

The Advocate

Louisiana Association of Criminal Defense Lawyers

Volume 4, Issue 2

Virginia Schlueter, Editor Spring 2007

As Joan Baez asked: "Where have all the heroes gone?"

Before his recent death, Neal Walker was the Executive Director of the Louisiana Capital Assistance Center; a New Orleans based non-profit law office specializing in defending impoverished prisoners facing the death penalty in Louisiana and the Gulf region. With over twenty-five years of criminal defense experience, including two years as an Assistant Federal Public Defender for the Eastern District of Kentucky, he defended dozens of capital indictments at all stages of the legal process from trial through appeal and in habeas corpus actions. In 1992 he argued *Sawyer v. Whitley* in the United States Supreme Court. His victories were legendary: obtaining acquittals, dismissals and relief from the death penalty for scores of capital defendants. In fact not one death sentence imposed on a trial level client ever survived appellate review.

In recognition of his accomplishments, Neal received the Defender Services Award from the National Legal Aid and Defender Association in 1990 and the Sam Dalton Capital Defense Advocacy Award from LACDL in 1998. Neal was a member of the Eastern District of Louisiana's Criminal Justice Act Panel and received last year's CJA Panel award.

Neal lectured in twenty states and in Europe on topics relating to criminal justice and the death penalty. Earlier this year he appeared on NBC Nightly News and the Anderson Cooper 360 show in connection with his litigation on behalf of hundreds of

prisoners wrongfully detained following Hurricane Katrina. In March, 2006 *Judicature*, the journal of the American Judicature Society, published his most recent critique of the death penalty, *How the Malfunctioning Death Penalty Challenges the Criminal Justice System*.

Recently, when all of the Federal Public Defenders met in New Orleans for an annual conference, a search was made for an inspirational speaker. After a national search, the person most worthy of that task was found in our own backyard. Neal communicated with the audience on a level that weary defenders understood and recognized. People from outside our area came to

understand our unique criminal justice system and the extraordinary challenges it presents. He held them spellbound as he recounted the difficulties in attempting to assist the thousands of unrepresented Orleans Parish prisoners detained following Katrina. He previously detailed the course of litigation in an article in the Advocate entitled "Bayou Guantanamo."

Neal mustered capital lawyers to work together to improve the quality of our local representation. He often moderated our capital breakfasts and presented at our annual continuing legal education programs. This photo was taken at a recent CLE. As might be expected, his commitment to



Neal Walker
1953 - 2007

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LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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FROM THE PRESIDENT, John DiGiulio

By the time this gets out, I have a hunch that the American public will get a refresher course in one of our more unique and powerful constitutional protections: The Fifth Amendment. As the Justice Department inquiry plays itself out, a lawyer exercising her right not to testify against herself--a conservative Republican Bushie type no less--will provide a civics lesson. The various concepts of immunity, transactional, use and derivative use, statutory and informal, will be discussed by the talking heads of political TV. For Fox and Friends, like Rush Limbaugh and Sean Hannity, it surely must seem like the shoe is on the other foot. At least they can feel some sense of relief that neither sex or drugs seem to be involved--just misleading to justification for war and politicizing the Justice Department.

There are some ongoing cases in New Orleans where the principles of the Fifth and immunity are not well understood by prosecutors who should know better. In the Danziger Bridge case, where seven police officers have been indicted for First Degree Murder and Attempted First Degree Murder, the prosecutor sought and obtained statutory immunity under La. Code of Criminal Procedure Article 439.1 for three of the officers, brought them before the grand jury, then indicted them on the underlying offenses, even denying them the right to have their lawyer present as the code permits for "targets." Those indictments will likely be dismissed, as the Kastigar hurdle will be too much for the state to jump. Imagine the consequences of a contrary ruling: the state may as well notice the deposition of targets, and then make the defense lawyer wait outside.

I was a little disappointed when Senator Pat Leahy, a steady champion of the rights of defendants, had the average layman's reaction to the lawyer asserting the Fifth, through her lawyer, when he asked what she had to hide. Then the lawyer who wrote the letter used the Scooter Libby case as his reason, when in fact of course even Congressionally granted immunity would not protect the witness from perjury prosecution. The power of prosecutors to wreak havoc on lives is often enough in and of itself for good lawyers to interpose their clients right not to testify without immunity.

We have come a long way over the years in public education about the right to counsel and the right to be free from unreasonable searches and seizures. It would be nice for the Fifth to get the same esteem.

John DiGiulio
2007 LACDL President

Executive Director's Message

By: David Tatman

After the retreat in February, LACDL was off to a great start. The meeting addressed the **SWOTs** of LACDL, the **Strengths, Weaknesses, Opportunities, and Threats** for the Association. Members of the Board were very enthused about this process and learned where LACDL has been and the paths for future growth and development with the help of the Committees and Members. The committees decided to have individual committee conference calls after the retreat. The conference calls have been very productive in keeping everyone on track and focused. Thank you to all who took time out to contribute to the retreat and the work and support for the Committees.

The second round of membership invoices went out and at this time, we have over 300 members so far and they are still coming in daily. The membership directory deadline was April 1st and you should be receiving your 2007 Directory in the mail in the next week or so.

The Death Penalty Seminar has been scheduled for Thursday, July 27, 2007 through Friday, July 28, 2007 at the Paragon Casino in Marksville, Louisiana. Thank you to David Price for helping with these arrangements. Speakers need to be lined up still. A save the date card went out the second week in April and the brochure will go out in May. The date for the next seminar is September 13-15, 2007, at the Marriott Hotel in Baton Rouge. Marci Blaze will be chairing this seminar. We need to start working on the title and subject matter of this seminar and recruiting speakers to assure success in our Marketing efforts. Suggestions have been made to make this seminar include white-collar crime, DWI, drug cases, etc.

The Last Chance Seminar is scheduled for Thursday, December 6, 2007 through Friday, December 7, 2007 at the Hotel Monteleone, so make plans to attend. The Tate Banquet has been scheduled for Friday, December 7, 2007 to be held at the Hotel Monteleone also, so mark your calendars to share a special evening with friends.

And last, I would like to thank Virginia Schlueter for all her contributions and help, as the first Member Issue Editor of the Advocate. If you would like to contribute anything to the Summer Advocate please contact Jill Guillory at the Tatman Group or email it to her at jill@tatmangroup.com.

I look forward to seeing all of you at the Law and All That Jazz CLE Seminar.

