Illinois Supreme Court in every death penalty case (similar to the review called for by a Missouri statute);

5) Always allowing consideration of actual innocence in post-conviction proceedings;

6) Setting minimum qualifications for counsel in death penalty cases and setting an appropriate compensation rate to attract qualified counsel;

7) Lengthening the time limits on filing post-conviction claims beyond the current 45-day period after the filing of a defendant's brief with the Illinois Supreme Court;

8) Requiring the taping of all interrogations and confessions in death penalty cases;

9) Requiring signed oaths that witnesses have not been influenced or induced to testify improperly and that

all exculpatory evidence has been turned over to the defense;

10) Enacting a Racial Justice Act similar to Kentucky Penal Code 532.300;

11) Requiring the State to plead in the charging instrument the statutory qualifying factors that they will rely on in the death-penalty eligibility phase;

12) Equalizing the resources afforded to the defense and the prosecution in capital cases.

Membership in the IACJ is \$100 per year for regular members; \$50 per year for public defenders and \$25 per year for lawyers admitted to the bar for less than 3 years and law students. You can join by mailing a check in the appropriate amount to IACJ, P.O. Box 2864, Chicago, IL 60690-2864.

Take advantage of the opportunity to attend an outstanding seminar in Chicago from November 3-6, 1999 and consider joining the two fine organizations that are sponsoring it, the NACDL and IACJ.

Volume 18 - July 1999

Come Again?

Petitions for Rehearing in the Seventh Circuit

By: David B. Mote
Deputy Chief Federal Defender

Hope springs eternal. Consequently, we are sometimes moved to ask for rehearing or rehearing *en banc* in the usually misguided hope that, with just a bit more explanation, the Court of Appeals will understand why we should have prevailed in our last appeal. While knowing some basic rules will not guarantee that you will be successful in obtaining rehearing, it can help you avoid unnecessary headaches.

The first thing you must know about petitions for rehearing is that they **“must be physically filed with the clerk by the due date.”** Practitioner's Handbook for Appeals to the

United States Court of Appeals for the Seventh Circuit (1999 ed.) XXVI. The due date for a petition for rehearing is 14 days from the entry of the judgment and the “mail box rule” does not apply. Id.

The next thing you should know is how the Seventh Circuit generally views petitions for rehearing. “Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted.” Id. Personally, I see little point in seeking rehearing unless there is either a dissent or a conflict between the instant decision and a prior decision rendered by the Seventh Circuit.

You should also be aware that a petition for rehearing is not a pre-requisite to the filing of a petition for certiorari in the Supreme Court, although the timely filing of a petition for rehearing tolls the time for filing a petition for a writ of certiorari. Id.

Fifteen copies of a petition for rehearing must be filed; thirty copies are required when filing a petition for rehearing with suggestion for rehearing *en banc*. Id.; Cir. R. 40(b). The cover of the petition should be the same color as was the party’s main brief. The page limit on a petition for rehearing is 15 pages. Fed. R. App. P. 40(b).

“A party who suggests that an appeal be reheard en banc must state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, [the Seventh Circuit,] or another court of appeals the panel decision is claimed to be in conflict.” Practitioner’s Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (1999 ed.) XXVII. Failure to comply with this provision risks sanctions.

A petition for rehearing “must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.” Fed R. App. P. 40(a)(2). The petition must include a table of contents with page references and a table of cases (arranged alphabetically), statutes and other authorities with references to the pages of the petition where they are cited. Cir. R. 40(a).

Finally, you should be aware that you can (and should)

obtain a copy of the Practitioner’s Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (1999 ed.) free of charge from the Clerk’s Office for the U.S. Court of Appeals for the Seventh Circuit.

Volume 17 - April 1999

YES, VIRGINIA, THERE IS A VALKYRIE PROGRAM

By: David B. Mote
Deputy Chief Federal Defender

I first heard of “Operation Valkyrie” seven or eight years ago, as I set in the gallery of a United States District Court observing a suppression hearing. As I recall, a large quantity of cocaine had been discovered when a truck with two Hispanic occupants was stopped for some minor traffic offense, like going three miles over the speed limit on the interstate. Defense counsel suggested that the traffic stop was a pretextual traffic stop pursuant to “Operation Valkyrie.” The State Police Officer on the stand, I believe he was a veteran officer -- perhaps a Master Sergeant, denied any knowledge of Operation Valkyrie.

Well, Virginia, it turns out that there is a Valkyrie program.

In June, 1998, I had a suppression hearing in United States v. Silva-Rocha, No. 98-30017 (C.D. Ill. 6/8/1998). Dale Schempp, an attorney on the court’s CJA list, represented the co-defendant. Prior to the hearing, he had subpoenaed the arresting trooper’s duty records for the day of the arrest. Lo and behold, the arresting trooper, ISP Trooper Rios, was on Valkyrie duty. Having heard that Valkyrie duty involved traffic stops based on drug profiles, I was curious to learn more about the Valkyrie program when I cross-examined Trooper Rios:

Q. Okay. What are -- what are your duties on the Valkyrie squad?

A. Drug interdiction.

Q. Okay. And how is that drug interdiction carried out?

A. As far as we’re on--our assignments are I-55. We monitor traffic on I-55 in District 9.

Q. But you’re monitoring traffic not as a regular trooper and make [sic] traffic stops, is that correct?

A. Yes, that's part of our duties. It's still regular traffic stops.

Q. Okay. Now, you said the questions you ask are the questions that every officer asks. So what I'm trying to get at is what do you do different as a Valkyrie -- as an officer -- as a trooper on Valkyrie duty?

A. What do I do different --

Q. Yes.

A. -- than any other officer?

Q. Yes.

A. I couldn't tell you. I make the same kind of traffic stops.

Q. Okay. And in the -- is there any training for the Valkyrie squad?

A. Not any hour class or anything like that, no.

Q. Is there a manual?

A. No.

Q. Any written instructions?

A. No.

Q. So as far as you know, this Valkyrie duty has no special duties?

A. Nothing in training as far as hours and anything in writing, a manual, no.

THE COURT: Mr. Mote, have we -- is the record clear whether the stop on March 16th of 1998, whether this was a, quote Valkyrie duty stop or a traffic stop? Is that clear yet?

MR. MOTE: The record is not clear on that, Your Honor.

THE COURT: Would you ask the question for my advocacy?

Q. Was this a Valkyrie stop?

A. No.

Q. If there is no difference between Valkyrie stops and regular stops, how do you distinguish them?

MR. SANCHEZ: Objection, irrelevant. The trooper has testified that it isn't a Valkyrie stop and therefore, it now becomes irrelevant. What is Valkyrie or what is the difference between one and the other.

Transcript of Suppr. Hrg., pp. 62-63, United States v. Silva-Rocha, No. 98-30017 (C.D. Ill. 6/8/1998).

Despite my argument that Trooper Rios' testimony

demonstrated he had no way of distinguishing whether or not this was a Valkyrie stop, the prosecutor's objection was sustained. We did learn from another witness, however, that Trooper Rios had made three enforcement stops that day and two of them involved vehicles with Arizona plates. Transcript at 150.

My legal research regarding operation Valkyrie turned up little. The earliest published case I found was People v. Flores, 231 Ill.App.3d 813, 596 N.E.2d 1204 (4th Dist. 1992). More interesting is a case that came out after the hearing in my case. Chavez v. Illinois State Police, 1998 WL 778341 (N.D. Ill. 11/5/1998) is a civil case alleging that African-American and Hispanic motorists are stopped, detained and searched on the basis of race. The testimony of one of the Illinois State Troopers given in Chavez has a familiar tone:

Q. Who were your Valkarie instructors at the training program?

A. The original training program?

Q. Yes.

Q. Mike Snyders, I believe Tom Alvaro.

Q. How about the race of the driver, is that an indicator?

A. You have to keep it in mind, yes.

Q. What do you keep in mind about the race of the driver?

A. Just use it as one of many indicators to -- you've got to keep it in mind when talking to the subject.

Q. So how would--give me a scenario where the race of the driver would factor into the equation.

A. I can't give anything like that. I don't know what you mean.

Q. How about a young black male in a very expensive BMW, new BMW, would that be a factor?

A. It depends if any--some of the other indicators ... It can be an indicator I suppose.

Q. What about the race of the driver, would that be a factor that you would consider?

A. Maybe ... I'm not saying you see one thing and decide to stop them. If there is a bunch of different things together--

Q. Well, would it--could it possibly make a difference if it was, let's say, a caucasian versus a black male?

A. I don't know. It would just be--it just depends on the situation what you do at the time.

Q. Have you been given any instructions by the Illinois State Police regarding how to decide which cars to stop and not to stop?

A. No ... It's all discretionary.

Chavez at *18.

This article, like the troopers quoted above, provides little useful information on the Valkyrie program. Nonetheless, the transcripts quoted above demonstrate a desire on the part of the authorities involved to keep the nature of these programs secret.

An excellent article recently appeared in the April 1999 edition of *Esquire*. The article, titled "DWB" (which stands for Driving While Black), written by Gary Webb, detailed the abuses that programs like Operation Valkyrie have invited. More telling, it revealed that most such state programs are the result of a DEA program called Operation Pipeline. Mr. Webb ended up inside Pipeline as an investigator for the California Legislature following stories from law-enforcement sources about California Highway Patrol units pulling over Latino motorists and randomly searching them for guns, drugs and cash. The article makes clear the operating principle that troopers involved in Operation Valkyrie and similar programs dance around; pretextual stops of drivers the troopers believe might be carrying drugs, often based on nothing more than race and/or the State on the license plate, are used as a basis to stop cars and conduct searches. In New Jersey, a superior court judge found that the state police Pipeline units had "at least a de facto policy ... of targeting blacks for investigation and arrest." A study revealed that although blacks constituted only 13 percent of the turnpike traffic, they accounted for nearly half of the stops by troopers searching for drugs. Records kept in Maryland as part of a settlement of a civil rights suit resulting from the pretextual stop of a Harvard Law School graduate returning from a funeral revealed that of 732 people detained and searched in 1995 and 1996, 75% were black

and 5% were Hispanic. The lack of justification for these stops is illustrated by an example given in the *Esquire* article of an Ohio trooper who testified to having personally conducted 786 searches in a single year, "sometimes for no other reason than to keep in practice."

This is useful information, but hard to utilize. It must be remembered that the Supreme Court has essentially ruled that pretext is irrelevant as long as there is a legal basis for the stop, regardless of whether a "reasonable officer" would have stopped the vehicle for the traffic violation absent some other motivation. See Whren v. United States, 116 S.Ct. 1769 (1996). While the Supreme Court was certainly not intending to condone discriminatory enforcement of the traffic laws, the Whren decision certainly facilitates pretextual stops. The *Esquire* article stated:

"Since that ruling, known as the Whren decision, state and local police participation in Operation Pipeline has soared. Enrollments in DEA training schools are way up. 'After Whren,' one of my [California Highway Patrol] instructors told me, 'the game was over. We won.'"

Unfortunately, it's a zero sum game. Any gain by the police in their discretion to stop anyone they think might be carrying drugs is balanced by a corresponding loss of every citizen's right to be free from unreasonable police interference. The *Esquire* article noted that there were an estimated 27,000 Operation Pipeline grads cruising the highways and that 95% of Operation Pipeline searches have come up empty. The public has lost a great deal.

Volume 15 - December 1998

Reflection on the National Conference on Wrongful Convictions and the Death Penalty

By: David B. Mote
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A historical event took place at Northwestern University School of Law in Chicago on November 13-15, 1998 as an estimated 1,200 people attended the National Conference on Wrongful Convictions and the Death Penalty. The conference featured more than one hundred speakers including attorneys, DNA scientists, professors, journalists, representatives of human rights organizations

and exonerated victims of miscarriages of justice.

