

# The Advocate

Louisiana Association of Criminal Defense Lawyers

Volume 5, Issue 1

Lee Harville, Issue Editor

Winter 2008

## 18th Annual Law & All That Jazz CLE Seminar

Featuring Issues On:

Eyewitness Misidentification, False Confessions, Bad Identifications,  
Junk Science, Competency, Insanity & Child Interviews

April 24-26, 2008

Chateau Sonesta Hotel - New Orleans, LA



Photo Credit: The Louisiana Office of Tourism

**INSIDE:**

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- **PREMIER CRIMINAL DEFENSE SEMINAR HIGHLIGHTS AND PICTURES**
- **22ND ANNUAL TATE AWARD BANQUET HIGHLIGHTS AND PICTURES**

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Volume 5, Issue 1  
Winter 2008

## FROM THE PRESIDENT, Elton Richey

### Restoring Blackstone's Ratio

While the United States boasts the highest incarceration rate in the civilized world Louisiana maintains the highest per capita incarceration rate in a nation. We build no new prisons to house the convicted, and yet incarceration has become a cottage industry among the Sheriffs in this state. As a citizen, as a lawyer, and as the newly elected President of LACDL, this concerns me. It should concern you. The collateral damage in the ever-expanding war on crime has left no part of the American civilization and its foundational principles unscathed. I believe our cultural obsession with crime and punishment is less a reflection of the criminality of our citizens than a reflection the corruption of our political system by those willing to pander to public fears for their office, while paying lip service to the foundational principles upon which our civilization was erected.

But, I am here to tell you there has never been a better time in this country's history to be a criminal defense lawyer. People are talking. Yes, it is true that at every session the legislature creates more crimes, makes sentences harsher, and casts the forfeiture nets ever wider. At the same time though, demonstrably innocent people are being released from prison, even from Death Row, at an ever-alarming rate. The ministers, bankers and businessmen I talk to are beginning to recognize that courtrooms are less about justice and morality than they are about rubberstamping the actions of overzealous police and prosecutors. Now with the creation of a statewide system to provide for indigent defense, we have a great opportunity to bring about major positive changes in the administration and operation of our criminal justice system.

Certainly, I don't expect anyone to agree with me all the time, and that's okay. And while I don't have all the answers to the problems plaguing our system, I do believe that the time is right for us as individuals and as an organization to make a difference. I also know that anyone elected to lead this organization owes it to the membership to explain where he is going if he wants the membership to follow. So here's my plan—the vision is nothing less than for LACDL to become the premier state association for advancing the professional interests of criminal defense practitioners. Whether they are public defenders or private lawyers, whether their clients are blue collar or white collar, it does not matter.

The target upon which we will set our collective sites is to nothing less than the restoration of Blackstone's Ratio —**10:1**— the shifting of the philosophical and practical balance of the criminal justice system in this state to Blackstone's axiomatic observation that it is "Better that ten guilty persons escape than that one innocent suffer."

This lofty goal will not be accomplished today, tomorrow or even this year. It requires long-range planning by this organization and a long-term commitment from each of us. It requires hard work, but it is nonetheless achievable. Our members, our colleagues, our clients and our fellow citizens deserve nothing less. There is much groundwork to be laid this next year.

A healthy organization requires a healthy functioning committee system. We have grown beyond the point of being able to depend on one or two "old hands" and the association management team to get the important work of this organization done. My first goal for the New Year is to work with the Executive Committee and the committee chairs and co-chairs to set goals and develop plans to get their important work accomplished between the quarterly board meetings.

*continued on top of page 5*



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# Executive Director's Message

By: David Tatman

It is that time of year again to renew your 2008 annual LACDL membership dues. The first dues invoices were mailed in the middle of November and the second invoices will be mailed in February. However, you can call the LACDL office at 225-767-7640 and request a membership form or you can download one from the LACDL website at [www.lacdl.org](http://www.lacdl.org).

Please remember, membership is the driving force behind our association and every member should make an effort to recruit at least one new member in 2008. You can also download and print a membership brochure on the LACDL website, which will provide you with resources to solicit our potential members.

