

# THE EAST TENNESSEE DEFENDER



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**S**ometimes it just seems like it is all about sentencing.

Last month, I was invited to attend the 2008 National Sentencing Policy Institute which is sponsored by the Federal Judicial Center. The annual conference is attended by at least one judge, one United States Attorney, one probation officer, and a federal defender from each circuit. The organizers include members of the Committee on Criminal Law of the Judicial Conference. So, right from the beginning, you can probably imagine that there are interesting interactions that occur.

During the three day conference, we heard the commissioners from the Sentencing Commission discuss the crack amendment and the effect of Booker, Rita, Gall, and Kimbrough on sentencing practices. I was sad to learn that the average sentence in the Sixth Circuit has actually risen from 59 months to 65 months since the Gall decision, and that the median percent increase for non-government sponsored departures or variances has been only about 2%.

It was even more bothersome that the Sentencing Commission continues to support guideline sentences, because according to them, all of the factors of 18 U.S.C. §3553(a) were considered in the drafting of the guidelines, a position rejected by the Supreme Court. This was the theme repeated by one of the luncheon speakers, the United States Attorney from the Western District of Oklahoma, who was much more forceful in telling the judges that they violated the Equal Protection Clause every time they sentenced outside the guideline range.

The good news is that the judges to whom I spoke and who I heard reacting were not in agreement with either the Sentencing Commission or the United States Attorney from Oklahoma. They believe that the Supreme Court decisions give them the discretion to fashion sentences that are most appropriate for the defendants who appear before them. This was a group of judges who take their jobs very seriously and who want the people passing through their courts to be successful after their sentences.

However, it is not all up to the judges. We have to be the ones who give the judges the information they need to depart or to grant variances. We need to investigate all of the mitigating factors about our clients, and we need to prepare the sentencing memoranda that will substantively and procedurally support sentences that are outside the guideline range. It is a big responsibility, and I know that you are all up to the challenge.

Beth Ford  
Federal Community Defender

## May 2008 Sentencing Seminar

By Jodie Ricker, Paralegal ~ Greeneville  
& Julie Vandegrift, Paralegal ~ Chattanooga

Once again, the Sentencing Seminar put on by the Tampa Bay Chapter of the Federal Bar and the United States Sentencing Commission can only be described as a wealth of information. The seminar began with an introduction to the Sentencing Guidelines. This session not only gives an overview of the application of the guidelines for those who are unfamiliar with their application, but provides a nice review to help those who have calculated sentencing guidelines remain on track.

Additionally, the Sentencing Commission provides an overview of what has gone on in federal sentencing over the past year. This session also offers attendees the opportunity to question members of the Commission on these issues.

This year, appellate judges and a Duke University School of Law professor offered their views on recent Supreme Court cases involving federal sentencing, focusing on *Rita v. United States*, – U.S. –, 127 S. Ct. 2456 (2007); *Gall v. United States*, – U.S. –, 128 S. Ct. 586 (2007) and *Kimbrough v. United States*, – U.S. –, 128 S. Ct. 558 (2007) as well as tips to district court judges, attorneys and probation officers on aiding appellate review.

Insight into the *Rita* case provided such information as when the judge and the Commission agree on a sentence, it is probable that it is reasonable, i.e., a sentence within the guidelines range imposed by the sentencing judge is probably reasonable. However, a district court cannot presume that a sentence should be within the guidelines. The district court should discuss that it has considered the arguments of the parties, give a reasoned basis for the sentence, and explain the rejection of non-frivolous arguments. Nonetheless, a sentence within the guidelines will not normally require a long explanation.

*Gall* stands for the proposition that all sentences are subject to deferential review. The *Gall* Court rejected mathematical and proportional review.

Pursuant to *Gall*, the sentencing court begins each sentencing by considering the advisory guideline range and the parties' arguments. The court must then consider the factors under 18 U.S.C. § 3553(a) for an individual assessment of the defendant and then give an adequate explanation of the sentence imposed. The Court of Appeals determines if there was a procedural error, then looks at a sentence for substantive reasonableness under the abuse of discretion standard. Abuse of discretion is not used when reviewing for procedural error.

The *Kimbrough* Court pointed out that the guidelines are advisory only and that a district judge could base his sentencing decision on the crack/powder disparity. *Kimbrough* also suggests there may be a closer review on what has become known as variances.

Other tips given at this session included making objections to the underlying facts of a case, not just the conclusions, and making a substantive objection to a sentence by asking for a higher or lower sentence. Judge Sutton from the Sixth Circuit also advised trying to win cases at the district court level as the district court is frequently affirmed.