One aspect of the conference that made it newsworthy, in addition to its size, was its focus. The focus was not on the wisdom of the death penalty in theory, but on the problems with the death penalty in practice. Of the 75 persons released from death row since the Supreme Court allowed the reinstatement of the death penalty in 1976, 28 or 29 appeared on stage together at the conference. It was impossible to see the frequency with which the system has erroneously imposed the ultimate punishment, and the cost of those errors, and believe that the death penalty is worth maintaining.

The list of the 75 victims of miscarriages of justice given below shows the years these people lost as a result of their wrongful convictions. Being deprived of years or even decades of their lives is just the most obvious aspect of what these people lost. Several of the exonerated defendants had come within 72 hours of execution. Many lost marriages and lost the chance to be a part of their children's childhoods. I felt particularly moved by the sorrow expressed by death-row survivors at the fact that one or both of their parents had died while they were on death row and would never know that they had been spared.

There is also the certainty that other innocent persons who were convicted were not spared. Professor Larry Marshall who organized the conference brought forward a number of the people on stage whose lives had been saved by DNA analysis that conclusively proved their innocence and observed that if the victims had merely been murdered, rather than raped and murdered, those men would not be free today. One of those men was Kirk Bloodworth who was twice convicted and sentenced to death for the rape and murder of a nine-year-old girl. DNA later conclusively established his innocence. Mr. Bloodworth stated:

We should give great pause before we hand out the ultimate sentence. If it could happen to me, it could happen to you.

Since the reimposition of the death penalty, almost 500 people have been executed in the United States and 75 have been released from death row. That's one person erroneously sentenced to death for every seven executions carried out.

Some things that emerged at the conference did not surprise me. As a defense attorney, I was not surprised that many wrongful convictions had resulted from the testimony of jailhouse informants who had struck deals with the government. That simply proves that the Tenth Circuit was correct in its quickly-vacated Singleton opinion -- purchased testimony is unreliable even when the government is the purchaser. Nor was I surprised that the failure of the prosecution and police to turn over evidence favorable to the defense turned up in many of the cases.

Other things did surprise me. I was surprised at the number of people wrongfully convicted and sentenced to death who had little or no prior record. And I was surprised at the fact that the jailhouse informants weren't the only ones who had no interest in the truth. Police perjury occurred in a substantial number of the cases. And blatant racism sometimes played a part as well. When Clarence Brandley was arrested for the rape and murder of a 16-year-old high school girl, the prosecution had concluded that it must have been one of the janitors. The four white janitors provided alibis for one another. When Mr. Brandley was arrested, one of the officers allegedly told him: "We need someone for this. Since you're the nigger you're elected." The defense later learned that caucasian hairs that did not match the victim were found on the victim's body. After an evidentiary hearing at which the judge determined that two of the white janitors had probably committed the crimes, Mr. Brandley's conviction was reversed and the prosecution dropped all charges against him.

These brave men and women who survived death-row continue to suffer today. In most cases, the prosecutors who argued that they had committed unspeakable crimes and deserved to die are unwilling to utter a simple apology, insisting they acted in good faith. When they apply for a job, they are likely to be asked about that years-long gap in their job history, and they must then explain how they were on death row, waiting to die. Rolando Cruz, after his release from death-row, went to get a copy of his birth certificate. The only proof of identity he could provide was his death warrant. Despite all they have lost, the death penalty survivors must endure death-penalty proponents who argue that their cases prove the system works. Understandably, experience has convinced the death-row survivors that all too frequently, the system doesn't work. And despite the fact that many death-row survivors have been exonerated beyond all doubt by DNA evidence, many death-penalty supporters insist, without looking into the actual cases, that the people who were released from death-row aren't necessarily innocent.

We are in a time when politicians seem to campaign on who is the bigger supporter of the death-penalty. Anyone against it is considered “soft on crime.” The Anti-terrorism and Effective Death Penalty Act of 1996 has greatly curtailed federal review of both capital and non-capital convictions. Yet there were too many people being wrongfully convicted before these reforms. Two books, Victims of Justice (Avon) about the case of Rolando Cruz and Alejandro Hernandez and A Promise of Justice (Hyperion) about the Ford Heights Four case, illustrate just how fallible our justice system can be. Currently, there are more than 3,500 people on death-row in the United States. Most of their cases will not be reviewed as extensively as death penalty cases were before the “reforms” enacted in 1996. Listed below are 75 people who know first hand that our criminal justice system is fallible. And a fallible system should not be allowed to execute people.

* * * * *

**75 CASES SINCE 1972 IN WHICH INDIVIDUALS
ONCE SENTENCED TO DEATH HAVE BEEN
RELEASED AND EXONERATED**

Randall Dale Adams
Texas
Convicted 1977; Released 1989

Jerry Banks
Georgia
Convicted 1975; Released 1980

Gary Beeman
Ohio
Convicted 1976; Released 1979

Jerry Bigelow
Arizona
Convicted 1981; Released 1989

Kirk Bloodsworth
Maryland
Convicted 1984; Released 1993

Clarence Brandley
Texas

Convicted 1980; Released 1990

Anthony Silah Brown
Florida
Convicted 1983; Released 1986

Jesse Keith Brown
South Carolina
Convicted 1983; Released 1989

Joseph Green Brown
Florida
Convicted 1974; Released 1987

Willie Brown
Florida
Convicted 1983; Released 1988

Joseph Burrows
Illinois
Convicted 1989; Released 1994

Sabrina Butler
Mississippi
Convicted 1990; Released 1995

Earl Patrick Charles
Georgia
Convicted 1977; Released 1981

Perry Cobb
Illinois
Convicted 1979; Released 1987

Robert Craig Cox
Florida
Convicted 1988; Released 1989

James Creamer
Georgia
Convicted 1973; Released 1975

Patrick Croy
California
Convicted 1979; Released 1990

Robert Charles Cruz
Arizona
Convicted 1981; Released 1995

Rolando Cruz
Illinois
Convicted 1985; Released 1995

Muneer Deeb
Texas
Convicted 1985; Released 1993

Henry Drake
Georgia
Convicted 1977; Released 1987

Neil Ferber
Pennsylvania
Convicted 1982; Released 1986

Gary Gauger
Illinois
Convicted 1993; Released 1996

Charles Ray Giddens
Oklahoma
Convicted 1978; Released 1981

Richard Gladish
New Mexico
Convicted 1974; Released 1976

Andrew Golden
Florida
Convicted 1989; Released 1993

Richard Greer
New Mexico
Convicted 1974; Released 1976

Ricardo Aldape Guerra
Texas
Convicted 1982; Released 1997

Benjamin Harris
Washington
Convicted 1985; Released 1997

Robert Hayes
Florida
Convicted 1991; Released 1997

Timothy Hennis
North Carolina
Convicted 1986; Released 1989

Alejandro Hernandez
Illinois
Convicted 1985; Released 1998

Larry Hicks
Indiana
Convicted 1978; Released 1980

Sonia Jacobs

Florida

Convicted 1976; Released 1992

Anibal Jarramillo

Florida

Convicted 1981; Released 1982

William Jent

Florida

Convicted 1980; Released 1988

Verneal Jimerson

Illinois

Convicted 1979; Released 1996

Lawyer Johnson

Massachusetts

Convicted 1971; Released 1982

Dale Johnston

Ohio

Convicted 1982; Released 1990

Troy Lee Jones

California

Convicted 1982; Released 1996

David Keaton

Florida

Convicted 1971; Released 1973

Richard Keine

New Mexico

Convicted 1974; Released 1976

John Henry Knapp

Arizona

Convicted 1976; Released 1990

Curtis Kyles

Louisiana

Convicted 1984; Released 1998

Carl Lawson

Illinois

Convicted 1990; Released 1996

Wilbert Lee

Florida

Convicted 1963; Released 1975

Michael Linder

South Carolina

Convicted 1979; Released 1981

Frederico Macias

Texas

Convicted 1984; Released 1993

Vernon McManus

Texas

Convicted 1977; Released 1988

Walter (Johnny D.) McMillian

Alabama

Convicted 1988; Released 1993

Earnest Miller

Florida

Convicted 1980; Released 1988

Robert Lee Miller, Jr.

Oklahoma

Convicted 1988; Released 1998

Roberto Miranda
Nevada
Convicted 1982; Released 1996

Adolph Munson
Oklahoma
Convicted 1985; Released 1995

Gary Nelson
Georgia
Convicted 1980; Released 1991

Randall Padgett
Alabama
Convicted 1992; Released 1997

Anthony Ray Peek
Florida
Convicted 1978; Released 1987

Freddie Pitts
Florida
Convicted 1963; Released 1975

Samuel Poole
North Carolina
Convicted 1973; Released 1974

Juan Ramos
Florida
Convicted 1983; Released 1987

James Richardson
Florida
Convicted 1968; Released 1989

James Robison

Arizona
Convicted 1977; Released 1993

Johnny Ross
Louisiana
Convicted 1975; Released 1981

Bradley P. Scott
Florida
Convicted 1988; Released 1991

John C. Skelton
Texas
Convicted 1982; Released 1990

Charles "Red" Smith
Indiana
Convicted 1983; Released 1991

Clarence Smith
New Mexico
Convicted 1974; Released 1976

Jay C. Smith
Pennsylvania
Convicted 1986; Released 1992

Delbert Tibbs
Florida
Convicted 1987; Released 1992

Darby (Williams) Tillis
Illinois
Convicted 1979; Released 1987

Jonathan Treadway
Arizona

Convicted 1974; Released 1979

Larry Troy

Florida

Convicted 1983; Released 1988

Robert Wallace

Georgia

Convicted 1980; Released 1987

Gregory R. Wilhoit

Oklahoma

Convicted 1987; Released 1993

Dennis Williams

Illinois

Convicted 1979; Released 1996

Volume 14 - September 1998

Home Sweet Home: Where's The Warrant?

By: David B. Mote

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Home sweet home, what makes it special? Ask a normal person that question and they are likely to tell you about their spouse, their children, or the peacefulness or chaos of life at home. But as a recent case reminded me, another special aspect of home is its sanctified status in Fourth Amendment law. This article reviews the caselaw on when the police are legally “welcome” to enter the home to make a felony arrest and when, after the arrest, they have overstayed their legal “welcome.”

“It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest.” Welsh v. Wisconsin, 466 U.S. 740, 748 (1984).

“[I]f probable cause exists, no warrant is required to apprehend a suspected felon in a public place.” Steagald v. United States, 451 U.S. 204, 221 (1981). But even when there is probable cause, the Fourth Amendment “prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home to make a routine felony arrest.” Payton v. New York, 445 U.S. 573, 576 (1980); United States v. Johnson, 457 U.S. 537, 538-39 (1982).

The Supreme Court has held that a “search or seizure carried out on a suspect’s premises without a warrant is *per se* unreasonable, unless the police can show ... the presence of exigent circumstances. ... [T]he court decided in Payton v. New York that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.... Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.” Welsh v. Wisconsin, 466 U.S. 740, 749, 750 (1984).

“Exigent circumstances exist when there is a compelling need for official action and no time to secure a warrant, ... such as when the police officers are in hot pursuit of the suspect.” Mason v. Godinez, 47 F.3d, 852, 856 (7th Cir. 1995).

Assuming the police are lawfully within someone’s home to make a felony arrest, they may be able to perform a protective sweep. “The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Maryland v. Buie, 494 U.S. 325, 337 (1990). It should be noted, however, that lack of information cannot be the sole basis for a protective sweep. See United States v. Akrawi, 920 F.2d 418 (6th Cir. 1990); United States v. Colbert, 76 F.3d 773 (6th Cir. 1996); Sharrar v. Felsing, 128 F.3d 810 (3rd Cir. 1997).