The 2008 LACDL Board will meet on February 8-9, 2008 in Alexandria, LA at the Parc England Hotel for the Board Planning Retreat and Board Meeting. LACDL President, Elton Richey, has some exciting plans for LACDL and all members are encouraged to attend. If you would like to attend the Planning Retreat and Board Meeting, please call Jill Guillory at the LACDL office (225-767-7640) for more information.

Make plans to join us for our 18th Annual Law & All That Jazz seminar scheduled for April 24-26, 2008 at the Chateau Sonesta Hotel in New Orleans, LA. Seminar Co-Chairs, Jim Boren, Mike Mitchell, John DiGiulio and Elton Richey, along with assistance from CLE Committee Chair, Marci Blaize, have lined up some exceptional speakers who are sure to keep the attention of the attendees. **The seminar registration form is located on page 7 and you can view a detailed agenda on the LACDL website. Call the hotel at 504-586-0800 now and make your reservations. Make sure to mention LACDL and the Law and All That Jazz Seminar to receive the special room rate of \$179.** The Jazz Fest music schedule and line-up is out and there are some great artists appearing the weekend of the seminar. Buckwheat Zydeco, Sheryl Crow, Robert Plant, Alison Krauss, Dr. John, Billy Joel, Keyshia Cole, Cowboy Mouth, Wayne Toups, Benjy Davis Project, Irma Thomas, Tim McGraw, Al Green and Elvis Costello just to name a few. Plan to attend the seminar, we would love to see you there!

Again, thank you for your continued support in the Louisiana Association of Criminal Defense Lawyers. Please take the time to renew your membership and help us become an even more significant force in Louisiana.

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PLEASE SUPPORT THE ADVERTISERS IN THIS ISSUE AS THEY HAVE SUPPORTED LACDL!!!

On February 9<sup>th</sup> we will gather in Alexandria for a Board of Directors and committee member retreat. **You need to be there!** Not a member of the Board? Doesn't matter! You don't have to be a board member to be on a committee or even chair a committee. Want to see the organization move in some new directions? Step up and chair a committee or co-chair to get your feet wet and learn the ropes. The worst thing that can happen by showing up for the retreat is that you will have the chance to spend some time with your colleagues planning the future of our organization and its impact on the courtrooms in which we work. The best thing that can happen is that you will become involved in the leadership of this organization and it, you, and your clients will be the better for it. Whatever happens it will be exciting!

We are told that at the Alamo a young Lieutenant Colonel by the name of William Barrett Travis Legend gazed out across the Texas prairie at Santa Anna's gathering forces, and drew a line in the sand. Then, he asked all those who would stand with him to cross the line. All the men present, save one, stepped across. They all perished with him at the Alamo.

"Talking about Freedom," Travis had told them, "is always easier than coming face-to-face with a man who is trying to take it away." Every day we come face-to-face with such men and women. Now, I'm not drawing any lines in any sand. And, I'm not asking anyone to make the kind of sacrifice that Barrett asked of his Freedom Fighters. But, I am asking you to stand with your colleagues and dedicate your time and your talent to the practical work of making our shared vision a reality.

Show up for the retreat. Attend the seminars and the board meetings. Chair a committee. Write an article for the Advocate. I am asking you to take an active participatory role in the growth and leadership of this organization. Whether you are in private or public practice or both does not matter. What matters is whether you will answer this call to do something outside the universe of your courtroom to advance the cause of Justice and Freedom. I trust that you will. Remember—**10:1**.

Elton B. Richey, Jr.  
LACDL President

### LACDL Upcoming Events

#### 2008 Board Planning Retreat & Board Meeting

February 9, 2008  
Retreat: 9:00 am – 1:00 pm  
Board Meeting: 1:00 pm – 3:00 pm  
Parc England Hotel – Green Room  
Alexandria, LA