CONGRATULATIONS TO
ORLEANS ASSISTANT PUBLIC DEFENDER,
CANDACE CHAMBLISS,
THE 2007 RECIPIENT OF THE
LACDL CAMILLE GRAVEL SCHOLARSHIP

2007 JAZZ REVISED SCHEDULE

THURSDAY, APRIL 26, 2007

- 8:00 - 9:00 a.m. **Registration/ Continental Breakfast**
- 9:00 - 9:30 a.m. **Welcome**
- 9:30 - 10:30 a.m. **"A Flooded Evidence Room: Defense Lawyers Dream...or Not?"**
Katherine Mattes, New Orleans, LA
- 10:30 - 11:30 a.m. **What makes "Death Different?"**
Richard Jaffee, Birmingham, AL
- 11:30 - 12:30 p.m. **Lunch (will be provided)**
- 12:30 - 1:30 p.m. **The Fourth Amendment as the Roberts Bench Sees It: Search and Seizure**
Cynthia Hujar Orr, San Antonio, TX
- 1:30 - 2:30 p.m. **The Trial Terrorist Bill: What Does it Really Say?**
Pamela Robillard Mackey, Denver, CO
- 2:30 - 2:45 p.m. **Break**
- 2:45 - 3:45 p.m. **Crawford, Phase II: The Rise of Davis/Hammon**
Marvin Schechter, New York, NY
- 3:45 - 4:45 p.m. **Jury Selection in Child Sex Cases**
Craig Jett, Dallas, TX
- 6:30 - 8:30 p.m. **Welcome Cocktail Reception**
**"The Ditch"- Ditcharo's
Restaurant & Pub
640 Carondelet Street
New Orleans, LA**

IMPORTANT NOTE: This schedule was accurate at the time of printing. We make every effort to present the topics as listed at the assigned times. Due to unforeseen circumstances, times, speakers and/or presentations are subject to change.

FRIDAY, APRIL 27, 2007

- 7:30 - 8:00 a.m. **Continental Breakfast**
- 8:00 - 9:00 a.m. **"Making the Courtroom Your Living Room": Trial Tips From 31 Years of the Good and the Bad**
Rusty Hardin, Houston, TX
- 9:00 - 10:15 a.m. **The Rings of Immigration Hell: The Collateral Consequences of Criminal Convictions to Aliens**
Robert McWhirter, Phoenix, AZ
- 10:15 - 11:15 a.m. **Federal Sentencing and the Perfect Presentence Report**
Richard Crane, Nashville, TN
- 11:15 - 11:30 a.m. **Break**
- 11:30 - 12:30 p.m. **Ethics: "There are Things You Can Do You Ought Not"**
Mike DeGeurin, Houston, TX
- 12:30 - 1:30 pm **Professionalism: "It's a Small World After All"**
Will Korman, Boston, MA

SATURDAY, APRIL 28, 2007

- 7:30 - 8:30 am **Continental Breakfast**
- 8:00 - 9:00 a.m. **Professionalism: "Being A Lawyer To Be Reckoned With"**
Jeff Weiner, Miami, FL
- 9:00 - 10:00 a.m. **"In Defense of Andrea Yates: The Verdict's Impact"**
George Parnham, Houston, TX
- 10:00 - 11:00 a.m. **Freud 101 for the Lawyer: How Do You Relate to Your Client?**
Debra DePrato, MD, Baton Rouge, LA
Laurie White, New Orleans, LA

**** This schedule has been approved for 14.5 hours of Louisiana CLE credit. other states approved CLE hours will vary.**

JAZZ REGISTRATION

SEMINAR FEES *Registration (A CD of materials is included in registration)*

Life Member	<input type="checkbox"/> No Charge	<input type="checkbox"/> \$35- w/ Printed Materials* *
LACDL Member	<input type="checkbox"/> \$200	<input type="checkbox"/> \$235- w/ Printed Materials* *
Non-Member	<input type="checkbox"/> \$475	<input type="checkbox"/> \$510- w/ Printed Materials* *
One Day Only	<input type="checkbox"/> \$225	<input type="checkbox"/> \$260- w/ Printed Materials* *
New Member Joining*	<input type="checkbox"/> \$200	<input type="checkbox"/> \$235- w/ Printed Materials* *

*New Member joining must pay membership dues with seminar registration. Membership Dues: Sustaining \$250, Regular \$150 and Indigent Defender \$75.
 * *Written materials will not be provided at the seminar. If you would like printed materials, they must be purchased in advance by April 11, 2007.
 (Registrations received after April 11, 2007 will incur a \$50 late fee)

Name _____

State Bar # _____ State(s) * _____

* Please list any other State you would like to apply for CLE credit.

Address _____

City _____ State _____ Zip _____

Phone (____) _____ Fax (____) _____

E-mail _____

METHOD OF PAYMENT *(Please make checks payable to LACDL)*

Check # _____ MasterCard VISA Discover Am Express

Cardholder's Name _____

Billing Address for Card _____

Account # _____

Expiration Date _____ V-Code* _____ (*3-5 digit code on the front/back of the credit card.)

Signature _____

If paying after April 11th, add the \$50 late fee \$ _____

TOTAL AMOUNT ENCLOSED \$ _____

HOTEL ACCOMMODATIONS - Located along historic Canal Street, **The Astor Crowne Plaza** is the gateway to the most exciting destination, the **New Orleans' French Quarter**. Located where Bourbon Street meets Canal Street. Due to the high demand for hotel rooms during the Jazz and Heritage Festival, **please make your room reservation NOW** by calling the hotel directly at 504-962-0500. Be sure to mention that you are attending the Louisiana Association of Criminal Defense Lawyers LACDL seminar to receive the special rate of \$189 for a single/double guest room and \$239 for a club level room. **The deadline for receiving the special room rate is March 25, 2007.** Reservations made after this date will be accepted based on hotel availability. **ROOMS ARE LIMITED, PLEASE REGISTER EARLY!**

CLE INFORMATION - This course is pending approval by the Louisiana Continuing Legal Education Committee for a maximum of 14 1/2 credit hours, including 1 hour of Ethics and 2 hours of Professionalism based on a 60-minute hour. LACDL programs are normally accredited by state bar associations which grant CLE. The amount of credit varies by state.

CANCELLATION POLICY & LATE REGISTRATION - Seminar registrations cancelled after April 11, 2007 will be charged a \$100 cancellation fee. There will be no refunds for no-shows. Registrations received after April 11, 2007 will incur a \$50 late registration fee.