In addition to the fact that it would not comply with the “reasonable suspicion of danger” requirement of Buie, courts have expressed concern that allowing protective sweeps based on lack of information would provide an incentive for the police to “stay ignorant”, and threaten to “swallow the general rule requiring that the police obtain

a warrant.” United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996).

The Supreme Court has emphasized that “a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Maryland v. Buie, 494 U.S. 324, 335-36 (1990).

Finally, it should be noted that “the government cannot rely on exigent circumstances to excuse a warrantless entry to conduct a protective sweep if the circumstances and thus the sweep were made necessary by the law enforcement officers’ decision to abandon covert surveillance and confront the suspects without any justification whatsoever. That is a classic example of a police-manufactured exigency.” United States v. Rico, 51 F.3d 495, 503 (5th Cir. 1995).

Volume 13 - August 1998

Immigration, Re-entry and the Deported Citizen: Dangers of Overlooking the Obvious

By: David Mote
Deputy Chief Federal Defender
Central District of Illinois

Our office was appointed to represent a young man named Jose who was charged with illegal reentry by a previously deported alien in violation of 8 U.S.C. § 1326(a). The discovery revealed that Jose was born in Nuevo Laredo, Mexico, had previously been deported, that his exit from the country (or more properly, boarding of the flight from Chicago to Mexico) was witnessed by an immigration officer, and that he had admitted to the prior deportation and reentry when interviewed by INS prior to our appointment. Jose entered a guilty plea and a pre-sentence report was ordered.

On the day set for sentencing, I met with Jose to discuss my intended remarks at sentencing. In particular, we talked about his many family members who live in the

United States. During this discussion, he mentioned that his father was born and lives in Laredo, Texas. This conflicted with information in the INS reports that stated that Jose’s parents were citizens of Mexico. The discovery was correct, however, that his mother was a citizen and resident of Mexico.

A month earlier, the fact that his father was born in the States might not have seemed important to me. Between the time of Jose’s plea and the sentencing date, however, I had the good fortune of meeting a Chicago attorney who practices immigration law while we were both at the Seventh Circuit to argue appeals and we discussed “de facto citizenship.” Consequently, I requested and received a continuance of Jose’s sentencing hearing to look into what effect, if any, his father’s birth in the United States might have on Jose’s formerly obvious status as an alien.

I found that we had an argument that Jose couldn’t be guilty of reentry by a previously deported alien because, arguably, he was not an alien, but a citizen. 8 U.S.C. § 1401 provides:

“The following shall be nationals and citizens of the United States at birth:

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years”

Because we had an argument that Jose was not an alien, we moved to withdraw his plea under Rule 32(e) which permits a court to allow a motion to withdraw a guilty plea made before sentencing for “any fair and just reason.”

While the government did not contest the evidence that Jose’s father was a citizen, it nevertheless opposed the motion to withdraw the plea, arguing that defendant’s parents were not married and that the defendant did not meet the special requirements placed on illegitimate children born outside the United States claiming citizenship through their father, rather than their mother, including that the father, unless deceased, has agreed to provide financial support for the person until the person

reaches the age of 18 and that while the person is under 18, the person is legitimized under the law of the person's residence or domicile, the father acknowledges paternity of the person in writing under oath, or the paternity is established by court adjudication. See 8 U.S.C. § 1409(a)(3) and (4). The Supreme Court has recently rejected claims that differing requirements based on whether citizenship is claimed through the father or mother violate the Equal Protection Clause. See Miller v. Albright, 118 S.Ct. 1428 (1998).

In response, we argued that had Jose known that he had a claim to citizenship, he could have gone to court, through a legal guardian, and obtained an order establishing paternity and getting an order of child support. This is an important point since there are immigration decisions holding that failure to meet technical requirements to retain citizenship should not be applied to strip persons of citizenship who did not learn of their claim to citizenship within the time period when it was possible to comply. See Re Yanez-Carillo, 10 I & N Dec. 366 (1963)(holding that a Mexican resident who did not learn of his claim to American citizenship in time to fulfil the residency requirement had not forfeited his right to citizenship based on his failure to comply); Re Farley, 11 I & N Dec. 51 (1965)(same ruling with Canadian resident).

To add an additional twist, it also turns out that Jose's parents lived together in Texas for two years prior to and several years following his birth. Jose was born in Mexico by happenstance. His mother had gone shopping across the border from Laredo, Texas and was in Nuevo Laredo, Mexico when she went into childbirth. Documents provided by the family demonstrate that Jose's mother was using her father's last name as a married name and an affidavit that immigration took from the father indicates that they weren't married but "just lived together as common law." Texas, where Jose's parents lived together both before and after his birth, recognizes common law marriage. See Russell v. Russell, 865 S.W.2d 929 (Tex. S. Ct. 1993). If Texas considered Jose's parents to be married, the government's argument based on 8 U.S.C. § 1409 should meet an unhappy end.

Our attempt to withdraw Jose's plea is still pending, but there are already lessons to be learned from this case. One is that it is sometimes better to overlook the obvious. It appeared obvious that Jose was an alien since he had been born in Mexico and had previously been deported. I now ask clients charged with illegal reentry not just about where they were born but also about where their parents were born. The case is also a reminder that our clients and

their families may not know what information is important to the case. Finally, this case is a lesson in some of the niceties of immigration law that most criminal defense lawyers don't know, but might find useful.

* * * * *

A Useful Review of The Bluebook Rules

By: David Mote

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In law school, we learned to give full cites, including all subsequent case history and parallel citations. Few lawyers continue to be so formalistic after settling in to the actual practice of law. Still, for formal briefs, proper citation form should still be used and, fortunately, it is not as cumbersome as what many of us learned in law school.

The sixteenth edition of The Bluebook A Uniform System of Citation, published in 1996, which seems to provide no example of how to cite itself, by the way, provides the following useful information:

1) "Whenever a decision is cited in full, give the entire subsequent history of the case, but omit denials of certiorari or denials of similar discretionary appeals, unless the decision is less than two years old or the denial is particularly relevant. Omit also the history on remand or any denial of a rehearing, unless relevant to the point for which the case is cited." Rule 10.7;

2) You need not provide parallel cites on Supreme Court cases. "Cite to U.S., if therein; otherwise cite to S. Ct., L.Ed. or U.S.L.W. in that order of preference." Table T.1.

3) When citing a case with subsequent history in the same year, "include the year only with the last-cited decision in that year." Rule 10.5(d).

Volume 12 - June 1998

The Meaning of Frivolous

By: David Mote

Deputy Chief Federal Defender

Appointed counsel in criminal cases face some challenges seldom encountered by retained counsel. For example, appointed counsel often hear clients conjecture that they would be offered a better deal or perhaps the charges would be dismissed if they could hire their own counsel. These kinds of comments and inquiries are often irksome, but they generally don't impact on counsel's exercise of professional judgment in handling the case. On the other hand, the fact that a defendant has appointed counsel frequently impacts on the question of whether an appeal is taken. Unfortunately, it has the greatest impact when there is the least reason to appeal.

A client with retained counsel will seldom pursue an appeal when the attorney advises there is very little chance for success. By contrast, appointed counsel who advise their clients that an appeal is pointless are frequently told -- "I want to appeal -- what do I have to lose?" I have had clients state in advance of the sentencing hearing that they wanted to appeal the sentence regardless of what sentence the court imposed; that they wanted to appeal because if the government was going to take years of their life, they wanted it to cost the government as much as possible; and that they wanted to appeal because it was always possible that lightning would strike.

Clients who wish to appeal because they have nothing to lose, rather than because there is a colorable argument to be made on appeal, create difficult decisions for their appointed counsel. Obviously, if there is no non-frivolous basis to appeal, counsel is obliged to file a motion to withdraw and a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Unfortunately, "frivolous" is not a clear concept and counsel can usually find some issue that, while having little chance of success, is at least arguable under the caselaw. Nonetheless, the question of what "frivolous" means has to be faced when preparing a brief where none of the caselaw supports your position.

Personally, there has been more than one occasion when my preparation for oral argument has consisted of reviewing my arguments on the merits and preparing an answer to the question "Why isn't this frivolous?" Good lawyering can, of course, go into preparing a brief on bad issues. I was rather proud of one brief I prepared in which I distinguished every prior published case in this circuit on the application of the reckless endangerment enhancement. This had to be done since the enhancement had been affirmed in every case. Yet, while I felt it was successful

as a scholarly and creative effort, I knew, at least until I reached that necessary final delusional state of optimism to argue the appeal, that it was a loser.

More recently, I appealed a sentence on a revocation of supervised release where the client was sentenced to more than double the top of the suggested range of U.S.S.G. §7B1.4. Unfortunately, the Seventh Circuit has said that because §7B1.4 is only a policy statement, the district judge must consider the suggested range but is not bound by it. United States v. McClanahan, 136 F.3d 1146, 1152 (7th Cir. 1998). Worse yet, since there is no actual guideline, the review of the judge's choice of sentence is limited to determining whether it was "plainly unreasonable." United States v. Doss, 79 F.3d 76 (7th Cir. 1996). Understandably, my client could not see how I could suggest that it would be difficult to argue that a 24-month sentence on a violation with a suggested range of 4-10 months was "plainly unreasonable." As I prepared my brief, with every published case in the circuit addressing whether a sentence above the suggested range finding that the sentence was not "plainly unreasonable," I struggled with the question of whether the appeal was "frivolous," or merely a loser. I decided that, while it was a loser, it was not, in my opinion, "frivolous" and prepared my brief and my explanation, if called upon, of why the appeal was not "frivolous."

Having struggled with the issue myself, I was pleased to see the issue of what it means for an argument to be "frivolous" addressed in a recent Seventh Circuit case. In United States v. Howard, slip. op. (7th Cir., 4/9/1998), 1998 WL 164093, the court wrote "to address the novel issue of whether an Anders motion can ever be made and granted when there is a ground for appeal that is not barred by dispositive caselaw, clear statutory language, or any other clear legal bar to the ground, but instead involves the application of law to fact."

In Howard, the principal issue on appeal was the suggestiveness of a photo array. The defendant's expert had testified that while he was "struck by how fair" the photo array was ... the defendant's picture looked more like a mug shot than the other pictures in the array." The Seventh Circuit concluded that "bearing in mind the deference that the Court of Appeals owes to the District Court in regard to so fact-intensive an issue ... we cannot imagine that a challenge to the array in this case would succeed on appeal, and no more is required to pronounce the appeal frivolous and thus allow the defendant's lawyer to withdraw."

By way of further explanation, the Court explained:

“Our point is not that the defendant’s appeal on the basis of a challenge to the array is predictably a loser. It is, but that is not the criterion. Penson v. Ohio, 488 U.S. 75, 86 (1988). The point is that a responsible lawyer would not advise this defendant to base an appeal on a challenge to the array. *** Granted we are dealing with differences of degree rather than of kind in any case in which eyewitness identification is questioned; but at some point the ground on which to question the identification is so meager as fairly to be described as frivolous. A frivolous appeal is merely one that is groundless, United States v. Eggen, 984 F.2d 848, 850 (7th Cir. 1993)(per curiam).”

This opinion allows, I believe, the zealous advocate some breathing room when his best or only argument is “predictably a loser.” At the same time, it grants counsel the option of moving to withdraw in a case where the only issue is the client’s contention that it was clear error for the district judge not to find that all of the evidence against him was not credible.



Volume 11 - April 1998

Tips On Insanity In The Seventh Circuit

by: David Mote
Chief Deputy Federal Defender
Central District of Illinois

Representing clients who suffer from mental problems of varying degrees is part and parcel of almost every criminal defense attorney’s practice. This article is intended to provide some tips regarding issues in federal cases involving an insanity defense with some basic statutory and Seventh Circuit authority.