#### 18<sup>th</sup> Annual Law and All That Jazz CLE Seminar

April 24-26, 2008  
Chateau Sonesta  
New Orleans, LA

#### Board Meeting

April 26, 2008 (tentative)  
Chateau Sonesta  
New Orleans, LA

#### Nuts & Bolts CLE Seminar

July 17-18 or 24-25, 2008  
Location - TBD  
Baton Rouge, LA

#### Art of Law CLE Seminar

October 9-10, 2008  
Hilton (New Location)  
Shreveport, LA

#### Board Meeting

October 11, 2008 (tentative)  
Hilton (New Location)  
Shreveport, LA

#### Last Chance CLE Seminar

December 4-5, 2008  
Hotel Monteleone  
New Orleans, LA

#### Tate Awards Banquet

December 5, 2008  
Hotel Monteleone  
New Orleans, LA

#### General Membership & Board Meeting

December 4, 2008 (tentative)  
Hotel Monteleone  
New Orleans, LA

### 2008 Proposed Presidential Caucus Resolution Submitted By: George Steimel

- Whereas, there are over two million men and women incarcerated in American prisons (and almost eight million people incarcerated or under some sort of supervision);
- Whereas, the vast majority of those inmates were convicted of drug offenses (and other non violent offenses);
- Whereas, the present War on Drugs is an absolute failure as evidenced by the increasing number of drug offenders in prison;
- Whereas, treatment is far more effective and efficient than incarceration (new advances in addiction medicine have developed drugs to cure cocaine addiction, in some instances with one dose);
- Whereas, a large percentage of the billions of tax dollars being spent on enforcement and imprisonment could be diverted to prescription drugs for the elderly and for education.
- Be it resolved, that the Democratic Party urges the U.S. Congress to pass and the President to sign legislation that eliminates mandatory minimum laws, reinstates federal parole, and makes treatment rather than incarceration available to all offenders.

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## **FOR YOUR INFORMATION:**

### **Federal Crack Cocaine Guideline Reduction**

U.S. Sentencing Commission changes crack cocaine sentencing guideline.

The U.S. Sentencing Commission approved guideline changes to federal crack cocaine penalties. The April 2007 amendment affected approximately 78 percent of defendants convicted of crack cocaine offenses, reducing their sentences by an average of 16 months. It was sent to Congress on May 1, 2007. Because Congress took no action to nullify this change the result is that on November 1, 2008, there is a two point reduction in all crack cocaine base offense levels subject, of course, to the statutory mandatory minimum.

While this incremental change does not equalize crack and powder cocaine as the Commission recommended in 1995, it is a start. For 15 years the Commission has researched crack cocaine and its penalties and concluded current federal crack sentences are unjustifiable. Among the findings from its 2002 report to Congress, "Cocaine and Federal Sentencing Policy," are that crack penalties:

1. exaggerate the relative harmfulness of crack cocaine
2. sweep too broadly and apply most often to lower level offenders
3. overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality
4. and mostly impact minorities.

Despite this evidence, Congress and the U.S. Sentencing Commission had been in a stalemate for a dozen years over how to improve crack sentences.

During that time, nearly 56,000 people were sentenced under the harsh federal crack cocaine statutes and guidelines. The United States Sentencing Commission advised that this amendment will affect over 19,000 people across the country and 231 defendants sentenced in the Eastern District of Louisiana. The amendment did not affect people sentenced before November 1, 2007. However, the United States Sentencing Commission has ruled that the amendment reducing the Base Offense Level by 2 points will become effective March 8, 2008.

It is probable that you will soon be receiving calls from clients who were already sentenced for distribution of crack. There are training sessions being held to determine how to handle retroactivity. Simply stated, this amounts to a two level reduction in the base offense level, subject, of course, to the statutory mandatory minimum.

However, with the recent win in United States V. Kimbrough, judges have discretion to depart even further. Go for it!

## **18th ANNUAL LAW and ALL THAT JAZZ CLE SEMINAR**

**April 24-26, 2008**

### **HOTEL INFORMATION:**

The Chateau Sonesta fronts Iberville Street in the heart of the French Quarter and boasts some of the most spacious guest rooms in New Orleans, with spectacular high ceilings, and balconies with views of Bourbon Street or Dauphine Street or wonderful interior courtyards. And, of course, you're within walking distance of everything that you come to New Orleans for - great music, award-winning restaurants, eclectic shopping and a red-hot nightlife.



**For reservations call the Chateau Sonesta at 504-586-0800 and make your reservations now! After March 24, 2008, the special room rate of \$179 will not be guaranteed and reservations will be based on hotel availability.**

**Make sure to mention LACDL and the Law and All that Jazz Seminar to receive the special discounted room rate of \$179.**

The hotel is located in the French Quarter at 800 Iberville Street, check-in time is 3:00 pm and check-out time is 12:00 pm.