THE JAZZ & HERITAGE FESTIVAL - The New Orleans Jazz & Heritage Festival is one of the world's greatest musical celebrations and a showcase of Louisiana culture. It's been more than three decades of singing, swinging, eating, dancing and frolicking in the sun! For 10 days, over 4,000 musicians assemble to share their music with over 500,000 music and fun lovers from throughout the world. Enjoy 12 stages of soul-stirring music: traditional and contemporary jazz, rock and roll, This year is expected to be bigger and better than ever! Cajun, pop, zydeco, folk, country and gospel music. Festival goers can also enjoy regional foods and a giant arts and crafts display. For more information contact the Jazz & Heritage Festival's web page at www.nojazzfest.com.

NOTE - Since Jazz Fest begins on Friday, April 27, 2007, LACDL has expanded the Thursday seminar schedule to allow for shorter schedules on Friday and Saturday. Make plans to enjoy the festival while you're in the Big Easy. We are proud to contribute to tourism and the rebuilding of New Orleans. LACDL is committed to helping Louisiana rebuild after the storms and we thank you for aiding in our efforts.

Please complete and mail a check to the below address or if paying with a credit card you can fax your completed form to 225-767-7648.

Louisiana Association of Criminal Defense Lawyers
 P. O. Box 82531, Baton Rouge, LA 70884
 Phone (225) 767-7640 Fax (225) 767-7648
www.lacdl.org

For New Orleans Jazz and Heritage Festival information please see their website at:

www.nojazzfest.com

Campaigns come in many forms. Within a year's time, Louisiana will have gone through an election cycle where the legislative and executive branches - along with other constitutional offices - are transformed. These campaigns have already resulted in some definitive change. We already know that many legislators will not be returning to their current positions because of term limits. The Governor's race will be open as a result of the incumbent's choice not to seek a 2nd term. It's also marked with both parties pushing for a balance of power among all of the constitutional offices. We shall see it defined in many ways, each central to victory. In the end, this redesign in the political landscape holds great potential for the future of this state and its citizens.

The reformation taking place as a result of the 2005 hurricanes has provided an enticing atmosphere for change in our state. Many improvements in state government have already been established in response to demand for recovery and to prevent future impediments. These types of campaigns are important to improving the infrastructure, personnel and procedure of the criminal justice system that was devastated by the hurricanes. LACDL members will continue their work to improve the criminal justice system in general and, in particular this session, the quality of representation provided for the indigent accused. We recognize how important it is to the clients and the practice of law in Louisiana. Hopefully, the result is a system that is held more accountable to the citizens of the state of Louisiana.

The activism of LACDL members, along with other stakeholders, is geared towards the reduction of the number of citizens that are incarcerated in Louisiana. This issue has been consistently addressed, first in the 2001 legislative session through sentencing reform and administrative rule changes, and

more recently through new legislative acts producing procedural changes for certain diversionary methods and early release. A simple method is applied when considering these types of changes. Reduce the number of people in the custody of the state while considering its effect on public safety and the victims. All of the stakeholders have been able to find common ground with the use of this principle.

A report released this year by the U.S. Justice Department pointed to a projected increase of only 5% growth in Louisiana state prison population over the next 5 years. This is a comparison of an average 12% increase overall in the 50 states. At this rate, Louisiana should fall in the top ranking among the 50 states. We look forward to participating and supporting these kinds of campaigns in the future.

While it's impossible to predict what will occur during the upcoming legislative session, there is no lack of ambition to improve the criminal justice system. In the 2 years after the hurricanes there has been more task force activity, as a result of legislative resolution and internally from almost every segment of government. Many of the findings and recommendations will be submitted in the form of legislation this session. State and local governments will attempt to address many issues while also prioritizing spending with limited recurring resources available. Late last year the Governor called the legislature in to a special session and had some success but at the same time fell rather short of her goal. This year is critical in addressing many of the same issues as well as coming to some resolution over others.

We should remain vigilant in an effort to help in this process. LACDL's members, its legislative committee, and other stakeholders have been drafting legislation that will be prefiled by the April 20th deadline. The premier legislation this year provides for major changes within state and local public defense delivery systems. I believe that everyone who has participated in

the exchange of ideas to provide for the legislation has done so in a fashion to produce a genuine act of reform. This kind of commitment has now been rewarded by a recommendation from the Administration's proposals in HB 1 for recurring money in state wide indigent defense spending. This campaign is so recognized as providing changes in the criminal justice system that other legislative Task Forces, for example the Task Force to Study the Representation of Children in Need of Care, have coordinated their recommendations and legislation to be in step with indigent defense reform.

With the limited nature of this year's legislative session it will require definitive action on everyone's part to try and resolve any uncertainty in an effort to pass good legislation. Without any doubt there will be a maximum number of bills filed in this election year to provide for changes in our criminal law. Our agenda requires us to bring a balance of information to our lawmakers during the session with the hope of compromise.

We should be optimistic that in the remaining year of this Legislative Class, we will see a sense of balance in these new Acts. There will be new leadership in the coming year. That should also give us reason for optimism in the future. We all should be proud of the fact LACDL means campaigning with your fellow defenders in the struggle for liberty, individual rights, the basic principle of due process, and the fundamental right to a fair trial. With this message, we invite all members of the greater criminal defense bar to spread the word.



LACDL Planning Retreat Wrap-Up

The LACDL Executive Committee, with John DiGiulio, as President, met this past February, to review and plan the year ahead for the Louisiana Association of Criminal Defense Lawyers. Rick Schroeder graciously hosted the large turnout for the two day Board Meeting and Planning Retreat at the Jones Walker Law Offices in New Orleans.

The Board Meeting began with the approval of the LACDL Budget for 2007. Discussion took place on Membership promotion, Amicus and Lawyer Assistance Committee development, along with other committee plans including CLE Seminars and an update on the upcoming Legislative session by George Steimel, lobbyist. The Executive Committee would like to encourage LACDL members to become active participants in the Association, to attend Board Meetings, become Committee Members and to take advantage of the wonderful CLE opportunities offered.

David Tatman with The Tatman Group led the LACDL Executive Committee in an enlightening planning session entitled **SWOT**. Board members broke out into groups and discussed the four components – the **Strengths, Weaknesses, Opportunities** and **Threats** for LACDL. The first question asked was, what is the Mission Statement and Purpose of LACDL and to think of this in terms of who LACDL is and what LACDL does. The members attending were asked to review these questions and to bring back ideas of how to use this information to help LACDL meet the needs of its members now and in the future. The excitement in the room was elevated by the groups testimonies of the great strengths the association has including the history of the institution, the networking opportunities, List Serve communications, and most of all working members of LACDL who want to make a difference in the Criminal Defense profession.