Judge Riley from the Eighth Circuit finished up the session with the tempting thought, will the Supreme Court apply variances to mandatory minimum and maximum sentences? He intimated he believes this is a question lurking out there.

In an equally valuable session, attendees were treated to Tips from the District Court Bench. In this session, the district court judges stressed such things as the judge's desire to get the positions of the parties, not overlooking departures in favor of variances because they are not the same, getting a narrative of the facts of the case, and addressing the question "do the guidelines make sense in this case?". The facts of a case are very important as they allow counsel to compare similarly situated defendants and look at sentencing alternatives. Importantly, the judges see far too

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many boilerplate sentencing memorandums, which they do not believe does a defendant justice.

One judge did point out that they are willing to hear from one or two family members but in the long run, this generally does not affect the sentence. If they are going to hear from someone, they would rather hear from the defendant, though they would not hold it against him if he was silent.

The session ended with an enlightening talk on the value of good writing. Be simple and direct, and avoid boilerplate pleadings. Probation officers were encouraged to use fact language, not conclusory language. Conclusory language gives the appearance of being an arm of the prosecutor.

The seminar also had many breakout sessions on particular sections of the guidelines such as gun offenses, drug offenses, plea bargaining and Chapter Three adjustments.

On the last day of the seminar, training sessions were divided into three categories: Probation Officer Training, Defense Attorney Training, and Prosecutor Training. The panelists for the Defense Attorney Training session were Amy Baron Evans, National Resource Counsel to the Federal Public & Community Defenders; Barry Boss of Cozen O'Connor, Washington, D.C.; James E. Felman of Kynes, Markman & Felman, P.A., Tampa Florida; and James

T. Skuthan, Chief Assistant Federal Defender, Middle District of Florida.

The panel discussed the crack retroactivity amendment, crime victims rights, and effective sentencing strategies. Defense attorneys have a great source of information available at [www.fd.org](http://www.fd.org). This website is updated routinely with articles and case law that assist the defense in every aspect of a criminal federal case. Amy Baron Evans also announced that an article, "Deconstructing the Guidelines", will be available soon on the website.

Because most of the defense's success is at the sentencing stage, one of the most important tips that was given during the session was the importance of beginning to gather information that will be used during the sentencing phase at an early stage. Post-*Booker*, the importance of the 18 U.S.C. § 3553(a) factors is paramount in effectively representing a defendant at his sentencing. <http://www.fd.org> One way to accomplish this as a defense attorney is to provide the client with a copy of 18 U.S.C. § 3553(a) and request the client provide any information that can then be presented to the Court for consideration at sentencing.

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**O**n January 15, 2008, the Bureau of Prisons implemented new electronic search procedures for *all persons* attempting to gain access to the secure confines of our institutions excluding camps. This change does not replace or eliminate other requirements or procedures related to BOP's search and detain policy for inmate visitors. According to the BOP, this change was necessary to reduce the potential for the introduction of contraband into its facilities. The changes will be applied consistently.

**Blair Wood, Intern ~ Knoxville**

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## USA v. Blair

By Jennifer O'Connell, Intern ~ Knoxville  
&  
Kurt Hippel, Intern ~ Knoxville

In Blair, an undercover police officer (Munday) witnessed Marcus Blair drive up to a known drug house and speak with an inhabitant of that house. Some type of hand-to-hand exchange occurred; however, Munday could not see what was being exchanged, so he made no attempt to apprehend either party. Blair then returned to his vehicle and left the known drug house, failing to stop at a stop sign in the process. Munday radioed to another officer (Holmes), advising him of a possible drug transaction and the stop-sign violation. Munday did not instruct Holmes, who was positioned around the corner in a patrol car with audio and visual equipment, to stop Blair. Holmes had not witnessed any of the preceding.

When Blair's vehicle came within Holmes's view, although Holmes was not sure it was the same vehicle Munday had alerted him to, Holmes stopped Blair for an inoperable tag light under Knoxville City Code § 17-379(1)(b)(4). Holmes retrieved Blair's license and returned to his patrol car to run a criminal history check which turned up clear for outstanding warrants. While running the check, Holmes noticed that Blair was "fidgety" and repeatedly reached to the floor of his vehicle. Soon after the completion of the records check Holmes learned from Munday of the aforementioned hand-to-hand exchange. Munday also informed Holmes that he had stopped Blair on a previous occasion in which Blair was in possession of a firearm and had attempted to flee the scene. Upon receiving this information, Holmes returned to Blair's vehicle and asked Blair for consent to search his vehicle. Blair refused. After advising Blair that the area was a known drug area and that the officers were aware of Blair's history with drug possession, Holmes advised Blair that if he refused to consent to a search again, Holmes would radio for a K-9 unit to search. Blair again refused to consent to a search.