**Appearing at Jazz Fest April 25-27, 2008:  
Sheryl Crow, Robert Plant, Alison Krauss,  
Dr. John, Billy Joel, Keyshia Cole, Cowboy  
Mouth, Wayne Toups, Benjy Davis Project,  
Irma Thomas, Tim McGraw, Al Green,  
Elvis Costelo and many more!**



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# 18th Annual Law and All That Jazz CLE Seminar Registration

## SEMINAR FEES: (A CD of materials will be included with all registrations)

- \*\*\*LACDL Member  \$435- With Printed Materials & CD \*\*  
 \$400- CD only

\*\*\* As a benefit of being an LACDL Member, we will offer a \$100 discount to all members UNTIL March 24, 2008. Fees must be received at the LACDL office before March 24th. After March 24, 2008 the registration fee will be \$400 for a CD only and \$435 for printed materials and a CD.

- Non-Member**  \$510- With Printed Materials & CD \*\*  
 \$475- CD only

- New Members Joining\***  \$385- With Printed Materials & CD \*\*  
 \$350- CD only

- Non-Lawyer Team (P.I., Paralegal, etc.)**  \$235- With Printed Materials & CD \*\*  
 \$200- CD only

- Thursday Only**  \$245- With Printed Materials & CD \*\*  
 \$210- CD only

- Friday/Saturday Only**  \$185- With Printed Materials & CD \*\*  
 \$150- CD only

- Life Time Member**  \$35- With Printed Materials & CD \*\*  
 No Charge - CD only

**Please complete and mail with appropriate registration fees to:**

**LACDL**  
P. O. Box 82531  
Baton Rouge, LA 70884

**For Questions, Contact:**  
Jill Guillory or Patty Young

Phone (225) 767-7640  
Fax (225) 767-7648  
www.lacdl.org



\*A "New Member Joining" must pay their membership dues at the same time as their seminar registration fee. (Membership Dues: Lifetime \$2000, Sustaining \$250, Regular \$150, and Indigent Defender \$75).

\*\* Printed materials will not be available to purchase at the seminar. Printed materials that have been purchased in advance will be handed out at the Seminar. If you would like printed materials, they **MUST** be purchased in advance, before April 7, 2008. \*\*If you are requesting CLE credit in another State, please make sure to add an additional \$25 for each additional State.

**CANCELLATION POLICY & LATE REGISTRATION:** All registrations received after **April 7, 2008** without a registration fee included will incur a \$50 late registration fee. All registrations cancelled on or after **April 7, 2008** will incur a \$100 cancellation fee. **LACDL will not issue a refund for "No Shows."**

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If paying by credit card, you can fax your completed registration form to 225-767-7648.

**Registration Fee:** \$ \_\_\_\_\_  
(Check the appropriate box above)  
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(If after April 7, 2008) \$ \_\_\_\_\_  
**\*\*If requesting CLE credit in another State, please add \$25 for each State:** \$ \_\_\_\_\_  
**Total Amount Enclosed:** \$ \_\_\_\_\_

# Association and Member News Bulletin Board

## REMINDER:

**18th Annual  
Law and All That Jazz CLE Seminar  
April 24-26, 2008  
Chateau Sonesta  
New Orleans, LA  
Call 504-586-0800 for reservations now!  
Room block deadline is March 24, 2008.**



LA's Premier Seminar Meet the Enemy Panel, Ralph Brandt, Honorable Davis & Christine Lehmann



Enjoying the Cocktail Reception before the Tate Banquet.



John James, Nathan Bays and Prof. Katherine pose for a picture after their LACDL Premier Criminal Defense Seminar, "Competency Hearings" presentation.

Dear Members of the LACDL,

On behalf of the Tulane Law Clinic, I just wanted to say thank you for allowing us to give a presentation at the November 30th seminar. It was truly an honor for us to be able to present on the current state of mental competency hearings in Louisiana—it's one of the topics we've been focusing on in the clinic this year, and the opportunity to share our work with all of you was exciting for us. We really enjoyed the chance to interact with the Louisiana criminal defense community and are deeply appreciative of your kindness in allowing us to attend. Keep up the good work!