As discussed, the **Threats** facing the Association, really present **Opportunities** to meet the needs of its members. In this world of competition LACDL has the opportunity to offer high quality CLE seminars and an invaluable networking system with contacts and support for Criminal Defense professionals.

If you would like to become a LACDL Committee member please contact John DiGiulio or jill@tاتمangroup.com for additional information or consult the website at www.lacdl.org. Your participation in the association is what makes the difference in our success.

A CALL TO ARMS

By: Virginia Schlueter

Following the LACDL'S board meeting on February 23, 2007, the Board met for dinner at the Bon Ton restaurant in New Orleans. There, with fresh new ideas from law students and lively discussion, the Board mapped out its objectives and events. The gang regrouped Saturday morning for several hours to hammer out the planning for 2007. If you notice that there were several vacant chairs in the pictures on page 11 post Katrina you are correct. In fact the hope is that you will get more involved. Every effort is being made to infuse the board with new blood. There is room for leadership and more work to do than people to do it. If our organization is to remain viable, your help is needed.

Generally, LACDL organizes five major events throughout the year. From the revenues derived from these seminars, the organization strives to achieve its purpose. LACDL sustains itself with your dues and fees from attendance at seminars.

If you have an area of expertise and are interested in presenting at one of the seminars contact David Price, one of the chairs of the CLE Committee. There is also a real need for attorneys with specialized experience to submit articles for publication in this newsletter. For the upcoming Summer Issue, submissions should be sent to Jill Guillory at jill@tاتمangroup.com **by June 19, 2007**.

LACDL is your organization and with your assistance it will continue to thrive. In the last couple of years, there have been concerted efforts to improve the quality of representation of indigent clients. As a result, fair payment to public defenders will benefit everyone. With such successes to point to, LACDL hopes that you will realize the value of the organization and realize that LACDL is your organization and contribute by publishing, presenting, briefing or joining the Board.

CRIMINAL CASES IN THE U.S. SUPREME COURT – 2006 TERM

October 2006 - June 2007

As of February 28, 2007

Prepared by Frances H. Pratt, Research and Writing Attorney
Office of the Federal Public Defender, Alexandria, Virginia

The purpose of this document is to keep attorneys abreast of cert. grants, pending decisions, and recent decisions in the U.S. Supreme Court so that they can identify issues that they should challenge and preserve in the district court and/or raise on direct appeal. The document also includes cases relating to habeas corpus law and procedure, as well as other cases that may be of interest to federal criminal practitioners.

The cases are arranged alphabetically, with a topical index provided below. An asterisk (*) by the case name indicates that the Supreme Court has decided the case.

The information about each case is taken primarily from the Granted/Noted Cases Lists that are maintained by the Supreme Court Clerk's Office; they are available on the Supreme Court's web site, at <http://www.supremecourtus.gov/orders/orders.html>. Slip opinions are available at <http://www.supremecourtus.gov/opinions/opinions.html>. If you are not familiar with the Court's web site, <http://www.supremecourtus.gov>, it is worth spending some time exploring it, as it contains much useful and interesting information.

ABDUL-KABIR V. QUARTERMAN

Docket No. 05-11284

Capital punishment, jury instructions

Case Below: 418 F.3d 494 (5th Cir. 2005) Cert.

Granted: 127 S. Ct. 432 (Oct. 13, 2006)

Argument Date: Jan. 17, 2007 (consolidated with *Brewer, infra*)

Decision:

Questions Presented:

1) Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" – permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment"

2) Do this Court's recent opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") and *Smith*, both of which require instructions that permit jurors to give "full consideration and full effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions – antedating *Penry II* and *Smith* – that reject *Penry* error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?

3) Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under *Penry* that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?

4) Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instruc-

tions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

*** AYERS V. BELMONTES**

Docket No. 05-493

Capital punishment, habeas corpus, jury instructions

Case Below: 414 F.3d 1094 (9th Cir. 2005)

Cert. Granted: 126 S. Ct. 1909 (May 1, 2006), *sub nom. Ornaski v. Belmontes*

Argument Date: Oct. 3, 2006

Decision: 127 S. Ct. 469 (Nov. 13, 2006)

1) Does *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2) Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989)?

Holding (5-4):

The "factor (k)" instruction is consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings.

BRENDLIN V. CALIFORNIA

Docket No. 06-8120

Fourth Amendment, detention, Standing

Case Below: 136 P.3d 845 (Cal. 2006)

Cert. Granted: 127 S. Ct. 1145 (Jan. 19, 2007)

Argument Date: April 23, 2007

Decision:

Question Presented:

1) Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

BREWER V. QUARTERMAN

Docket No. 05-11287

Capital punishment, jury instructions

Case Below: 442 F.3d 273 (5th Cir. 2006)

Cert. Granted: 127 S. Ct. 433 (Oct. 13, 2006)

Argument Date: Jan. 17, 2007 (consolidated with *Abdul-Kabir, supra*)

Decision:

Questions Presented:

1) Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" – permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment?"

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4) Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

*** BURTON V. STEWART**

Docket No. 05-9222

Habeas corpus, retroactivity, Sixth Amendment, right to jury

Case Below: 142 Fed. App'x 297 (9th Cir. 2005)

Cert. Granted: 126 S. Ct. 2352 (June 5, 2006), *sub nom.* at sentencing *Burton v. Waddington*

Argument Date: Nov. 7, 2006

Decision: 127 S. Ct. 793 (Jan. 9, 2007)

Questions Presented:

1) Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?

2) If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

Holding (per curiam):

Dismissed for lack of jurisdiction because petitioner did not comply with gatekeeping requirements for second or successive petitions under 28 U.S.C. § 2244(b).

*** CAREY V. MUSLADIN**

Docket No. 05-785

Habeas corpus

Case Below: 427 F.3d 653 (9th Cir. 2005)

Cert. Granted: 126 S. Ct. 1769 (April 17, 2006)

Argument Date: Oct. 11, 2006

Decision: 127 S. Ct. 649 (Dec. 11, 2006)

Question Presented:

1) In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased? Holding (6-0, 3 concurring in judgment) (copied from opinion):

This Court has recognized that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial. *Estelle v. Williams*, 425 U.S. 501, 503-506 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). In this case, a state court held that buttons displaying the victim's image worn by the victim's family during respondent's trial did not deny respondent his right to a fair trial. We

Criminal Cases continued...

must decide whether that holding was contrary to or an unreasonable application of clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1). We hold that it was not.