Holmes turned to return to his patrol car. At that time, Blair yelled after him, requesting a reason for the stop, to which Holmes responded, "Tag light."

Holmes returned to Blair's car to explain further the reason for the stop (only mentioning the inoperable tag light), and he observed Blair reaching underneath the seat while acting in a nervous manner. Holmes instructed him to cease reaching around the car and radioed for backup. Blair attempted to exit the vehicle in order to check his tag light, although Holmes claims this action caused him to believe that Blair was attempting to flee the scene. Holmes returned to his patrol vehicle once again and dimmed his headlights, revealing to the video camera that the tag light of Blair's vehicle was lit and operable. Holmes maintained that even with an operable tag light, the tag was not readily visible from 10 feet away.

Near this time, Munday arrived on the scene and identified Blair's vehicle as the one he had seen earlier. Two other officers arrived as well. Blair repeatedly asked the reason for the stop, to which he was told that it was his inoperable tag light. Blair was also informed that a K-9 unit was on its way and that if the dog did not alert to the vehicle, Blair would be free to go. However, when the unit arrived, and Blair was told to exit the vehicle for the search, he was patted down and crack cocaine was found on his person. Blair was then taken into custody.

The district court in the case ruled that the search was valid, and the evidence obtained from it was admissible. However, on appeal, the Sixth Circuit vacated the district court's ruling. First, the court pointed out that an officer must have probable cause for a civil infraction stop and reasonable suspicion for a criminal violation. *U.S. v. Blair*, citing *U.S. v. Sanford*, 476 F.3d 391, 394 (6<sup>th</sup> Cir. 2007). The court also stated, in citing *U.S. v. Mesa*, that the true subjective intent of the officer in stopping a vehicle has little to no relevance as long as the necessary probable cause or reasonable suspicion exists. 62 F.3d 159, 162 (6<sup>th</sup> Cir. 1995). The Sixth Circuit, although stating that the tag light excuse for the stop in *Blair* was questionable, chose to give Holmes what amounts to the benefit of the doubt in stopping Blair. However, the court did

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note that there was not sufficient evidence at the time to warrant a *Terry* stop, which is ultimately what the stop in *Blair* amounted to once the vehicle and the person were searched. The reason for this is that Holmes must have had a reasonable suspicion of an ongoing criminal activity. The court found that the facts in *Blair* fell short of this; the simple facts that this was a known drug area and that Holmes had received word of a vehicle in the area leaving a possible hand-to-hand exchange are not enough to rise to the level of a reasonable suspicion of ongoing criminal activity. Holmes did not know until after the stop that Blair was the person involved in the possible exchange, nor was Blair's nervous behavior enough to signify that he was currently involved in criminal activity.

Because the court deemed the stop itself to be reasonable but declined to extend the allowance to a *Terry* stop, the next consideration is whether or not the officer was correct in detaining Blair until the K-9 officer arrived to search the vehicle. Also, it must be determined whether, in that time, some event occurred to give the officer the necessary cause to continue to detain Blair and/or search him and his vehicle. First, the Sixth Circuit turned to *U.S. v. Perez*, which states that “[o]nce the purpose of a traffic stop is completed, a police officer may not further detain the vehicle or its occupants unless something that occurred during the

traffic stop generated the necessary reasonable suspicion to justify a further detention.” 440 F.3d 363, 370 (Sixth Cir. 2006). The reason for the stop, as stated time and time again by Officer Holmes, was an inoperable tag light. However, this purpose was completed at the time that the criminal history was run and the citation was written. Any further detention was a violation of Blair's Fourth Amendment rights.

To the issue of whether some event occurred to extend Blair's detainment and raise the officers' suspicions as to possible criminal activity, the Sixth Circuit was quite clear. Denying search of his vehicle, acting nervously, and attempting to check the tag light Blair was told was inoperable were not sufficient to cause Holmes to gain reasonable suspicion of a crime. *U.S. v. Blair*, citing *U.S. v. Richardson*, 385 F.3d 625, 630-31. Neither does reaching under the seat alone justify a *Terry* stop or hold and search of the vehicle. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Under the totality of the circumstance, the Sixth Circuit determined that the stop and search of Marcus Blair violated his Fourth Amendment rights, and any and all evidence obtained from the stop is fruit of the poisonous tree and must thus be suppressed.