1. Notice. Under Fed. R. Crim. P. 12.2(a) the defense must give notice in writing to the government of its intent to present an insanity defense and file a copy of that notice with the clerk. The notice must be provided within the time provided for filing pre-trial motions or at such later time as the court directs. The court may allow

late filing for good cause shown. Fed. R. Crim. P. 12.2(b) requires that the defendant also file a notice if he intends to present expert testimony on his mental condition bearing on the issue of guilt. The time limits on filing mirror those in 12.2(a).

2. Examination of the defendant. If notice of an insanity defense has been filed, the court will order that the defendant submit to an examination to determine his sanity at the time of the offense. 18 U.S.C. §4142(a). No statement made by the defendant in the course of the examination may be admitted without the consent of the defendant. Fed. R. Crim. P. 12.2(c). Failure to comply with the examination can result in the exclusion of any expert testimony offered by the defendant on the issue of defendant’s guilt. Fed. R. Crim. P. 12.2(d). However, nothing in Rule 12.2(d) would support the exclusion of lay testimony regarding the defendant’s mental state.

3. Withdrawn Notice Inadmissible. Evidence that defendant gave notice of an intent to rely on an insanity defense, which was later withdrawn, is inadmissible. Fed. R. Crim. P. 12.2(e).

4. Standard. To prove insanity, the defendant must prove that at the time of the alleged offense “the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.” 18 U.S.C. § 17(a).

5. Burden of Proof. “The defendant has the burden of proving the defense of insanity by clear and convincing evidence.” 18 U.S.C. § 17(b).

6. Ex Parte Application for Expert. If you are counsel in an appointed case, you can move the court *ex parte* for authorization to retain an expert if the services of the expert are necessary. 18 U.S.C. § 3006A(e)(1). The maximum amount to be paid for such expert services is \$1,000, unless the court certifies that a higher amount is necessary to provide fair compensation and the chief judge of the circuit approves the higher fee. 18 U.S.C. § 3006A(B)(3). (It is therefore wise to include the expert’s hourly fees for in-court, out-of-court, and travel time in your request for authorization to retain the expert.) Counsel may obtain, subject to later review, necessary investigative, expert and other services up to \$300 without prior approval. 18 U.S.C. § 3006A(e)(2).



7. May Be Entitled to Voir Dire on Insanity. A defendant may be entitled to have prospective jurors questioned on voir dire regarding prejudice against the insanity defense. See, United States v. Jackson, 542 F.2d 403, 413 (7th Cir. 1976)(finding judge’s questions to potential jurors regarding the issue adequate).

8. Basis for Expert Testimony. Under F.R.E. 703, an expert may base his opinion on information “of a type reasonably relied upon by experts in the particular field in forming opinions.” It does not matter if the facts or data on which the expert bases his opinion are otherwise inadmissible. See United States v. Smith, 869 F.2d 348 (7th Cir. 1989).

9. Questions on Whether Acts Consistent with Ability to Appreciate Wrongfulness of Acts. Counsel may ask the expert whether the defendant’s behavior was consistent with an ability or inability to appreciate the wrongfulness of the defendant’s acts. See United States v. Reno, 992 F.2d 739, 742-744 (7th Cir. 1993).

10. Lay Testimony on Sanity Admissible. Lay witnesses may testify regarding defendant’s apparent mental state. See, e.g., Greider v. Duckworth, 701 F.2d 1228 (7th Cir. 1983) (lay witnesses testified about defendant’s drug addiction and his sanity at the time of the offense; “jury could credit the testimony of lay witnesses over that of an expert witness”).

11. Verdict Form. Where an insanity defense is raised, the verdict may be guilty, not guilty, or not guilty by reason of insanity. 18 U.S.C. § 4242(b).

12. Result of Not Guilty By Reason of Insanity. If a person is found not guilty by reason of insanity, they are *not released!* Rather, they are committed to a “suitable facility” until it is determined “that the person’s release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect.” 18 U.S.C. § 4242(a) and (e). Consequently, a person found not guilty by reason of insanity may be confined longer than a person who is found guilty.

13. Cannot Educate Jury on Consequence of Verdict. In Shannon v. United States, 512 U.S. 573, 587 (1994), the Court concluded that an instruction on the effect of a verdict of not guilty by reason of insanity was

“not to be given as a matter of general practice.” This conclusion was based on the idealistic notion that the jury will not concern itself with what the effect of its verdict will be, but simply determine whether the evidence has established the defense without any thought or preconceived notions of consequence of a “not guilty” verdict.

14. Prosecutor Can Open The Door To Consequences. Shannon recognizes, however, “that an instruction of some form may be necessary under certain limited circumstances. If, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would ‘go free’ if found [not guilty by reason of insanity,] it may be necessary for the district court to intervene with an instruction to counter such a misstatement.” Shannon, 512 U.S. at 587.

15. Unsuccessful Insanity Defense Does Not Prohibit Acceptance of Responsibility. Application Note 2 to U.S.S.G. § 3E1.1 states:

“This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitution right to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.”

In United States v. Reno, 992 F.2d 739, 745 (7th Cir. 1993), the Seventh Circuit found that a situation where the defendant acknowledged his criminal act but blamed it on a circumstance could be viewed two ways:

“The first interpretation is that when a defendant acknowledges the role of circumstance in his criminal activity, he is making the first step toward reform. The other interpretation is that the person blaming circumstance is trying to avoid responsibility. Because we find that there are two permissible views of the evidence, we cannot

say that the district court's finding was clearly erroneous."

While Reno resulted in the affirmance of a decision to deny a defendant who went to trial on an insanity defense the reduction for acceptance of responsibility, it clearly leaves a district court the option of granting the reduction where it is appropriate. See also, United States v. Barris, 46 F.3d 33, 35 (8th Cir. 1995)(rejecting position that an insanity defense automatically precludes an acceptance of responsibility finding). This flexible approach makes sense. The district court should be able to deny a defendant whom it is convinced faked mental problems the reduction for acceptance of responsibility, while granting the reduction to a defendant who clearly has severe mental problems and never denies the criminal conduct even though the jury does not find by clear and convincing evidence that the defendant was insane at the time of the offense.

Circuit Clerk's Office.

One issue counsel should be careful of in the Seventh Circuit is the contents of the appendix to the appellate brief. Circuit Rule 30 sets forth the required contents for an appendix. See In re Galvan, 92 F.3d 582 (7th Cir. 1996)(discussing Circuit Rule 30). The Seventh Circuit has both chastised and issued rules to show cause to counsel in criminal cases for failing to include the required materials in the appendix. The errors causing the most frequent grief are the omission of the judgment or order being appealed, the omission of other orders relating to the issues counsel is raising and the omission of excerpts of the transcript relating to the issues being raised. See, e.g., Woodruff v. United States, 1997 WL 768941 (7th Cir. 1997)(findings at evidentiary hearing omitted from appendix); United States v. Wallace, 114 F.3d 652 (7th Cir. 1997)(failure to include relevant portions of sentencing transcript). A few minutes reviewing Circuit Rule 30 when finalizing your appendix can save you a lot of stress later.

Volume 10 - January 1998

Appealing Issues

By: David Mote

Assistant Federal Public Defender

Generally speaking, there is little difference between representing a client on a court appointment and representing a client on a retainer. There are occasional differences, however. One is the occasional slight appointed counsel receives, such as when the client's family asks you whether they should hire him an attorney. Another difference is that an accused with appointed counsel often has no reason not to appeal since it costs him nothing to appeal. When the client has a meritorious issue on appeal, appointed counsel can recommend the client appeal without having to worry about how he will be paid. The downside is that the client with appointed counsel may insist on appealing even when his counsel advises him he has no viable issues. This article highlights a few issues relevant to appeals, particularly in appointed cases.

An immensely valuable resource for counsel handling federal appeals is the Practitioner's Handbook For Appeals to the United States Court Of Appeals for the Seventh Circuit copies of which can be obtained from the Seventh

One difficulty faced by appointed counsel is how to proceed when a client who has no arguable issues to appeal insists on appealing. Appointed counsel are required to continue representing the client on appeal unless relieved of that duty by the Court of Appeals. Circuit Rule 4. Section XIII(E) of the Practitioner's Handbook (p.54), mentioned above, and Fed. R. App. P. 38 and Circuit Rule 38 require that all appeals and arguments be well grounded and provide for sanctions for making frivolous arguments or filing frivolous appeals. If there is no non-frivolous issue and the client insists on appealing, counsel must file a motion to withdraw and a brief in accordance with Anders v. California, 386 U.S. 738 (1967). In that case, counsel is supposed to discuss all possible issues and explain why they are frivolous. Personally, I consider the number of frivolous issues theoretically limitless. A pragmatic approach is to discuss the issue of guilt (e.g., that a guilty plea waives issues relating to guilt and the appellant has not sought to withdraw the plea), the sentence (e.g., the case law indicating that the court of appeals won't review where within the guideline range the district court imposes sentence), all issues counsel unsuccessfully argued or researched before concluding the issues were frivolous (e.g., the Seventh Circuit has held that a firearm without a firing pin is still considered a firearm) and all issues the client believes should be raised on appeal (e.g., that defendant's argument that considering his prior conviction in determining his sentence is double jeopardy has been previously been rejected). Counsel cannot argue the frivolous issues as if they had merit;

rather, he must discuss what the possible issues are and why they are frivolous. See United States v. Tabb, 125 F.3d 583 (7th Cir. 1997). If defense counsel's Anders brief is adequate on its face, the Seventh Circuit will limit its review to the issues raised in the brief. See United States v. Wagner, 103 F.3d 551 (7th Cir. 1996). Counsel should, of course, carefully review the record in an effort to find some arguable issue of the client wishes to appeal. In any case that has gone to trial, there is likely to be some non-frivolous argument to be made regarding a pre-trial or evidentiary ruling, improper closing argument or the calculation of the sentencing guidelines. When, however, a client has pled guilty, had no objections to the presentence report, received the bottom of the guideline range or a downward departure and insists on appealing, an Anders brief may well be unavoidable.

Appointed counsel's duties following the denial of an appeal are discussed in section V of The Plan of the United States Court of Appeals for the Seventh Circuit to Supplement the Plans of the Several United States District Courts within the Seventh Circuit (Practitioner's Handbook p. 234, 237-38). Section V provides, in part:

3. After an adverse decision on appeal by this Court, appointed counsel shall advise the defendant in writing of his right to seek review of such decision by the Supreme Court of the United States. If, after consultation (by correspondence, or otherwise), the represented person requests it and there are reasonable grounds for counsel properly to do so, the appointed attorney must prepare and file a petition for writ of certiorari and other necessary and appropriate documents and must continue to represent the defendant until relieved by the Supreme Court. Counsel who conclude that reasonable ground for filing a petition for writ of certiorari do not exist must promptly inform the defendant, who may by motion request this court to direct counsel to seek certiorari.

Appointed counsel are far more likely than retained counsel to be asked to take a case "all the way to the Supreme Court." This can be a cumbersome burden or an exciting challenge. Unless otherwise provided by statute, a petition for certiorari must be filed within 90 days after entry of the judgment sought to be reviewed. Supreme Court Rule 13. Although it is not clear from the paragraph quoted above, if counsel believes there is no non-frivolous basis to petition for certiorari and the client insists counsel file the petition, counsel should file a motion to withdraw in the Seventh Circuit Court of Appeals. Cf., Austin v. United States, 513 U.S. 5 (1994)(suggesting that circuit court rules should be changed so as not to require counsel

to file petitions for certiorari on frivolous claims). If counsel does file a petition for certiorari, counsel must notify the Clerk of the Court for the Seventh Circuit of the mailing or filing of the petition. Circuit Rule 41(e). While counsel considering a petition for certiorari should review the Rules of the Supreme Court generally, Rule 10 should be read and re-read even before communicating with the client about whether to seek certiorari. That rule states:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Under Rule 10, an issue that is hopeless or frivolous in the Seventh Circuit may have merit in a petition for certiorari--for example, when your client loses under a settled Seventh Circuit ruling that is in conflict with rulings from other circuits. Conversely, a legitimate suppression issue in the Seventh Circuit may have no promise as an issue for

certiorari if based wholly on factual findings.