CLAIBORNE V. UNITED STATES

Docket No. 06-5618

Appellate review, sentencing procedure

Case Below: 439 F.3d 479 (8th Cir. 2006)

Cert. Granted: 127 S. Ct. 551 (Nov. 3, 2006)

Argument Date: Feb. 20, 2007

Decision:

Questions Presented:

1) Was the district court's choice of below-Guidelines sentence reasonable?

2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

• **CUNNINGHAM V. CALIFORNIA**

Docket No. 05 6551

Sixth Amendment, right to jury at sentencing Case Below: 2005 WL 880983 (Cal. Ct. App. 2005)

Cert. Granted: 126 S. Ct. 1329 (Feb. 21, 2006)

Argument Date: Oct. 11, 2006

Decision: 127 S. Ct. 856 (Jan. 22, 2007)

Question Presented:

1) Whether California's Determinate Sentencing Law ["DSL"], by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

Holding (6 3) (copied from syllabus without extended explanation):

The DSL, by placing sentence-elevating fact-finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.

FRY V. PLILER

Docket No. 06-5247

Habeas corpus, harmless error

Case Below: 2006 WL 249542 (9th Cir. 2006)

Cert. Granted: 127 S. Ct. 763 (Dec. 7, 2006)

Argument Date: Mar. 20, 2007

Decision:

Question Presented:

1) If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or that enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice?

* **GONZALES V. DUENAS-ALVAREZ**

Docket No. 05-1629

Statutory definitions

Case Below: 176 Fed. App'x 820 (9th Cir. 2006)

Cert. Granted: 127 S. Ct. 35 (Sept. 26, 2006)

Argument Date: Dec. 5, 2006

Decision: 127 S. Ct. 815 (Jan. 17, 2007)

Question Presented:

1) Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), includes aiding and abetting.

Holding (8-1) (copied from syllabus without extended explanation):

The term "theft offense" in 8 U.S.C. § 1101(a)(43)(G) includes the crime of "aiding and abetting" a theft offense.

JAMES V. UNITED STATES

Docket No. 05 9264

Statutory definitions, prior convictions

Case Below: 430 F.3d 1150 (11th Cir. 2005)

Cert. Granted: 126 S. Ct. 2860 (June 12, 2006)

Argument Date: Nov. 7, 2006

Decision:

Question Presented:

1) Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

"Holding(5-4):

Attempted burglary, as defined by Florida law, is a "violent felony" under the Armed Career Criminal Act because it "involves conduct that presents a serious potential risk of physical injury to another" under the residual provision of Section 924(e)'s definition of "violent felony."

* **LAWRENCE V. FLORIDA**

Docket No. 05-8820

Habeas corpus, statute of limitations

Case Below: 421 F.3d 1221 (11th Cir. 2005)

Cert. Granted: 126 S. Ct. 1625 (Mar. 27, 2006)

Argument Date: Oct. 31, 2006

Decision: 127 S. Ct. 1079 (Feb. 20, 2007)

Questions Presented:

1) There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending . . ." Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post conviction relief, does the defendant have an application pending which tolls the § 2244 (d)(2) statute of limitations?

2) Alternatively, does the confusion around the statute of limitations – as evidenced by the split in the circuits – constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari?

3) And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel – a species of state actor – under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

Holding (5 4) (copied from syllabus without extended explanation):

Section 2244(d)(2) does not toll the 1-year limitations period during the pendency of a certiorari petition in this Court.

LOGAN V. UNITED STATES

Docket No. 06-6911

Statutory definitions, prior convictions

Case Below: 453 F.3d 804 (7th Cir. 2006)

Cert. Granted: 2007 WL 506020 (Feb. 20, 2007)

Argument Date: Fall 2007

Decision:

Question Presented:

1) Whether the "civil rights restored"

provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights, thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

* **LOPEZ V. GONZALES**

Docket No. 05-547

Statutory definitions

Case Below: 417 F.3d 934 (8th Cir. 2005)

Cert. Granted: 126 S. Ct. 1651 (April 3, 2006)

Argument Date: Oct. 3, 2006 (consolidated with

Toledo-Flores, infra)

Decision: 127 S. Ct. 625 (Dec. 5, 2006)

Question Presented:

1) Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

Holding (8-1) (copied from syllabus without extended explanation):

Conduct made a felony under state law but a misdemeanor under the [Controlled Substances Act] is not a "felony punishable under the Controlled Substances Act" for [immigration] purposes. A state offense comes within the quoted phrase only if it proscribes conduct punishable as a felony under the CSA.

PANETTI V. QUARTERMAN

Docket No. 06-6407

Eighth Amendment, competency to be executed

Case Below: 448 F.3d 815 (5th Cir. 2006)

Cert. Granted: 127 S. Ct. 852 (Jan. 5, 2007)

Argument Date: April 18, 2007

Decision:

Question Presented:

1) Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime?

RITA V. UNITED STATES

Docket No. 06-5754

Appellate review, sentencing procedure

Case Below: 177 Fed. App'x 357 (4th Cir. 2006)

Cert. Granted: 127 S. Ct. 551 (Nov. 3, 2006)

Argument Date: Feb. 20, 2007

Decision:

Questions Presented:

1) Was the district court's choice of within-Guidelines sentence reasonable?

2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

ROPER V. WEAVER

Docket No. 06-313

Capital punishment, habeas corpus

Case Below: 438 F.3d 832 (8th Cir. 2006)

Cert. Granted: 127 S. Ct. 763 (Dec. 7, 2006)

Argument Date: Mar. 21, 2007

Decision:

Question Presented:

1) Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a

Criminal Cases continued...

penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

SCHRIRO V. LANDRIGAN

No. 05-1575

Habeas corpus, ineffective assistance of counsel

Case Below: 441 F.3d 638 (9th Cir. 2006)

Cert. Granted: 127 S. Ct. 35 (Sept. 26, 2006)

Argument Date: Jan. 9, 2007

Decision:

Question Presented:

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence.