Thanks,  
Nathan Bays  
Tulane Law Clinic  
LACDL Student Representative

Dr. Mr. DiGiulio,

Being that it is near Thanksgiving, I thought it would be appropriate that I finally take the time to thank LACDL for granting me the Camille Gravel scholarship and allowing me the opportunity to attend the National Criminal Defense College in Macon, GA this past June. Words cannot express how grateful I am for the experience. I had a chance to be part of a cohort of defense attorneys who are absolutely inspiring and I benefited both professionally and personally.

At present, I continue to work with juveniles and young adults in Orleans Parish. I recently applied for funding to initiate a project to better represent New Orleans youth who are charged as adults. Ultimately, the project seeks to reduce juvenile transfers to criminal court and reduce convictions as well as produce policy in favor of eradicating transfer and automatic waiver. It is an ambitious project that would be housed at the Juvenile Justice Project of Louisiana, where I first worked upon completing law school and moving to New Orleans. Please keep your fingers crossed on my behalf, and again thank you so much for funding my time with NCDC.

Please extend my thanks to Jill Guillory who I spoke with on the phone and emailed back and forth in arranging my trip to Macon. Hopefully one day I will be able to return the favor to your organization. Have a wonderful Thanksgiving (or is this letter reaches you after the fact, I hope you have a terrific holiday).

Sincerely,  
Candace Chambliss



LA's Premier Criminal Defense Seminar Co-Chairs; Paul Fleming, Jean Faria & Rick Schroeder



Family and friends of Derrick Carson join him in celebrating his LAPDA Trustees of Freedom Lifetime Achievement Award at the Tate Banquet held at the Hotel Monteleone.

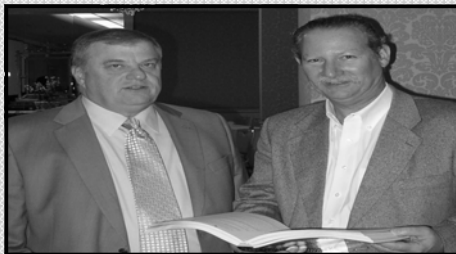
## WAY TO GO NATHAN!!!!

I got some good news--my comment on the Patrick Kennedy case on the death penalty for child rape got published in the Tulane Law Review and it's finally up on Westlaw and Lexis now.

If you ever get a chance or if anyone is interested, the article is: *A Rush to Punishment: The Louisiana Supreme Court Upholds the Death Penalty for Child Rape in State v. Kennedy*, and the citation is 82 Tul. L. Rev. 339.

Nathan Bays,  
Tulane Law Clinic  
LACDL Student Representative

**REMINDER:  
IN ORDER TO BE LISTED IN THE LACDL MEMBERSHIP  
DIRECTORY, YOUR 2008 MEMBERSHIP DUES MUST BE  
RECEIVED AT THE LACDL OFFICE BY MARCH, 1, 2008.**



G. Paul Marx and Richard Stricks look over materials.

## Triple Supreme Court Wins - Just in from [www.scotusblog.com/wp/](http://www.scotusblog.com/wp/)

Win 1 – Kimbrough – Crack guideline is advisory just like everything else.

The Supreme Court ruled 7-2 that the federal guidelines on sentencing for cocaine violations are advisory only, rejecting a lower court ruling that they are effectively mandatory. Judges must consider the Guideline range for a cocaine violation, the Court said, but may conclude that they are too harsh when considering the disparity between punishment for crack cocaine and cocaine in powder form. Justice Ruth Bader Ginsburg wrote the decision in *Kimbrough v. U.S.* (06-6330). The ruling validates the view of the U.S. Sentencing Commission that the 100-to-1 crack v. cocaine disparity may exaggerate the seriousness of crack crimes.

Win 2 – Gall – Abuse of Discretion – Deferential Standard of Review applies to appeals of below Guideline Sentences!