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REPORT ON THE SIXTH CIRCUIT JUDICIAL CONFERENCE  
CHATTANOOGA, TENNESSEE  
MAY 7-10, 2008

*By Rita LaLumia, Assistant Federal Defender ~ Chattanooga*  
*And*  
*Kurt Hippel, Intern ~ Knoxville*

**W**hat do Abraham Lincoln, Jimmy Hoffa, and Justice John Paul Stevens of the United States Supreme Court have in common?

Well, other than appearing in a weird dream you might have had or a bad joke you might have heard, these three men had very little in common until all three showed up, in one form or another, in Chattanooga, Tennessee, for the 68th Judicial Conference of the Sixth Circuit held at the Marriott Chattanooga Convention Center, May 7-10, 2008.

This was Chattanooga's first time ever hosting the Sixth Circuit Judicial Conference and the idea of bringing the conference to "The Scenic City" came from Chief Judge of the Eastern District of Tennessee, Curtis Collier way back in 2004. Acting to convince Sixth Circuit Chief Judge Danny J. Boggs and Circuit Executive Jim Higgins that Chattanooga would make for an excellent host city, Chief Judge Collier enlisted the help of Senior District Judge Leon Jordan and Knoxville attorney Wilson Horde of Kramer Rayson LLP. After several trips back and forth to Chattanooga in which Chief Judge Collier, Judge Jordan, and Mr. Horde persuaded the Sixth Circuit to come to Chattanooga, the real planning for the conference needed to be done.

Judge Jordan said that the planning committee knew that one of the programs that they wanted to present to the conference would be about the Chattanooga trial of union leader James "Jimmy" Hoffa. That presentation came in the form of a documentary film entitled "Balancing the Scales: The Chattanooga Trial of U.S. v. James R. Hoffa", which details the 1964 jury tampering trial of the former Teamster president.

The Chattanooga trial proved to be the beginning of the end for Hoffa. Long thought to be bulletproof after escaping the previous prosecutorial scrutiny and indictments of Attorney General Robert F. Kennedy, Hoffa was handed his first federal conviction in Chattanooga. The film examines the high drama of the trial and effectively places Hoffa's Chattanooga conviction in historical context: after his conviction in Chattanooga, a legally bruised Hoffa would lose a second consecutive trial (this time for pension fraud) and be ordered to prison. After President Richard Nixon pardoned him in 1971, Hoffa attempted to regain control of the United Brotherhood of Teamsters but went missing in 1975, never to be heard from again.

The Hoffa documentary garnered considerable praise. In discussing the film, Judge Jordan stated that the film was "really outstanding, Assistant Federal Defender Rita LaLumia and the Chattanooga Chapter of the Federal Bar did] a beautiful job...I've heard a number of conference goers say it was the best program they have ever seen."

Judge Jordan and Mr. Horde, acting in cooperation with the members of the Chattanooga state and federal bars, the Chattanooga Chamber of Commerce, and the Chattanooga Area Convention and Visitors Bureau, planned the free time or social program for the conference. Outings included a tour of Chickamauga Battlefield, a visit to the Bluff View Art District, a luncheon and ride on the Southern Belle Riverboat, rounds of golf at the Chattanooga Country Club and the Honors Club, and the conference banquet on Friday night, May 9<sup>th</sup>.

The conference banquet proved to be the crown jewel of the conference as it welcomed

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two famous Americans. Few at the banquet would have expected that Justice John Paul Stevens of the United States Supreme Court, who delivered remarks to the conference banquet, would be the second most famous figure to appear at the banquet. But, little did the conference attendees know that President Abraham Lincoln would follow up Justice Stevens' remarks. Gene Griessman, Ph.D, an Abraham Lincoln impersonator from Atlanta, GA, entertained the banquet attendees with a dramatic portrayal of Honest Abe's thoughts and presidential musings. Judge Jordan credits Mr. Horde with coming up with the idea of having Dr. Griessman come to the banquet and said that the performance was very well received.