1) In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2) Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

SMITH V. TEXAS

Docket No. 05-11304

Capital punishment, jury

Case Below: 185 S.W.3d 455 (Tex. Ct. Crim. App. Instructions 2006)

Cert. Granted: 127 S. Ct. 377 (Oct. 6, 2006)

Argument Date: Jan. 17, 2006

Decision:

Questions Presented:

1) In *Smith v. Texas*, 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to petitioner's mitigating evidence notwithstanding this Court's conclusion to the contrary?

2) Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision that this Court then summarily reversed, impose on remand a daunting standard of harm ("egregious harm") to the constitutional violation found by this Court?

*** TOLEDO-FLORES V. UNITED STATES**

Docket No. 05-7664

Case below: 149 Fed. App'x 241 (5th Cir. 2005)

Statutory definitions, prior convictions Cert.

Granted: 126 S. Ct. 1652 (April 3, 2006)

Argument Date: Oct. 3, 2006 (consolidated with *Lopez v. Gonzales, supra*)

Decision: 127 S. Ct. 638 (Dec. 5, 2006)

Question Presented:

Has the Fifth Circuit erred in holding – in opposition to the Second, Third, Sixth, and Ninth Circuits – that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

Holding (per curiam):

The writ of certiorari is dismissed as improvidently granted.

*** UNITED STATES V. RESENDIZ-PONCE**

Docket No. 05-998

Fifth Amendment, grand jury, appellate review, harmless error

Case Below: 425 F.3d 729 (9th Cir. 2005)

Cert. Granted: 126 S. Ct. 1776 (April 17, 2006)

Argument Date: Oct. 10, 2006

Decision: 127 S. Ct. 782 (Jan. 9, 2007)

Questions Presented:

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

Holding (8-1) (copied from syllabus without extended explanation):

Respondent's indictment was not defective, and, thus, this Court need not reach the harmless-error issue.

UTTECHT V. BROWN

Docket No. 06-413

Capital punishment, habeas corpus, jury selection

Case Below: 451 F.3d 946 (9th Cir. 2006)

Cert. Granted: 127 S. Ct. 1055 (Jan. 12, 2007)

Argument Date: April 17, 2007

Decision:

Question Presented:

In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment.

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

WATSON V. UNITED STATES

Docket No. 06-571

Statutory definitions

Case Below: 191 Fed. App'x 326 (5th Cir. 2006)

Cert. Granted: 2007 WL 559880 (Feb. 26, 2007)

Argument Date: Fall 2007

Decision:

Question Presented:

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that "use" of a firearm under § 924(c) means "active employment." *Id.* at 144. The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

*** WHORTON V. BOCKTING**

Docket No. 05-595

Habeas corpus, retroactivity, Sixth Amendment, confrontation

Case Below: 399 F.3d 1010 (9th Cir. 2005)

Cert. Granted: 126 S. Ct. 2017 (May 15, 2006)

Argument Date: Nov. 1, 2006

Decision: 127 S. Ct. 1173 (Feb. 28, 2007)

Questions Presented:

1) Whether, in direct conflict with the published opinions of the Second, Sixth, Seventh, and Tenth Circuits, the Ninth Circuit erred in holding that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review.

2) Whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates this Court's ruling in *Teague v. Lane*, 489 U.S. 288 (1989).

3) Whether, in direct conflict with the published decisions of the Fourth and Seventh Circuits, the Ninth Circuit erred in holding that 28 U.S.C. § 2254(d)(1) and (2) adopted the *Teague* exceptions for private conduct which is beyond criminal proscription and watershed rules.

Holding (copied from syllabus without extended explanation):

Crawford announced a new rule of criminal procedure that does not fall within the *Teague* exception for watershed rules. . . . Because *Crawford* announced a new rule and because that rule is procedural and not substantive, it cannot be applied here unless it is a "watershed rul[e]" that implicates "the fundamental fairness and accuracy of the criminal proceeding." This exception is "extremely narrow," *Schriro v. Summerlin*, 542 U.S. 348, 351, and since *Teague*, this Court has rejected every claim that a new rule has satisfied the requirements necessary to qualify as a watershed. The *Crawford* rule does not meet those two requirements.

UNITED STATES V. WILLIAMS

Docket No. 06-694

Child pornography, First Amendment, Case Below: 444 F.3d 1286 (11th Cir.2006)

Fifth Amendment Cert. Granted: 2007 WL 879579 (Mar. 26, 2007)

Argument Date: Fall 2007

Decision:

Question Presented:

Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits "knowingly, advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

Association and Member News Bulletin Board

LACDL member Jason Williams successfully defended an allegation that New Orleans Police Officer Keith Griffin raped a 37 year old woman while on duty. Despite his DNA evidence on a napkin found in the squad car and on the exterior side of the squad car, the jury concluded that the sexual contact was consensual. The jury returned a verdict of not guilty after hours of deliberation.

Kudos to Jason!!

Congratulations:

Washington Parish. Anthony Johnson has served 22 years for the murder of his girlfriend. In an even better order than last week's Glenn Davis order, the judge made a firm finding of factual innocence and sua sponte addressed the Brady issues in the case that had not yet been argued and submitted (we raised them in the application for DNA testing but were holding the evidentiary hearing on Brady in abeyance until the resolution of the DNA testing etc).

This was an interesting case because there was DNA testing performed on the victim that showed male DNA under her fingernails. After DNA testing performed at our request, through 2005 and 2006, the results showed it was not our client's DNA. There had clearly been a struggle between the victim and the perpetrator. After the DNA test results came back, the State argued that someone else's DNA under the victim's fingernails was of no moment if we couldn't prove whose it was. During the evidentiary hearing, there was extensive testimony from Dr. Sinha at Reliagene, who discussed how unlikely it is that a person would get DNA under their fingernails from casual contact.

The order is 18 pages, but 18 pages of great reading.

Serious congratulations go to David Park and Rick Schroeder at Jones Walker, who co-counseled this case with us and also of course to Emily Bolton for writing the original application for testing and Calvin Duncan for finding the case.

Emily Maw
Director, Innocence Project New Orleans
636 Baronne St.
New Orleans, LA 70113

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During retreat, the 2007 Board discusses upcoming business.