Ruling in a second Guidelines case, *Gall v. U.S.* (06-7949), the Court — also by a 7-2 vote — cleared the way for judges to impose sentences below the specified range and still have such punishment regarded as “reasonable.” The Justices, in an opinion written by Justice John Paul Stevens, told federal appeals courts to use a “deferential abuse-of-discretion standard” even when a trial court sets a punishment below the range. Chief Justice John G. Roberts, Jr., announced the opinion in Stevens’ absence. The *Gall* decision overturned a ruling by the Eighth Circuit Court that a below-Guidelines sentence would be reasonable only if justified by “extraordinary circumstances.” It was not for the Circuit Court to decide de novo the issue of whether a variation from a Guideline range was justified, it said.

Win 3 – Watson 924(c) does not apply to a person who receives a gun in a trade for drugs.

The Court decided unanimously that one does not “use” a gun, for purposes of imposing a mandatory five-year sentence, if the person receives the gun in a trade for drugs. Justice David H. Souter wrote the opinion in *Watson v. U.S.* (06-571).

*Logan v. United States*, 12/04/07

Full text: <http://www.supremecourtus.gov/opinions/07pdf/06-6911.pdf>

The United States Supreme Court voted unanimously (opinion by Ginsburg) that a violent felon who has not relinquished civil rights does not fall under the exception under the Armed Career Criminal Act (ACCA) for felons who have had their rights “restored.” The Court held that the exemption for felons who have had their civil rights restored does not cover felons who have retained their civil rights at all times. This

undercuts what ever was left in the First Circuit of *Indelicato*, and means that a number of older Massachusetts priors will probably now count as ACCA predicates.

### Cert. Grants

*Burgess v. US* (case no. 06-11429). From the Fourth Circuit (*US v. Burgess*, 478 F.3d 658 (4th Cir. 2007)), the Supreme Court will be deciding:

- 1) whether the term “felony drug offense” as used in 21 U.S.C. 841(b)(1)(A), which carries a mandatory minimum of 20 years if the defendant has a prior conviction for a “felony drug offense,” must be defined consistent with federal statutes defining both “felony” and “felony drug offense”, so as to require that the prior drug conviction be both punishable by more than one year in prison and characterized as a felony by controlling law; and
- 2) when the court finds that a criminal statute is ambiguous, must it then turn to rule of lenity to resolve ambiguity? Note: Mr. Burgess, appears to have filed his cert. Petition pro se!!!

*Indiana v. Edwards* (case no. 07-208). This government appeal raises the issue of whether a trial court can deny a mentally ill but competent defendant the right to represent himself on the ground that permitting him to do so would deny him a fair trial. The trial court refused to allow the defendant to waive his right to counsel and the Indiana Supreme Court reversed and remanded the defendant’s conviction, holding that because the defendant was competent to stand trial, he was also competent to waive his right to counsel. *State v. Edwards*, 866 N.E.2d 252 (Ind. 2007).

*United States v. Ressam* (case no. 07-455). Another government appeal, this one out of the Western District of Washington, the Supreme Court will decide whether 18 U.S.C. 1844(h)(2)’s 10 year mandatory minimum for carrying an explosive during the commission of a felony requires that the explosives be carried “in relation to” the underlying felony. The Ninth Circuit (*US v. Ressam*, 474 F.3d 597 (9th Cir. 2007)), agreed that it does.

*Rothgery v. Gillespie County, TX*, 12/03/07

Full Text: <http://www.ca5.uscourts.gov/opinions%5Cpub%5C06/06-50267-CV0.wpd.pdf>

The issue in this case is whether a criminal defendant is entitled to an attorney when brought before a Magistrate by a police officer without a prosecutor’s involvement.

*Continued on page 10*

LACDL offers the **Camille F. Gravel, Jr. Scholarship** to attend the NCDC. Each year, NCDC presents two sessions of the Trial Practice Institute on the campus of Mercer Law School in Macon, Georgia. The dates for the 2008 sessions are June 15-28, 2008 and July 13-26, 2008.