Volume 9 - November 1997

The Defendant's Due Process Right to Reliable Hearsay

by: David Mote

Deputy Chief Federal Defender

On occasion, every defense attorney has a case where the statements another suspect reportedly made would greatly benefit the defense. Jurors often think of the defense as the side that wants to keep out evidence the jury would like to hear, but when hearsay would aid the defendant, the prosecution is always good for a hearsay objection. Generally, of course, Fed. R. Evid. 802 provides that hearsay is inadmissible, subject to numerous exceptions.

The Supreme Court has recognized, however, that the defendant's rights under the Due Process Clause can trump technical rules of evidence. In Green v. Georgia, 442 U.S. 95 (1979), the Supreme Court determined that defense testimony that was highly relevant to a critical issue and had substantial indicia of reliability should not have been excluded on hearsay grounds. The Court pointed out that the statement in question was made "spontaneously to a close friend," that there was substantial corroboration, that the statement was against interest and that there was no reason to believe the declarant had any ulterior motive in making the statement. Green, 442 U.S. at 97.

The decision in Green relied upon the earlier Supreme Court decision of Chambers v. Mississippi, 410 U.S. 284 (1973). In Chambers, the Supreme Court reversed the defendant's conviction because he had been denied the

right to present hearsay testimony regarding statements by a man named McDonald that he had been the shooter and also denied the right to impeach McDonald when he was called by the defense. The Court stated:

"The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."

Chambers, 410 U.S. at 302.

In Lee v. McCaughtry, 933 F.2d 536 (7th Cir. 1991), the Seventh Circuit provided some guidance on what type of hearsay is reliable enough that the defendant should be allowed to use it in his defense. The Seventh Circuit stated: "if a confession is sturdy enough for the state to use it in its own case--if it is the sort of evidence that prosecutors regularly use against defendants--then defendants are entitled to use it for their own purposes." Lee, 933 F.2d at 537 (citing Rivera v. Director, Department of Corrections, 915 F.2d 280, 282 (7th Cir. 1990)). In Rivera, the Seventh Circuit stated that "[t]he due process clause entitles a criminal defendant to demand, irrespective of the state's hearsay rule, a trial 'adequate to separate the guilty from the innocent'." Rivera, 915 F.2d at 281.

In conclusion, if the hearsay is of the type that is "sturdy enough for the state to use it in its own case" and your client needs the hearsay evidence in order to have a fair trial, *i.e.*, a trial "adequate to separate the guilty from the innocent," you should be allowed to introduce it.

Volume 8 - September 1997

The Burden of Coonce

By: David Mote

Deputy Chief Federal Defender

As mentioned in the Defender's Message this month, 97% of federal criminal cases result in convictions. And that means that 97% of those cases lead to Pre-Sentence Reports (PSRs). Accompanying any PSR will be a letter from probation explained your duties in responding to the

PSR. That letter will state, in part, “the party disputing information in the presentence report has the burden of producing evidence challenging the accuracy of the report,” or words to that effect, and cite United States v. Coonce, 961 F.2d 1268 (7th Cir. 1992). As the PSR is generally prepared primarily from reports or information supplied by the prosecutor, it is most often the defendant who has a dispute with information in the PSR. Unfortunately, Coonce and the description of it in the letter from probation are sometimes misunderstood as placing the burden of disproving information in the PSR on the defendant who disagrees with the information. This is not quite correct.

“A defendant has a due process right to be sentenced only on the basis of accurate information.” United States v. Isirov, 986 F.2d 183, 185 (7th Cir. 1993) (citations omitted). Coonce itself appropriately observes that “It may be that in the case of a naked or unsupported charge a defendant need only deny the allegation.” Coonce, 961 F.2d at 1279 (citation omitted). Thus, if there is no apparent basis for a factual assertion or a conclusion in the PSR, that needs to be pointed out in your objection.

The statements in the PSR in Coonce were not considered unsupported because they were based on “the testimony of his convicted agents, interviews with victims, and the testimony of the postal inspector.” Id. at 1279-1280. In that kind of case, there is a shifting burden. The Seventh Circuit summarized the procedure to be followed:

“First, the defendant must challenge the facts in the PSR (or other facts the court might consider) as being unreliable or incorrect. Having done so, and assuming the facts as presented bear sufficient indicia of reliability, the defendant must carry the burden of presenting some evidence beyond a mere denial calling the reliability or correctness of the alleged facts into question. If the defendant meets this burden of production, the burden of persuasion then shifts back to the prosecution, who in turn must convince the court that the facts presented by the government are actually true.”

Coonce, 961 F.2d at 1280 (footnote omitted).

Factual stipulations in a plea agreement may be considered in sentencing determinations, but are not binding. Isirov 986 F.2d at 186; U.S.S.G. § 6B1.4(d). Nonetheless, counsel should obviously avoid stipulating to facts during the plea process that will be contested at sentencing. As

the case law has repeatedly reminded us, the quantity of drugs or amount of financial loss is not generally an element of the offense. Consequently, your client should not have to agree to the amount of drugs or amount of loss stated in the prosecutor’s recitation of the factual basis in order to enter a plea of guilty. If there is a dispute over amount, protect your position by stating on the record that while your client is admitting the offense, the drug quantity or amount of loss is not an element of the offense and may be disputed at sentencing.

With 97% of federal criminal defendants being convicted, the importance of knowing the guidelines and advocating for your client at sentencing cannot be overrated.

Volume 7 - June 1997

Judicial Views on the Guidelines

By: David B. Mote,
Deputy Chief Federal Defender

Earlier this year, the Federal Judicial Center released a report titled: The U.S. Sentencing Guidelines: Results of the Federal Judicial Center’s 1996 Survey. In case you have other things to read while lounging pool side during your summer vacation, yours truly has picked out some of the more interesting tidbits for your enlightenment and edification.

The survey included district judges, circuit judges and chief probation officers. Many questions involved a statement followed with a choice of “strongly agree,” “somewhat agree,” “somewhat disagree” and “strongly disagree.” For simplicity’s sake, I have combined the “strongly agree” and “somewhat agree” responses in some places. Not all questions were asked of all respondent groups.

In response to the statement that the law should be amended to provide for broader ranges in the final sentencing table, more than 81% of district judges and more than 69% of circuit judges agreed.

More than 78% of district judges and more than 67% of circuit judges thought that the guideline ranges should be “de-linked” from statutory mandatory minimums. One primary concern of the respondents was the fact that the mandatory minimums for drug trafficking were based on the quantity of drugs involved. More than three-quarters

of district and circuit judges supported basing mandatory minimums on factors other than drug quantity. Of district judges, 48% felt that drug quantity should have a smaller effect on the sentences than it presently does. More than 60% of district judges thought the scope of relevant conduct was inappropriate. Only 13% of district judges agreed with using “acquitted conduct” against the defendant at sentencing, while 70.6% of circuit judges thought that it was appropriate. (The Booker case, discussed in this month’s *Dictum Du Jour* is an example of this philosophical difference.)

More than 63% of district judges believed alternatives to incarceration should be made available to first-time offenders generally, and more than 66% believed such alternatives should be made available to offenders with extenuating circumstances.

Over 86% of all respondents (district judges, circuit judges and chief probation officers) agreed that the guidelines give too much discretion to prosecutors, with 57% saying they strongly agreed.

If you’re a defense lawyer and you’ve had the feeling that nothing you say will have any effect on your client’s sentence, the survey offers validation for your feelings. When district judges were asked which of the four participants in sentencing--judge, defense attorney, probation officer, or prosecutor--has the most influence over the final sentence under the guidelines, 74.9% said the prosecutor had the most influence, 16.5% said the judge, 7.7% said the probation officer and .1% said the defense attorney. When the same question was asked of chief probation officers, the prosecutor garnered 58.6% of the responses, the judge 31%, probation officers 10.3% and the lowly defense attorney dropped to 0.0%.

Surprisingly, 59% of district judges and 55% of chief probation officers said that they have had cases where they believed the defendant provided substantial assistance, but the government did not make a 5K1.1 motion. More than 80% of both district and circuit judges believed that the court should be able to depart based on substantial assistance without a government motion. Of district judges, 49.4% believed they should be able to depart based on substantial assistance on the defendant’s motion and 55.6% believed they should be able to do so on the court’s own motion. Among circuit judges, 52.6% believed departure for substantial assistance should be permitted on the defendant’s own motion and 67.2% believed it should be allowed on the court’s motion.

District judges and chief probation officers were asked to rate the fairness of the guidelines for frequently used offense guidelines. Both groups of respondents rated drug guidelines as the most harsh and fraud guidelines as the most lenient.

A majority of both district and circuit judges thought waivers of appeal should be used more frequently (67.2% and 62.3%, respectively) while a significant minority believed they should be used less frequently (29.8% and 24.2%, respectively). A majority of circuit judges expressed the view that waivers of appeal should not include ineffective assistance of counsel in pleading guilty (61%) or waiver of the appeal of an upward departure (51.1%). (District judges were not asked about the appropriate scope of the waiver.)

Chief probation officers and district judges were asked to rank the knowledge of the guidelines of different participants in the sentencing process. The frequency with which chief probation officers rated the different participant groups’ knowledge as very good or excellent (combined): district judges (80.2%); probation officers (100%?!); assistant U.S. attorneys (55.8%); federal public defenders (84.7%); CJA panel attorneys (17.4%); private attorneys (10.7%). The combined excellent and very good ratings by the district judges varied slightly: district judges (84.6%); probation officers (94.3%); assistant U.S. attorneys (75.2%); federal public defenders (85.2%); CJA panel attorneys (34.5%); private attorneys (29.7%). Consistent with their responses, more than 80% of district judges and chief probation officers think CJA attorneys and private defense counsel could use more training on the guidelines.

Hopefully, the Sentencing Commission will consider the judges’ responses and broaden the guideline ranges, allow judges discretion to use sentencing alternatives with first-time offenders, “de-link” the guideline ranges from the statutory mandatory minimums and reduce the scope of relevant conduct eliminating, at the very least, the inclusion of “acquitted conduct” at sentencing. In the meantime, you need not feel paranoid just because you don’t think the position you take will have any effect on the sentence. Relax at the pool side and read up on the latest edition of the guidelines.



Volume 6 - April 1997

“We’re From The Government, We’re Here To Help”

By: David B. Mote,
Deputy Chief Federal Defender

Some useful resources have come to my attention in the last month or two--things you may want, even if you don't know it yet. All are available from the United States Government--free of charge! What they are, how to get them, and my own musings:

1. The much discussed report on the scandalous inner-workings of the FBI Laboratory titled **The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (April 1997)** is available on the Internet at the following site: <http://www.usdoj.gov/oig/>. The report is contained in approximately twenty different files. The report is estimated to be between 500 and 600 pages in length. There is an executive summary that is approximately 30 pages.

However bad you imagine the problems in the FBI Laboratory to be, after reviewing even the summary of the report, you will realize it is worse than you imagined. The report is the result of an investigation conducted by the D.O.J. Office of the Investigator General as a result of allegations made by FBI Supervisory Special Agent Frederic Whitehurst, Ph.D. The report indicates that they found “significant instances of testimonial errors, substandard analytical work, and deficient practices.” That’s an understatement.