Executive Director David Tatman, explains the **SWOT** exercise to the Board focusing on **Strengths, Weaknesses, Opportunities and Threats.**

John Thompson—Exonerated after 18 years on death row receives \$14M verdict against Orleans Parish District Attorney’s Office

John Thompson sued the Orleans Parish District Attorney’s Office and others in the United States District Court for the Eastern District of Louisiana for pain and suffering resulting from his wrongful murder conviction in 1985 in which he was sentenced to death and served 18 years on death row. When he entered Louisiana State Penitentiary he was 22 years old, and had two young sons. The cell that he moved into had previously been inhabited by Sterling Rault who had been executed less than a week before his arrival. He left death row at the age of 40 deprived not only of his youth but from witnessing the maturation of his sons to adulthood. This suit was filed under 42 U.S.C. 1983, a civil rights statute, which provides remedies to those who suffer a constitutional violation as a result of state action. Thompson was represented by Gordon Cooney Jr. and Michael Banks of Morgan, Lewis & Bockius a Philadelphia Law Firm along with local counsel Robert Glass and Carol Kolinchak. They were able to prove prosecutorial misconduct by establishing they suppressed exculpatory evidence. As a result, the jury awarded him fourteen million dollars.

In 1985 Mr. Thompson, who has always maintained his innocence, was wrongfully convicted in Orleans Parish Criminal District Court of two unrelated crimes: a car jacking for which he received a fifty year sentence and the 1984 murder of hotel executive Ray Liuzza Jr.

After exhausting all appeals and only weeks before he was to be executed, in 1999 a private investigator hired by Mr. Thompson’s lawyers found exculpatory evidence not previously disclosed to the defense. The prosecutors had tested blood found on the clothing of the victim of the carjacking which had been deposited by the carjacker during a struggle. The crime lab report revealed DNA evidence proving the carjacker’s blood type did not match that of John Thompson. Based upon this discovery, a stay of execution was granted only weeks before Mr. Thompson was scheduled to die by lethal injection. The death sentence was thrown out in 2001 and John Thompson was sentenced to life without parole because the district court found the robbery conviction influenced the jury’s decision to sentence him to death.

Not only did the State fail to disclose the crime lab report in the carjacking case, they also failed to provide exculpatory evidence during the murder trial. They did not disclose there were eyewitnesses who had given a different description of the perpetrator and who had been shown a photo lineup and did not identify Mr. Thompson as the murderer. These witnesses did not testify at his trial in 1985. John Thompson was granted a new trial on the murder charge by the Fourth Circuit Court of Appeal which found that he was denied his right to testify at the 1985 murder trial due to the armed robbery conviction. In his 2003 trial, three witnesses testified that John Thompson was not the man they witnessed fleeing from the crime scene. On May 8, 2003 he was found not guilty of the 1984 murder of Ray Liuzza Jr.

Mr. Thompson is the 108th person in the United States to be exonerated from death row since 1973.

Mr. Thompson currently works at the Center for Equal Justice, an organization that represents inmates on death row. Gordon Cooney Jr. and Michael Banks worked on John Thompson’s case on a *pro bono* basis since 1988. Disney has plans to tell John Thompson’s story in a movie starring Matt Damon and Ben Affleck as his attorneys.

“Where have all the heroes gone?” continued...

continuing legal education resulted in rave reviews and requests for additional presentations by Neal. In fact, on the day before he died, Neal presented at the National Forensics Seminar held in New Orleans.

Lawyers felt especially comfortable conferring with Neal, who would always find time to be the sounding board for unusual and often difficult defenses. The anxiety felt when federal prosecutors dismissed the capital prosecution of Eric Matthews was assuaged when Neal signed on to represent Matthews in Tangipahoa Parish. The consummate professional, Neal successfully negotiated a life sentence and located competent counsel for Mr. Matthews in other states. Those attorneys, armed with the mental illness evidence developed by Neal, were also able to negotiate life sentences.

The legacy he leaves us all is a ready cache of top-notch investigators, mitigation specialists, and lawyer’s hand selected and taught by him to uncover a client’s most painful memory or embarrassing secret in order to develop proper mitigation. Only last month, two of his new LCAC associates moved for admission in the Eastern District to continue his tradition of vigorous capital defense work.

Neal epitomized the type of lawyer constitutionally mandated to protect the rights of indigent clients who might otherwise be unable to obtain effective assistance of counsel.

Recent Improvements and Remaining Challenges at OPD

By: Dane S. Ciolino & Christine Lehmann

A year after the appointment a new Board, the Orleans Parish Public Defenders office continues to improve the quality of legal services for indigent defendants in New Orleans.

Pre-Katrina, indigent defense in Orleans was provided by under-paid, under-resourced, part-time public defenders. A study conducted by the Department of Justice Bureau of Justice Administration identified that one of the greatest flaws of the Pre-Katrina Orleans public defender system was that virtually all of its lawyers worked part-time, spending a large amount of time and energy on private caseloads. This system created a perverse incentive for lawyers to spend as little time as possible attending to the needs of their public defender clients. Worse, the public defenders' office was structured so that accused individual went unrepresented – no bond reduction motions, no preliminary hearing, no investigation, no preservation of exculpatory evidence, nothing -- for months while held in jail on a money bonds they could not post. If Churchill was right when he declared that the true measure of a civilized society is how it treats those accused of crimes, New Orleans was a far reach from civilization.

In an effort to reform and restructure its public defender office in the wake of Katrina, the Board hired a national expert in indigent defense systems, Yale Law School Professor and former Director of the Public Defender Service for the District

of Columbia (PDS) Ronald S. Sullivan, Jr., to serve as counsel to the Board. Professor Sullivan in turn, has brought on Professor Stephen Singer of Loyola Law School in New Orleans and formerly of PDS as Chief of Trials, to provide local support and assist in integrating national "best practices" standards into the peculiarities of the New Orleans criminal justice system. Jon Rapping, former Training Director for both PDS and the State of Georgia's new statewide public defenders' office has also joined the New Orleans Public Defenders (OPD) as Director of Training and Recruitment. Together, they are spearheading efforts to build a quality public defender office in New Orleans.

Over the course of the last year, OPD has replaced the part-time public defenders with full-time attorneys. The office has been thoroughly modernized going from a single room in the courthouse with two phones, four computers (only two which connected to the internet), and a handful of file cabinets, to an entire floor of an office building located a half block from the courthouse and jail. OPD lawyers now have individual offices, desks, telephones with separate extensions and voicemail, as well as laptop computers networked through docking stations. OPD is also now striving to provide "continuous representation" to its clients from first appearance within 12 to 24 hours of arrest through the conclusion of the case while trying to maintain manageable caseloads. With a commitment to recruit

and train a cadre of committed young attorneys, the office hopes to create a system that provides poor people the promises of Gideon.