Our scholarship pays for tuition, and housing (double room only). Meals that are not covered by NCDC will not be reimbursed. Any travel expense incurred is the responsibility of the scholarship recipient. **Applicants interested in applying for the scholarship can print, complete and submit the application on the LACDL website at [lacdl.org](http://lacdl.org). In order for an applicant to be considered, all applications must be completed and received by February 14, 2008.**

Completed applications can be e-mailed to [jill@tatmangroup.com](mailto:jill@tatmangroup.com) or faxed to 225-767-7648 or mailed to LACDL - Gravel Scholarship, P.O. Box 82531, Baton Rouge, LA 70884. The recipient of the scholarship must agree to perform indigent defense service for at least one year from the conclusion of the NCDC session attended. Applications for the LACDL Camille Gravel, Jr. Scholarship does not serve as an application to NCDC. To obtain an application to attend NCDC’s Trial Practice Institute, call or write NCDC, c/o Mercer Law School, Macon, Georgia 31207 or Phone (478) 746-4151, fax (478) 743-0160 or Email: [Rosie@ncdc.net](mailto:Rosie@ncdc.net) or [RosieFlanigan@gmail.com](mailto:RosieFlanigan@gmail.com).

## 2008 ADVOCATE SUBMISSION DEADLINES

<u>ISSUE</u>	<u>SUBMISSION DEADLINE</u>
Spring	March 17, 2008
Summer	June 17, 2008
Fall	September 15, 2008

Please e-mail all submissions to [jill@tatmangroup.com](mailto:jill@tatmangroup.com)

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Effective November 1, 2007, the United States Sentencing Guidelines were amended, lowering the guideline sentencing ranges for offenses involving cocaine base, crack cocaine (hereafter the "November amendments"). See *U.S.S.G. § 2D1.1*. On December 11, 2007, the United States Sentencing Commission unanimously voted to make the November amendments retroactive. See <http://www.ussc.gov/PRESS/rel121107.htm>. However, the retroactivity of the November amendments will not become effective until March 3, 2008. See *id.*; [http://www.ussc.gov/FEDREG/finalaction-12\\_2007.pdf](http://www.ussc.gov/FEDREG/finalaction-12_2007.pdf).

Accordingly, the retroactivity of the November amendments will not be included in U.S.S.G. § 1B1.10(c) until March 3, 2008. Under U.S.S.G. § 1B1.10(a), "a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2) *only* when a defendant is serving a term of imprisonment, and [*only when*] the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below." Therefore, the Commission effectively denied defendants relief under § 1B1.10(a) until March 3, 2008.

Until March 3, 2008, a defendant is not entitled to relief pursuant to a § 3582(c)(2) motion based on the November amendments, and before March 3, 2008, a district court would have to deny any such motion. If defendants file such motions before March 3, 2008, continuances or extensions of time should be sought to avoid the denial of such motions on technical grounds, while promoting justice and efficiency by avoiding the pro forma dismissals of motions that have merit under the spirit and intent of the Commission.

Undoubtedly some defendants, those set for release from imprisonment in the coming months, will suffer because of the delay in retroactivity. However, if they are released from imprisonment before a ruling can, or is likely to, be made on their § 3582(c)(2) motions, they can ask the courts to modify or terminate their supervised releases under 18 U.S.C. § 3583(e)(1). See § 1B1.10, *Application Note 5*.

On a positive note, there may be a way to utilize the Commission's retroactivity decision before March 3, 2008. In explaining why the November amendments should be retroactively applied, the Commission noted that its:

actions today, as well as promulgation of the . . . [November amendments], are only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants. The Commission has continued to call on Congress to address the issue of the 100-to-1 statutory ratio that drives Federal cocaine sentencing policy. Only Congress can provide a comprehensive solution to a fundamental unfairness in Federal sentencing policy. See <http://www.ussc.gov/PRESS/rel121107.htm>.

In *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), the United States Supreme Court held, the day before the Commission's retroactivity decision,

that, under [*United States v. Booker*, 543 U.S. 220 (2005)], the cocaine Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory. A district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within Guidelines sentence is greater than necessary to serve the objectives of sentencing. 18 U.S.C. § 3553(a) (2000 ed. and Supp. V). In making that determination, the judge may consider the disparity between the Guidelines treatment of crack and powder cocaine offenses.