Although following the United States' sixteenth president was no easy task, Justice Stevens nonetheless aroused the attention and emotions of the attendees of the conference in his own way. After making comments on the state of several recent Supreme Court decisions and the pleasant reception he and his wife were given by the penguins at the Tennessee Aquarium, Justice Stevens made another animal related remark that garnered a round of enthusiastic applause from his audience. Commenting on the recent euthanization of Kentucky Derby runner up Eight Belles, Justice Stevens stated that the horse probably received a more humane death than those human beings executed on death row. Justice Stevens' remark was prompted by the fact that it is illegal in Kentucky to kill a horse using one of the three drugs used to lethally inject a death penalty inmate. Justice Stevens had recently concurred in a decision that

did not find the use of the three drug lethal injection cocktail to be cruel and unusual punishment but he admitted that his opinion and remarks would "generate debate...about the constitutionality of the three-drug protocol...[and] the death penalty itself."

Overall, as the sun set on the 68<sup>th</sup> Judicial Conference of the Sixth Circuit, Chief Judge Collier, Judge Jordan, Mr. Horde and all the others who worked so hard to ensure the success of the conference could bask in the greatness of their achievement. The Chattanooga based conference had welcomed well over 700 judges and attorneys and was, according to the Chattanooga Times Free Press, the "largest crowd to ever attend." As for Judge Jordan, he commented that everyone he talked to was really impressed with the conference and its programs and that he "was pleased that everything went so smoothly."

The next open judicial conference for the Sixth Circuit will be held in Columbus, Ohio, in 2010.

"Balancing the Scales: The Chattanooga Trial of U.S. v. James R. Hoffa" has been nominated to be shown at the Hunter Museum of American Art in Chattanooga, TN in July of this year. Contact the Hunter Museum or the Chattanooga Chapter of the Federal Bar Association for more information.

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Thanks to Judge Jordan for agreeing to be interviewed for this article.

## Supreme Court Watch Habeas and Constitutional Law Cases

By Susanne Bales, Assistant Federal Defender ~ Knoxville

When Chief Justice Roberts was appointed to the United States Supreme Court, many observers anticipated renewed efforts to minimize dissent and to decide cases on the narrowest basis possible. But this terms' cases exposed core philosophical differences among the Justices; and on two of the biggest cases, the death penalty for child rape case, and the Guantanamo detainee case, Justice Kennedy reveled in casting the deciding vote in favor of constitutional protection of the individual.

### **District of Columbia v. Heller, No. 07-290 Decided June 26, 2008**

The Court, splitting 5-4, struck a District of Columbia ban on handgun possession. Justice Scalia, writing for the majority declared, "it is not the role of this Court to pronounce the Second Amendment extinct." The Court found the ban on possession of a gun in one's home and the requirement that the gun have a trigger lock violated the Second Amendment. The Court did not pass upon licensing requirements, bans on carrying concealed weapons, bans on possession by felons or the mentally incompetent, bans on guns at schools or government building, and restrictions on gun sales.

### **Kennedy v. Louisiana, No. 07-343 Decided June 25, 2008**

"The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection. See Amdts 8 and 14." So begins Justice Kennedy's opinion finding the death penalty for child rape unconstitutional. Stevens, Souter, Ginsburg, and Breyer, JJ, joined Kennedy; Alito, J., filed a dissenting opinion, in which Roberts, C.J., and Scalia and Thomas, JJ., joined. Predictably, the majority found there was not a national consensus that the death penalty was an appropriate punishment for child rape. But the rest of the majority opinion demonstrated the Court's discomfort with death penalty jurisprudence: "When the law punishes

by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Justice Kennedy explained that the Court has counseled restraint or moderation in application of the death penalty and that its case law furthering this goal is "not all together satisfactory." Justice Kennedy explained that its death penalty jurisprudence "is still in search of a unifying principle." Because the law is so imperfect, prudence counsels against extending the reach of the death penalty. The Court found significant the number of executions that would be allowed if the death penalty were allowed for child rape. The Court also found it would be difficult to limit its application so that the death penalty is reserved for the most severe cases of child rape; the Court lacked "confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakish.'" Justice Kennedy concluded by noting that justice is better served by confining the child rapist and "preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense."

### **Giles v. California, No. 07-6053 Decided June 25, 2008**

The Supreme Court held that introduction at trial of statements that a murder victim made to law enforcement violated the constitutional rights of the defendant. Three weeks before her death, the victim informed the police that Mr. Giles, the defendant, threatened to kill her. Writing for the majority, Justice Scalia found that use of the statement violated Mr. Giles' Sixth Amendment right to cross-examine the witnesses against him, unless the prosecution could first prove that he killed the witness to make her unavailable.