Regarding the World Trade Center Bombing case, the report finds that the testimony of David Williams, an examiner in the Explosives Unit, as to the quantity and type of explosive the defendants were capable of manufacturing “exceeded his expertise, was unscientific and speculative, was based on improper non-scientific grounds, and appeared to be tailored to correspond with his estimate of the amount of explosive used in the bombing.” The report found that his opinions were based on improper inferences and statements “and speculation beyond his scientific expertise that appeared to be tailored to the most incriminating result.” According to the report, Williams conceded during the investigation of the Lab that “based on the crime scene the main charge could have been

anything. That opinion differs substantially from the opinions he rendered in the Salameh trial that ... ultimately identified the main charge as urea nitrate.” The report also states that “Williams gave inaccurate testimony regarding his role--and the formulas used--in the FBI’s manufacture of urea nitrate, and his testimony concerning his attempt to modify one of Whitehurst’s dictations was misleading.”

David Williams’ work in the Oklahoma City Bombing case was also criticized. “Williams based some of his conclusions not on a valid scientific analysis but on speculation from evidence associated with the defendants.” The report states that “The errors he made were all tilted in such a way as to incriminate the defendants. We concluded that Williams failed to present an objective, unbiased, and competent report.”

The report found that Michael Malone, formerly with the Hairs and Fibers Unit, “falsely testified that he had performed a tensile test and that he testified outside his area of expertise and inaccurately with respect to the test results” in a 1985 judicial committee hearing “relating to then-U.S. District Judge Alcee Hastings, who was subsequently impeached.”

The report also criticized the testimony of Chemical-Toxicology Unit Chief Roger Martz in Florida v. Trepal, a case that resulted in the defendant being convicted and sentenced to death for adding poison to bottles of Coca-Cola. The report found that Martz “offered an opinion stronger than his analytical results would support,” “failed to conduct certain tests that were appropriate under the circumstances, failed to document adequately his work, and testified inaccurately on various points. Martz’s work in this case was seriously deficient.”

Despite the findings cited above, the report states that “the vast majority” of Whitehurst’s allegations were not substantiated, “including the many instances in which he alleged that Laboratory examiners had committed perjury or fabricated evidence. We found, however, significant instances of testimonial errors ...” The report did substantiate Whitehurst’s claims that unauthorized changes were made to some reports he prepared and found that some of the changes “resulted in inaccuracies and unsubstantiated conclusions.”

As to Whitehurst, the report states that “doubts exist about whether he has the requisite common sense and judgment to serve as a forensic examiner.”

The significance of the revelations about the FBI Laboratory are hard to overstate. A brief review of two related newspaper articles demonstrates the just how far the effects of this scandal may reach.

A story in the Wall Street Journal on April 16, 1997 titled Strand of Evidence: FBI Crime-Lab Work Emerges as new Issue In Famed Murder Case, discusses the attempts of Jeffrey MacDonald's lawyer, Harvey Silvergate, to reopen the case that was the basis of the book "Fatal Vision." MacDonald claimed that he had been attacked, and his wife and children attacked and murdered, by a band of drug crazed hippies led by a woman in a long blond wig and a floppy hat. An officer heading to the MacDonald home at 3:30 a.m on the night of the murders had seen a woman with blond hair standing blocks away in the rain and wearing a floppy hat. After MacDonald was convicted and serving a life sentence, "a report was uncovered by defense lawyers through a Freedom of Information Act Request that revealed that a 22-inch blond synthetic fiber was found in the MacDonald home shortly after the murders." This, along with other evidence not turned over by the government during MacDonald's trial, formed the basis of Silvergate's motion for a new trial. Silvergate suggested the "hair" might belong to Helena Stoekey, a nineteen year old drug user at the time of the murders. Stoekey had admitted that she owned and wore a blond wig and, at times, she admitted at times to being involved in the crime. On other occasions she claimed that she took too many drugs to remember. Her testimony was ruled inadmissible. She died in 1983.

Michael Malone, who was found in the report on the investigation of the FBI laboratory to have falsely testified in the Alcee Hastings hearing, investigated the hair issue for the government. Reviewing the evidence, he discovered two additional blond strands, one 24 inches in length, the other 9 inches in length. Malone determined that the synthetic hair, made from a substance called saran, came from dolls owned by the MacDonald girls. He asserted in an affidavit that the saran fibers were "not consistent with the type of fibers normally used in the manufacture of wigs." In a subsequent, more detailed affidavit, Malone stated that he had consulted numerous references routinely used in the textile industry and in the FBI Laboratory and that "none of these standard references reflect the use of saran fibers in cosmetic wigs." He suggested that this was because saran could not be manufactured in the "tow" form necessary to make human wigs. He concluded that the "blond fibers in this case are not cosmetic wig fibers."

The article reports that in 1993, Mr. Silvergate obtained two books under the Freedom of Information Act, one of which was marked as being part of the FBI's crime lab collection stating that "saran was indeed used for wigs." Mr. Silvergate also obtained a "tow" of blond hair one company had once made and obtained statements from wig manufacturers and wholesalers that saran fibers were used in wigs in the 1960s and 1970s. Mr. Silvergate also learned that Malone had attempted to get affidavits from a doll specialist from Mattel stating that a 24-inch saran strand might have come from a Mattel doll and that saran "was the major fiber used for doll hair by Mattel." Disagreeing with both assertions, the specialist refused to sign an affidavit. Malone also sought a statement from an executive with a wig company saying that saran wasn't used for wigs. Since he didn't know about saran, he refused to sign an affidavit prepared by the prosecutors. Instead, he provided his own statement that "didn't commit one way or the other on saran." That statement was not used and the refusal of the doll specialist and the wig company executive to sign affidavits supporting Malone's position on saran was not disclosed to the defense.

Malone's work in other cases has also been criticized. The article notes that prosecutor's loved Malone, or at least his testimony, because despite the fact that forensic specialists maintain that hair testimony is seldom definitive, Malone consistently projected a higher degree of certainty. His certainty hasn't always been shared by the courts of appeals, however. Convictions in Florida cases where Malone testified for the prosecution were overturned in 1987, 1988, and 1997 based on insufficient evidence.

The article reports that in a 1991 murder trial, Malone testified that there was a "very, very strong possibility" that a hair found on a blanket in the van of the defendant's alleged accomplice belonged to the murder victim. By contrast, another expert, the New York State examiner, found "unaccountable dissimilarities" between the victim's hair and the hair found in the van. Fortunately for the defendant, it was discovered that evidence had been mislabeled. The blanket tested by Malone didn't come from the van at all; it was a plain white blanket that belonged to the defendant and had never been near the crime scene. The blanket from the van had flowers on a white background. Confronted with proof of the mislabeled evidence, Malone still insisted he was right about the hair, although he didn't know how it got there. The defendant was acquitted. The defendant's counsel is quoted in the article as stating of Malone: "The guy's a total liar. My client could have been electrocuted based on his testimony if I hadn't discovered he'd been shipped the wrong blanket."

Despite all this, the article reports that Silvergate was concerned that “the courts were so disposed against the well-trodden MacDonald case that they wouldn’t pay much attention to further motions on his behalf.” After the FBI report, however, he believes that the MacDonald case may be seen as part of a larger pattern that will be harder for the court to ignore.

A March 18, 1997 story in the Los Angeles Times by Richard A. Serrano shows how much the FBI lab scandal has hurt the agency. The article reports FBI Director Freeh’s acknowledgment “that he gave ‘incomplete’ testimony to Congress” as a startling admission dealing another setback to the Bureau’s “increasingly tarnished image.” The article quotes Senator Grassley (R-Iowa) who chairs the Judiciary subcommittee that oversees the FBI. “‘We have put too much trust in the FBI,’ Grassley said on the Senate Floor. ‘The FBI has squandered our trust.’”

2. A Report titled **Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial** documenting 28 cases in which persons convicted of crimes were released after DNA conclusively established their innocence may be obtained by writing to the **National Criminal Justice Service (NCJRS), POB 6000, Rockville, Md. 20849-6000** or by calling **1-800-851-3420** navigating your way through a somewhat confusing voice-mail menu, and giving them the exact title of the report you are requesting. They also have numerous reports that are available for “fax on demand,” but the above DNA report is not among them. Incidentally, all 28 cases involved sexual assaults and those wrongfully convicted had been imprisoned an average of 7 years before being released.

3. A free single copy of the Report to the President by the **President’s Committee on Mental Retardation** titled **Citizens with Mental Retardation and the Criminal Justice System** (1991) can be obtained by calling the Committee’s office at **(202) 619-0634**. The report summarizes the contributions of experts in criminal justice and mental retardation who participated in the Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System held in September, 1989. The report will not give you case cites; it will, however, give you a source of authority for the obvious truths that prosecutors often contest because “the defense hasn’t cited any authority supporting his proposition.” For example, the report states: “individuals with mental retardation are sometimes easily led and intimidated, and may have a desire to please the questioner, which makes them vulnerable when questioned

by authorities anxious to resolve a crime.” An obvious proposition which the Attorney General’s Office contested in one of my cases on the ground that I had not cited authority for it. (That was the same Assistant Attorney General, by the way, who stated in response to my argument that my habeas petitioner was actually innocent of the crime for which he had been convicted that “innocence is moot.”) The report concludes with a six page section of quotes on mental retardation and the criminal justice system which, by itself, makes this report something anyone who may be called upon to represent a retarded defendant should have in his or her library. One quote, from Judge Exum, concludes “I asked this defendant if he was willing to waive his right to a jury trial. He said, ‘Yes, your honor,’ and waved his hands. Nobody suggested, nor did it occur to me, that he might be mentally retarded.” (Emphasis in original.)

Volume 5 - January 1997

Bad Law Makes Bad Facts

By: David Mote,

Deputy Chief Federal Defender

The usual saying is, of course, “bad facts make bad law” but a recent case dealing with habeas corpus and the Antiterrorism and Effective Death Penalty Act of 1996 proves the reverse is also true. The case is Swofford v. Detella, 101 F.3d 1218 (7th Cir. 1996).

James Swofford lived with J.S. (a minor, then 3 years of age) and his family for a short time. DCFS removed J.S. and his two siblings from the home in 1988. It was determined that incest had gone on in J.S.’s family for a long time and J.S. made allegations against his mother, his father and Swofford. A grand jury indicted J.S.’s parents and Swofford for abuse. The parents pled to a charge of “improper supervision of a child” and Swofford went to trial.

In response to evidence that J.S. had, in fact, been sexually abused, Swofford’s counsel sought to bring out evidence that J.S. had been abused by others. The prosecutor, however, objected on the grounds that the rape shield law put the victim’s sex life out of bounds and the trial court sustained the objection. J.S., three years old at the time of his abuse and five years old at the time of trial, testified. His testimony about his abuse was graphic and coherent. On cross-examination, however, he seemed confused. Asked where the assault happened, he answered: “Yesterday. Yesterday. Tomorrow.” Asked whether one

assault was around Christmas-time, he answered: “It was five days. One, two, three, four five. It was just seven, eight, nine, ten. Ten days.” Upon being excused from the witness stand, J.S. asked: “Did I tell the truth?”

In closing arguments, the prosecutor, having convinced the trial judge to prohibit the defense from bringing out the fact that J.S. had accused his father of anal rape, argued to the jury that J.S.’s advanced sexual knowledge could only have been the result of an assault by Swofford. The jury convicted in 45 minutes. Swofford’s counsel neither objected to the prosecution’s improper closing argument nor filed a post-trial motion. Mr. Swofford was sentenced to 30 years in prison.

The state appellate court affirmed Mr. Swofford’s conviction and he unsuccessfully sought habeas relief, which the district court denied. Finally, Mr. Swofford’s case went to the Seventh Circuit Court of Appeals.