The Commission's justifications for the retroactivity of the November amendments and the factual basis the *Kimbrough* court set forth in support of its holding provide fertile ground to argue for non-guidelines sentences for defendants who are to be sentenced under the November amendments. Further, if the issue of the crack/powder disparity was preserved before the district court, *Kimbrough* also could provide a basis for arguing that a pre-*Kimbrough* sentence should be vacated and remanded by the Court of Appeals unless the Government can establish harmless error. See *United States v. Zamora Vallejo*, 470 F.3d 592, 595 (5th Cir. 2006). For an alternative view that recommends attacking pre-amendment sentences before March 3, 2008, see [http://www.fd.org/pdf\\_lib/retroactivity%20memo.pdf](http://www.fd.org/pdf_lib/retroactivity%20memo.pdf).



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*Triple Supreme Court Wins, continued from page 9*

Rothgery was arrested and brought before a magistrate judge who informed him of the accusation against him and found probable cause to detain Rothgery until such time that bail was posted or judicial proceedings began. The Fifth Circuit Court of Appeals held adversary judicial proceedings against the Petitioner had not commenced in this case; therefore, Sixth Amendment rights to counsel had not attached. The Fifth Circuit reasoned this was because no prosecutor was involved in petitioner's arrest or appearance before the magistrate. The Fifth Circuit held a defendant has no right to counsel unless he can demonstrate that a prosecutor is aware of or involved in those events.

# 22nd Annual Tate Awards Banquet Wrap-Up

LACDL held their 22nd Annual Justice Albert Tate Awards Banquet at the Hotel Monteleone in New Orleans on November 30, 2007. The celebration began with a cocktail reception in the Queen Anne Parlor and followed with a delicious dinner in the Queen Anne Ballroom. John DiGiulio, 2007 LACDL President, served as the emcee and welcomed over 170 attendees including many LaPDA members and honorees. The banquet was very special this year because in an effort to draw the two associations to a shared vision, LaPDA partnered to host the awards together. It was a huge success and



King Alexander & Thomas Lorenzi

LACDL and everyone enjoyed coming together to celebrate the shared vision.



Honorable Jackson and Honorable Martiny



Chief Justice Calogero, 2007 Justice Albert Tate Award Recipient, Walt Sanchez and Emma Tate Heath visit at the Tate Awards Banquet.



Richard Bourke receives the Sam Dalton Capital Defense Award from Sam Dalton and Denny LeBoeuf.

LACDL was honored to have Chief Justice Calogero and his wife, Leslie, in attendance, as well as Mr. Sam Dalton, Mrs. Emma Tate Heath and her husband, Danny. Please mark your calendars, save the date and plan to attend the 23rd Annual Justice Albert Tate Awards Banquet on Friday, December 5, 2008 held again at the exquisite Hotel Monteleone. The Tate Banquet is a great way to start to the holiday season, celebrate with your colleagues and honor the award recipients. **We look forward to seeing you there!**

## Louisiana's Premier Criminal Defense Seminar Wrap-Up



Prof. Sol Fulero from Dayton, OH speaks on Eyewitness Reliability

LACDL held their Louisiana's Premier Criminal Defense CLE Seminar at the Hotel Monteleone in New Orleans, LA during November 29-30, 2007. Seminar Co-Chairs, Jean Faria, Paul Fleming and Rick Schroeder lined up some excellent speakers, that provided the attendees with valuable information.

LACDL was honored to have the Honorable Lynda Van Davis, currently the youngest sitting Judge in the State of Louisiana, on the Meet the Enemy Panel, along with Christine Lehmann, Chief Defender for the Orleans Public Defenders and Ralph Brandt, Chief of Trials with the Orleans District Attorney's office.

Professor Katherine Mattes, Nathan Bays and John James from the Tulane Criminal Defense Clinic presented a very well received Competency Hearings discussion while Zeke Edwards from the Innocence Project in New York presented enlightening information on Litigating Eyewitness ID Cases and left attendees wanting to hear more.

LACDL would like to thank the Criminal Law Section of the LSBA, Mike Walsh and Jean Faria for offering fifteen scholarships for the seminar. We were able to award all the scholarships to fifteen well-deserving attorneys, who were able to attend the seminar free of charge.



Immigration Panel; Hiroko Kusuda, Luz Molino & Jean Faria

Please make plans to join us in New Orleans, December 4-5, 2008 at the Hotel Monteleone, for our last seminar of the year. Seminar Co-Chairs, Jean Faria, Paul Fleming and Rick Schroeder already have some great speakers scheduled.

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(see page 7 for a registration form)



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