Despite the improvements, challenges remain. The indigent-defense needs in New Orleans far exceeds the resources available for the task. With funding to operate at only half-staff, an enormous backlog of pre-Katrina cases, and soaring crime rates in the city, the fledgling OPD is stretched to its limits. Furthermore, OPD's reform efforts continue to be frustrated by some in the Orleans criminal justice system who apparently would be happy to see OPD revert to the pre-Katrina status quo. Despite these challenges, the new Board and staff are optimistic that even an uncertain future can only be better than the past.

On April 18, 2007 in United States v. Kenneth Edwards, 463-200, Orleans Criminal District Judge Arthur L. Hunter, Jr. held that pursuant to State v. Peart, the Office of the Public Defender cannot constitutionally and ethically provide effective assistance of counsel to 45 cases involving 42 defendants. Judge Hunter halted the prosecution of all 42 indigent clients and ordered the release of any who remained in jail. The 4th Circuit Court of Appeal had previously stayed the ruling.

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The BIG (Not So) Easy:

What Every Federal
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THURSDAY, MAY 10, 2007

Early Registration and Reception 6-9 p.m.

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Registration Opens 7:30 a.m.

Welcoming Remarks 8:30-8:45 a.m.

Strategic Approaches to Dealing with Collateral Consequences 8:45-10:15 a.m.

A felony conviction can often mean much more than incarceration, including loss of a medical, law or broker's license; individual suspension and debarment from government contracts, such as physician reimbursement under Medicare or Medicaid; or, in a wide range of cases involving those who are not U.S. citizens, deportation. Panelists will explore the nuts and bolts of how conviction can impact issues of licensing, debarment, and deportation; strategies in plea negotiation to limit these collateral consequences; and how to approach relevant civil agencies or licensing boards to minimize the collateral damage of resolving a criminal case.

DAVID G. BARGER, Williams Mullen, McLean, Va.
LINDA OSBERG-BRAUN, Miami, Fla.
CHRISTOPHER W. SCHMEISSER, Securities and Investor Fraud Unit, U.S. Attorney's Office, District of Connecticut

Break 10:15-10:30 a.m.

Expert Witnesses in Federal Criminal Trials: Recent Trends and Common Practices 10:30 a.m.-Noon

From DNA testing to computer forensics and testimony relating to complicated financial transactions, both prosecutors and defense lawyers are increasingly expanding their use of expert witnesses to assist juries in understanding complex criminal cases. This panel will explore the application of *Daubert* to federal criminal prosecutions and will discuss recent cases and trends. In addition, the panel will provide practical advice for practitioners in dealing with admissibility, the examination of the witness, and the "CSI effect" on jury expectations.

HON. KURT ENGELHARDT, U.S. District Court, Eastern District of Louisiana, New Orleans, La.

Location

The Criminal Law Conference and Thursday night reception will be held at the Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, La.

Enrollment and Fees

The deadline for registration by mail, fax, or online is Friday, May 4, 2007. Attendees may also register onsite, provided space is available. Price includes registration fees, lunch, and one set of

course materials. After the conference, additional course materials can be purchased at a cost of \$100 for FBA members and \$130 for nonmembers.

Accommodations

A limited number of rooms are being held at the Sheraton New Orleans for conference attendees. Room rate is \$133 plus 13 percent tax. Mention the Federal Bar Association in order to get the group rate. The Sheraton New Orleans is locat-

ed at 500 Canal Street, New Orleans, La. For reservations call (504) 525-2500, (800) 325-3535, or (504) 595-5552 (fax). Make reservations by April 10, 2007.

CLE Credit

This program qualifies for approximately 6 hours of CLE credit.

The THURSDAY EVENING RECEPTION is SPONSORED by the New Orleans Chapter of the Federal Bar Association.

GEORGE CHANEY, Office of the Federal Public Defender for the Eastern District of Louisiana, New Orleans, La.

PAMELA R. METZGER, Associate Professor of Law, Tulane University Law School, New Orleans, La.

MICHAEL R. SKLAIRE, Williams Mullen, Washington, D.C.

Luncheon and Keynote Address Noon-1:30 p.m.

HON. RICARDO HINOJOSA, Chair of the U.S. Sentencing Commission, will talk about the current landscape of federal sentencing, including the continued impact of *Booker*.

The Federal False Claims Act: An Overview and Analysis of Parallel Criminal and Civil Proceedings 1:30-3 p.m.

This panel will include an overview of the federal False Claims Act, including the process for initiating a qui tam action, what factors Department of Justice attorneys apply in determining whether to intervene in an action, what steps corporate counsel should take when notified of a potential criminal and/or civil FCA action, the different standards of scienter, how to handle parallel criminal and civil proceedings under the act, common defenses and steps companies can take to reduce exposure to FCA actions.

ROBERT SALCIDO, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C. (former trial attorney in the Department of Justice Civil Fraud Unit)

KEVIN CONNELLY, Seyfarth Shaw LLC, Washington, D.C.
KEVIN MCGRATH, Seyfarth Shaw LLC, New York and Boston (former Assistant U.S. Attorney)

Break 3-3:15 p.m.

Supreme Court Update 3:15-4:45 p.m.

In the ever changing world of criminal defense, it is necessary to consider the practical implications of the most recent decisions from the country's highest Court. Timothy Crooks will provide attendees with a comprehensive review of recent Supreme Court decisions and how those decisions will impact the way both private and public practitioners approach the representation of their clients.

TIMOTHY CROOKS, Office of the Federal Public Defender for the Southern District of Texas, Chief of Appeals, Houston, Texas

LACDL Upcoming Events

LACDL 2007 Legislative Bill Review

Saturday, April 21, 2007
525 Florida Street, Suite 310
Baton Rouge, LA

Law & All That Jazz CLE Seminar

April 26-28, 2007
Astor Crowne Plaza
New Orleans, LA

LACDL Board Meeting

12:00 pm (lunch will be provided)
April 28, 2007
Astor Crown Plaza
New Orleans, LA

Death Penalty CLE Seminar

Jury Selection Techniques & Developing Mitigation Through Teamwork
July 26-27, 2007
Paragon Casino & Resort
Marksville, LA

September CLE Seminar

September 13-14, 2007
Marriott Baton Rouge
Baton Rouge, LA

Last Chance CLE Seminar

December 6-7, 2007
Hotel Monteleone
New Orleans, LA

Justice Albert Tate Awards Banquet

December 7, 2007
Hotel Monteleone
New Orleans, LA

For more information call LACDL at 225-767-7640.

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