Despite its professed recognition of the problems with Swofford’s trial, the Court of Appeals affirmed the denial of his habeas petition. The Seventh Circuit began its analysis by noting that under the new habeas provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996, Swofford had to show that the state court decision “‘resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court.’” 28 U.S.C. §2254(d)(1) (1996); Lindh v. Murphy, 96 F.3d 856, 861 (7th Cir. 1996).”

The Seventh Circuit rejected Swofford’s contention that his counsel was ineffective for not arguing that his due process rights overrode the rape shield law. The Court of Appeals noted that while Davis v. Alaska, 415 U.S. 308 (1974)(holding Sixth Amendment right of confrontation overrode states interest in confidentiality of juvenile records) would have supported such an argument, it could not disagree with the state court of appeals decision that counsel’s failure to “sail uncharted waters” constituted ineffective assistance of counsel. The Court of Appeals analyzed Swofford’s contention that the prosecutor’s improper statements in closing argument deprived him of a fair trial under the standard set forth in Darden v. Wainwright, 477 U.S. 168 (1968). That case identified the following relevant factors in determining whether the defendant has been deprived of a fair trial: (1) whether the prosecutor’s arguments manipulated or misstated the evidence; (2) whether the remarks implicated specific rights of the accused, such as the right to remain silent; (3)

whether the defense invited the response; (4) the instructions of the trial court; (5) the weight of the evidence; and (6) whether the defense was afforded the opportunity to rebut the remarks.

The state appellate court had found that the prosecutor’s closing remarks did not substantially prejudice Swofford, placing great weight on the clarity of J.S.’s testimony about the details of how he was sexually abused. The Seventh Circuit stated that, given the state appellate court’s reviewing authority, it “might have come to a different conclusion.” The Seventh Circuit recognized that “the prosecutor did manipulate the evidence in his closing arguments” and “made the evidence appear to stand for a proposition that he knew to be inaccurate.” The court also observed that the prosecutor used the rape shield law “not as a shield, as it was designed, but as a sword.” Nonetheless, the Court of Appeals found that the prosecutor’s closing did not deprive Swofford of a fair trial. The Court observed that “the evidence adduced at trial against Swofford appeared very strong and it is unlikely that these parting shots by the prosecutor made the difference.”

The Court of Appeals concluded that: “Given the competing signals emerging from our Darden analysis and the constraints and limited mandate of our habeas review, see 28 U.S.C. §2254(d)(1)(1996); Lindh v. Murphy, 96 F.3d 656, 861 (7th Cir. 1996), we are unable to conclude that it was unreasonable for the state appellate court to determine that the prosecutor’s statements did not deprive Swofford of a fair trial.”

It is ironic that a bad evidentiary ruling, prompted by the prosecutor, that turns the rape shield law on its head, keeps evidence critical to the defense from the jury and makes the prosecution’s evidence appear stronger than it actually is insulates the same prosecutor’s improper and misleading closing argument.

The Anti-Terrorism and Effective Death Penalty Act of 1996 greatly curtailed federal review of state court convictions. And that law leads to one cold, hard fact for Mr. Swofford; he will get no relief in federal court.

The Seventh Circuit said: “This case leaves us troubled, but addressing this concern is beyond our reach on this habeas petition.”

Words to ponder -- but not for thirty years.

Volume 4 - December 1996

Defense Reciprocal Discovery Obligations: What Isn't Required?

By: David Mote

Deputy Chief Federal Defender

In response to your request for discovery under Brady v. Maryland and Federal Rule of Criminal Procedure 16, you receive a request from the prosecutor for reciprocal discovery under Rule 16, your investigator's reports and notes from witness interviews and "reciprocal Jencks" materials. Do you have to turn over the results of your investigation to the prosecution?

Federal Rules of Criminal Procedure 16(b) and 26.2 provide most of the answers.

Under Fed. R. Crim. P. 16(b)(1), the defendant's duty to turn over (A) Documents and Tangible Objects, (B) Reports of Examinations and Tests and (C) Expert Witnesses is triggered by a defense request for corresponding discovery from the government. The duty of disclosure of information requested pursuant to Rule 16 or pursuant to a court order is a continuing one. Fed. R. Crim. P. 16(1)(c).

Defense counsel should also be conversant with Fed. R. Crim. P. 16(b)(2), Information Not Subject to Disclosure:

Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

The idea that the defendant has discovery duties under the Jencks Act, 18 U.S.C. §3500, is inaccurate. The Jencks Act provides that, on motion of the defendant, the court shall order the government to turn over the statements of any witness on the subject matter of the witness' testimony

after the witness has testified on direct. Nonetheless, there are occasional references to "reverse Jencks" material. See United States v. Bernard, 1993 WL 121258 n.1 (E.D. La) (noting without discussion that the defendant had been ordered to provide "reverse Jencks" material); In re Grand Jury Subpoenas, 659 F. Supp. 628 n.6 (D.Md.1987) (raising hypothetical "reverse Jencks" question under Fed. R. Crim. P. 26.2).

Federal Rule of Criminal Procedure 26.2 does give the government a limited right to witness statements in the possession of the defense under some circumstances. Fed. R. Crim. P. 26.2(a) provides:

After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified. (Emphasis added).

Rule 26.2(f) defines a statement of a witness as: (1) a written statement of the witness signed or otherwise adopted by the witness; (2) a substantially verbatim recital of an oral statement of the witness that is recorded contemporaneously with the making of the statement that is "contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof;" or (3) a statement by the witness to the grand jury however taken or recorded.

A defense investigator's summary of an interview with a prosecution witness is not discoverable by the prosecution under Rule 26.2 as a statement of the prosecution's witness both because the prosecution is not "a party who did not call the witness" and because a summary of an interview is not a statement under 26.2(f). If, however, the prosecution witness gives testimony that is inconsistent with what he or she told the investigator and the investigator testifies as to his interview of the prosecution witness, the investigator's report of his interview with that witness may be discoverable by the prosecution as a statement of the investigator relating to the subject matter of the investigator's testimony.

The above discussion shows why the defense should not be

compelled to provide its investigator's reports prior to trial. While early disclosure of discovery under Jencks and Fed. R. Crim. P. 26.2 is generally preferred because it avoids delays during trial, the defense is always in the position of responding to the government's case. If a prosecution witness testifies consistently with what he or she told the defense investigator, there would normally be no reason to call the defense investigator to testify about his interview of the witness. Thus, the defense will not know whether the defense investigator will testify regarding his interview of a prosecution witness until the defense hears the testimony of the prosecution witness.

In summary, the defense does not appear to have any pre-trial duty to turn over to the prosecution its investigator's reports of witnesses under Rule 16 or Rule 26.2, though there would appear to be a duty to turn over the investigator's report of the interview of any witness if the investigator is called to testify about what the witness told him in the interview.



Volume 3 - September 1996

Seventh Circuit Signals Sanctions: Brief-Writers Beware!

By: David B. Mote

Assistant Federal Public Defender

In a Seventh Circuit opinion cited on August 13, 1996, the Seventh Circuit sounded an ominous warning. In the matter of Galvan, 1996 WL 454498, 92 F.3d 582 (7th Cir. 1996), the court discussed the appropriate sanction to impose on four counsel in criminal appeals for failure to comply with Circuit Rule 30. Counsel is required to include in the appeal a statement that the appendix complies with all the requirements of Circuit Rule 30. The four counsel who were subject of the Galvan opinion had the misfortune of submitting with their briefs appendixes that failed to fully comply with Circuit Rule 30. Circuit Rule 30 requires:

(a) Contents. The appellant shall submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court or administrative agency upon the rendering of that judgment, decree, or order.

(b) Additional Contents. The appellant shall also include in an appendix:

(1) Copies of any other opinions or orders in the case that address the issues sought to be raised.

(2) Copies of any opinions or orders in the case rendered by magistrates or bankruptcy judges that address the issues sought to be raised.

(3) Copies of all opinions, orders, findings of fact and conclusions of law rendered in the case by administrative agencies (including their administrative law judges). This requirement applies whether the original review of the administrative decision is in this court or was conducted by the district court.

(4) An order concerning a motion for a new trial, alteration or amendment of the judgment, rehearing, and other relief sought under Rules 52(a) or 59, Fed.R.Civ.P.

(5) Any other short excerpts from the record, such as essential portions of the pleading or charge, disputed provisions of a contract, pertinent pictures, or brief portions of the transcript, that are important to a consideration of the issues raised on appeal.

(6) The documents in (b) may also be placed in the appendix bound with the brief if these documents when added to the required appendix in (a) do not exceed fifty pages.

(c) Statement that All Required Materials are in Appendix. The appendix to each appellant's brief shall contain a statement that all of the materials required by parts (a) and (b) of this rule are included. If there are no materials within the scope of parts (a) and (b) of this rule, counsel shall so certify."



Judge Easterbrook indicated that the presence of the Rule 30 certificate assured the court that counsel was aware of and had complied with the Rule. Indicating how seriously the court looked on errors in the appendix, the court stated, “We expect that lawyers will execute formal assurances only after doing their utmost to make them truthful; a false representation to a court is a serious delict.”

The court noted that compliance with Rule 30 in criminal cases is poor. Judge Easterbrook stated that the risk of dismissal has led to substantial compliance in civil appeals. He then stated: “Unfortunately, the lack of an effective sanction in criminal cases has led counsel to be careless, or, worse, to behave strategically--to omit the district court’s reasons in the hope that silence will make the district court’s decision look unsupported.” The court noted that the ineffectiveness of it’s prior admonition led it to impose a \$1,000 fine on counsel for failing to comply with Rule 30 in Hill v. Porter Memorial Hospital, 90 F.3d 220 (7th Cir. 1996). The court noted that while it was hesitant to impose on CJA attorneys fines that might approximate their full compensation for handling the appeal, the rules must nevertheless be enforced “especially when violation entails misrepresentation to the court. We therefore have decided that fines will be used in future criminal cases, but only for briefs filed after July 19, 1996,” the date of the Hill opinion.

From my own experience in preparing criminal appeals, I know that complying with the morass of technical requirements imposed by both the Federal Rules of Appellate Procedure and our own 7th Circuit Rules is often the most difficult aspect of preparing an appeal. Judge Easterbrook’s characterization of defense counsels’ work on appellate briefs as careless or worse is, in my opinion, unjustified. I believe that the majority of omissions in appendixes by criminal defense counsel are simply inadvertent and that only a small minority are likely to involve any intentional false misrepresentation. Nonetheless, in light of Galvan, all criminal defense counsel should be especially careful in appendixes for briefs. In Galvan, the court emphasized that under Rule 30 the appellant’s appendix must include:

- 1) Any document styled an opinion, memorandum, or entry;
- 2) Any transcript containing oral statements of reasons for admitting or excluding evidence, denying motions to sever, imposing sentence, or any other action that is contested on appeal

(counsel is responsible for ordering the transcript of any such oral statement of reasons).

- 3) Any pretrial order or transcribed statement of reasons concerning a motion to suppress or in limine, or to dismiss, that is contested on appeal. Statements of reasons for decisions not contested on appeal need not be included in the appendix.

Galvan also noted that in two of the four cases it was considering, counsel had also failed to comply with Circuit Rule 28(d)(2) which provides: “No fact shall be stated in the statement of facts unless it is supported by a reference to the page or pages of the record or the appendix where that fact appears.”

If, after reviewing the Galvan decision, you believe you have pending an appeal where your brief does not comply with Rule 30, you may wish to file a motion in the Court of Appeals to supplement your appendix or to withdraw the appeal to correct the appendix. If you are not in that situation, I hope that this will be “words to the wise.”

Volume 2 - May 1996

**TO RESENTENCE OR NOT TO
RESENTENCE: THE QUESTION
AFTER BAILEY**

By: David Mote
Assistant Federal Defender

The Supreme Court’s decision in United States v. Bailey, 116 S.Ct. 501 (1995), discussed in the first issue of this newsletter, has led to a plethora of habeas petitions by inmates contending that their sentences for use of a firearm in a drug crime should be vacated under Bailey. In Bailey, the Supreme Court held that a firearm locked in the trunk of a car or a locked footlocker in the closet of a drug dealer is not being “used” within the meaning of 18 U.S.C. §924(c).

In a number of cases where the facts on the record clearly do not qualify as “use” under Bailey, the government has conceded the habeas petition and then sought to have the defendant resentenced on another count. A pending case in point is Woodhouse v. United States, Do. Nos., 96-3040 & 90-30039 (C.D. Ill., Springfield Division). Mr. Woodhouse pled guilty to conspiracy to distribute LSD and use of a firearm in a drug offense. The “use” consisted

of the presence of a firearm at his residence. Following a 5K1.1 motion by the government, the defendant was sentenced to 67 months on the conspiracy count and the mandatory consecutive 60 months imprisonment on the firearm count. Because he was being separately sentenced for the firearm, defendant did not receive a two point enhancement to his offense level on the conspiracy count for possession of a firearm.

In response to his habeas petition, the government conceded that the firearm was not “actively employed” in a drug transaction as required to establish “use” for the purposes of 18 U.S.C. §924(c) under Bailey. After his sentence under 18 U.S.C. §924(c) was vacated, the government sought to have him resentenced on the drug count adding the two offense levels for possession of a firearm during a drug offense that he had not received at his original sentencing because he was being sentenced separately for the firearm pursuant to 18 U.S.C. §924(c).

Mr. Woodhouse’s case is somewhat unusual, as he had fully served his term of imprisonment on the drug offense before his habeas petition was granted. Despite the fact that Mr. Woodhouse has served his full term of imprisonment on his drug conviction, the government still maintains that the court should resentence him on that count. That issue is still pending before Judge Mills.

What arguments do you have to resist the government’s efforts to resentence a defendant on an accompanying charge after his conviction and sentence under 18 U.S.C. §924(c) are vacated? At the heart of the defense arguments is the Double Jeopardy Clause of the Fifth Amendment.

The Government’s Memorandum in Woodhouse cites numerous cases in support of the proposition that the Court has authority to resentence after the original sentencing package is disturbed. It appears, however, that none of the cited cases dealt with a situation where, as here, the government was seeking to resentence the defendant on a count on which he had fully served his term of imprisonment.

In Woodhouse, the government has relied on United States v. DiFrancesco, 449 U.S. 117 (1980), where the Supreme Court stated that the constitutional finality that attaches to a jury’s verdict does not attach in a similar manner to a criminal sentence at the time it is pronounced.

While the government is correct that resentencing is allowed in some cases, there are limits. In United States v. DiFrancesco, 449 U.S. 117 (1980), the Court stated: “The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence.” DiFrancesco, 449 U.S. at 136. The reasoning of DiFrancesco, however, is significant: “The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence **until the appeal is concluded or the time to appeal has expired.**” DiFrancesco, 449 U.S. at 136 (emphasis added).

Later Supreme Court cases make clear that DiFrancesco did not gut the Double Jeopardy Clause’s protection against being twice sentenced for the same offense as thoroughly as the government has suggested. Nine years after DiFrancesco, in United States v. Halper, 490 U.S. 435 at 440 (1989), the Supreme Court stated:

“This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The third of these protections--the one at issue here--has deep roots in our history and jurisprudence. As early as 1641, the Colony of Massachusetts in its ‘Body of Liberties’ states: ‘No man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.’ American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: ‘No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.’ 1 Annals of Cong. 434 (1789-1791)(J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: ‘If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.’ Ex parte Lange, 18 Wall. 163, 168, 21 L. Ed. 872 (1874).”

Since DiFrancesco was decided, the Seventh Circuit has had several occasions to consider its significance on the question of resentencing. In United States v. Bishop, 774 F.2d 771 at 776 (7th Cir. 1985), the Seventh Circuit stated:

“The Supreme Court in DiFrancesco also stated that the

Double Jeopardy Clause does protect the ‘legitimate expectations’ of the defendant as to the length of his sentence. The Court in DiFrancesco noted that since the defendant in that case was ‘charged with knowledge of the statute and its appeal provisions, the defendant had no legitimate expectation of finality’ since he knew the government could appeal his sentence. [United States v. DiFrancesco, 449 U.S.] at 136, 101 S.Ct. At 437. The Eleventh Circuit’s decision in United States v. Jones, 722 F.2d 632 (11th Cir. 1983), illustrates when a defendant has a legitimate expectation in the finality of his sentence when an error occurs in the sentencing process. The Eleventh Circuit was faced with the situation where the district court had relied on erroneous information in sentencing the defendant to six-months imprisonment and imposing a \$10,000 fine. The district court, upon learning that it relied upon improper information in sentencing the defendant, resentenced him to an increased term of incarceration. The Eleventh Circuit reversed stating that since the defendant had begun to serve his sentence, his legitimate expectation in the finality of his sentence barred any resentencing by the court. The Jones decision noted that the defendant had not provided the erroneous information, and thus, the defendant at the time of his original sentencing held a legitimate belief in the finality of his sentence.”

The Seventh Circuit again spoke to the issue in United States v. Daddino, 5 F.3d 262 at 265 (7th Cir. 1993). In that case, the district court amended Daddino’s sentence to include the costs of his incarceration and supervision after the time for either party to appeal had passed and after Daddino had served his term of imprisonment and paid all fines and restitution ordered. Daddino, 5 F.3d at 264-65. Daddino appealed the amendment of his sentence and the Seventh Circuit reversed. The Seventh Circuit stated:

“In United States v. Bishop, we stated that ‘the Double Jeopardy Clause respects the defendant’s ‘legitimate expectations’ in the finality of his sentence.’ 774 F.2d 771, 775 (7th Cir. 1985), citing United States v. DiFrancesco, 449 U.S. 117, 137, 101 S.Ct. 426, 437-38, 66 L.Ed.2d 328 (1980). The DiFrancesco court held that a defendant ‘has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired,’ but did not indicate exactly when during the service of a sentence such an expectation arises. 449 U.S. at 136, 101 S.Ct. at 437. In United States v. Arrellano-Rios, the Ninth Circuit held that although it is possible for such an expectation to arise earlier, it would certainly have arisen once the defendant completed service of a sentence of incarceration. 799 F.2d 520, 524 (9th Cir. 1986); see

also United States v. Fomai, 910 F.2d 617, 621 (9th Cir. 1990)(defendant acquired a legitimate expectation of finality in a reversed conviction when the time for appeal had expired and defendant had completed his sentence on the affirmed conviction by paying the fine). When the district court amended his sentence, Daddino had completed service of his sentence and paid all fines and restitution; only a portion of his probation and supervised release remained. As a consequence, Daddino acquired a legitimate expectation of finality in both the length of his incarceration and the amount of his fines and restitution. Therefore, the district court could not disturb these aspects of his sentence.”

Daddino, 5 F.3d at 265.

Other circuits which have considered the issue of when a sentence becomes final for double jeopardy purposes have reached similar conclusions. In United States v. Cook, 890 F.2d 672 (4th Cir. 1989), the Fourth Circuit stated: “it would be fundamentally unfair and a violation of due process to allow a district court to enhance a sentence ‘after the defendant has served so much of his sentence that expectations of its finality have crystallized.’” United States v. Cook, 890 F.2d at 675 (quoting United States v. Lundien, 769 F.2d 981 (4th Cir. 1985), cert. denied, 474 U.S. 1064 (1986)). The Second Circuit succinctly stated the matter in United States v. Rico, 902 F.2d 1065 (2d Cir. 1990), cert. denied, 498 U.S. 943: “So long as a sentence can be increased on appeal, defendant has no expectation of its finality. The expectation of finality comes from the prospect of release as defendant nears the end of his or her prison term.”

Rico, 902 F.2d at 1068 (citations omitted).

If your client’s §924(c) conviction was vacated on appeal, resentencing would not appear to be barred by the Double Jeopardy Clause. If, however, neither party appealed and the time to appeal has passed, the Double Jeopardy Clause and the cases discussed above provide powerful arguments against resentencing.

Volume 1 - March 1996

"PLEA" AGREEMENT?

**UNACCEPTABLE, NON-NEGOTIABLE
WAIVERS OF APPEAL AND §2255 RIGHTS
INCORPORATED INTO “NEGOTIATED” PLEA
AGREEMENTS**

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The United States Attorney’s Office for the Central District of Illinois has recently begun a disturbing practice of insisting that a defendant negotiating a plea waive all his rights to appeal his sentence or challenge it in a post-conviction proceeding. The inclusion of these draconian measures in plea agreements coming out of the U.S. Attorney’s Office has thus far been non-negotiable. Consequently, the Federal Defender’s Office has opted on several occasions to enter an open plea rather than accept the government’s oppressive terms. The language being included in proffered plea agreements is as follows:

“Defendant is aware that 18 U.S.C. §3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction on the grounds set forth in 18 U.S.C. §3742 or on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement. Defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. §2255.”

It is important to note that the language used in the waiver of the right to appeal the sentence applies to “any sentence within the maximum provided in the statute(s)” rather than any sentence within the guideline range. Under this language, the defendant would be unable to appeal even if the sentencing court departed upward from the guideline range. The Seventh Circuit has already shown that it will enforce such a waiver. In United States v. Wenger, 58 F.3d 280 (7th Cir. 1995), Cert. Denied, 116 S.Ct. 349, the Seventh Circuit dismissed an appeal where the sentencing court departed upward from an 18-24 month guideline range and sentenced defendant to 54 months based on the defendant’s waiver of his right to appeal in the plea agreement. The court stated that “if defendants could retract their waivers ... then they could not obtain concessions by promising not to appeal.” Wenger at 282. The court further indicated that: “To say that a waiver of appeal is effective if and only if the defendant lacks grounds for appeal is to say that waivers will not be honoured.” Id. The court did not consider a more specific waiver preferable: “Perhaps the parties could have negotiated a more complex waiver, containing an estimate of the likely sentencing range and a promise by Wenger not to appeal unless the sentence exceeded the upper

bound. Yet greater complexity makes the waiver even less understandable to litigants, and therefore may not be an improvement after all.” The Wenger court specifically observed that Wenger was not asking to withdraw his plea, but rather just to remove a provision of the plea agreement (the appeal waiver) he wished it did not contain. Id. at 283. Thus, it is possible, though not likely, that a defendant in a similar position seeking to withdraw his plea after an upward departure might have more success.

The waiver language being included in plea agreements raises the question of just how much the defendant can waive. The Supreme Court has held that a defendant may waive the inadmissibility of plea negotiations. United States v. Mezzanatto, 115 S.Ct. 797, 806 (1995). In reaching that determination, the Court stated that: “The mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether.” Id. However, defense attorneys can take comfort in the Seventh Circuit’s recognition that there are some limits to what rights the defendant can waive: “if the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.” United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985). (The inquisitive reader might naturally wonder why the Seventh Circuit automatically assumes the jury of 12 orangutans will convict rather than acquit.)

While it is the waiver of appeal rights that seems most likely to actually prejudice the defendant, the inclusion of the waiver of §2255 rights also presents serious problems. Foremost among these is the conflict defense counsel would have in advising a client to waive his right to file a §2255 petition should the defendant later learn that counsel’s representation was somehow ineffective.

So long as the U.S. Attorney’s Office insists that all written plea agreements contain the waivers discussed above, defense counsel should seriously consider the advantages of entering an open plea over a “negotiated plea” in those cases where the defendant should not proceed to trial. At least with an open plea, the defendant can appeal an error in the guideline calculation or an unjustified upward departure.

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