### **Boumediene v. Bush, No. 06-1195 Decided June 12, 2008**

Justice Kennedy returned to the role of swing voter in this Guantanamo detainee rights case. Justice Kennedy's seventy-page majority opinion was the Court's third rebuke of the Bush administration's enemy

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combatant policies. In a nutshell, the Court rejected the Government's position that "non-citizens designated as enemy combatants and detained in a territory located outside our Nation's borders have ... no privilege of habeas corpus" and found the jurisdiction-stripping provisions of the Military Commissions Act were an unconstitutional suspension of the writ of habeas corpus. Critical to the Court's ruling was the fact that the right of habeas corpus is embedded in "a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality" that informed the Court's current review of the Military Commissions Act. The Court concluded that "liberty and security can be reconciled [and] Security subsists in fidelity to freedom's first principles." Chief Justice Roberts, joined by Justice Scalia, Justice Thomas, and Justice Alito, dissented, complaining that "sensitive foreign policy and national security decisions have been shifted from elected branches to the Federal Judiciary." Justice Scalia also penned a bitter dissent, joined by Roberts, CJ., and Thomas and Alito, JJ., pointing out that "America is at war with radical Islamists" and that the "enemy began by killing Americans and American allies abroad." Justice Kennedy's majority opinion was informed by the history of the writ of habeas corpus, while Justice Scalia's dissent was informed by the worldwide battle against terrorism. All ninety-six pages of opinion are worth the read.

**Munaf v. Green, No. 06-1666**

**Decided June 12, 2008**

In this unanimous case, the Court held that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command. The Court concluded, however, that the habeas statute cannot be used to prevent the United States from transferring individuals alleged to have committed crimes against another sovereignty to the custody of that sovereignty for criminal prosecution.

**Rothgery v. Gillespie County, Texas, No. 07-440**

**Decided June 23, 2008**

In this Section 1983 case, the Supreme Court confirmed that the right to counsel attaches at the initial appearance. Mr. Rothgery would be our perfect client. He had never been convicted of a felony. However, erroneous records showed he did have a felony conviction and Mr. Rothgery was arrested for being a

felon in possession of a firearm. He was arraigned and the magistrate set bond at \$5000, which Mr. Rothgery posted. Significantly, he was NOT appointed counsel at this initial appearance. Several months later, he was indicted for the offense. The judge increased the bond to an amount Mr. Rothgery could not make. He was eventually appointed an attorney, who gathered documentation showing his client had no criminal history. The charges were dismissed, but not before Mr. Rothgery spent three weeks in jail. Mr. Rothgery filed a Section 1983 suit, alleging a Sixth Amendment violation of his right to counsel. The State of Texas argued the right to counsel did not attach until the prosecutor had knowledge of the case. The Supreme Court easily rejected this argument and reaffirmed the traditional test that the right to counsel attaches when adversarial proceedings begin, that is, when the government uses the judicial machinery to signal a commitment to prosecute

**Baze v. Rees, No. 07-5439**

**Decided April 16, 2008**

A widely splintered United States Supreme Court issued seven opinions on the constitutionality of Kentucky's lethal injection protocol. Chief Justice Roberts, joined in by Kennedy and Alito, JJ., adopted as a standard for assessing the validity of an execution method whether it poses a "substantial risk of serious harm." Four other justices disagreed in whole or in part with this standard but still concluded Kentucky's protocol did not violate the Eighth Amendment, regardless of what legal standard is used. Justice Thomas opined an Eighth Amendment violation could be found only if the execution method is "deliberately designed to inflict pain." Justice Stevens opined that Kentucky's method would pass constitutional muster but that he has personally concluded the death penalty itself is unconstitutional. Ginsburg and Souter, JJ, dissented, concluding Kentucky should be required to consider altering its execution method. It is unclear how the *Baze* opinion will affect future litigation on method of execution claims, partly because there is not a majority opinion and partly because it turned intimately on the facts of the case.

**Medellin v. Texas, No. 06-984**

**Decided March 25, 2008**

Jose Medellin is a Mexican citizen on Texas' death row who was not afforded his rights under the Vienna

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Convention on Consular Relations. President Bush ordered state courts to provide the review required by the international law. The state court in Texas refused to do so. The United States Supreme Court granted certiorari to determine whether the President had the authority to issue such order. The Court ruled 6-3 that the President did not have the authority to order states to comply with the International Court of Justice rules.

**Snyder v. Louisiana, No. 06-10119**

**Decided March 19, 2008**

You may recall hearing the media refer to this case as “the O.J. Case.” An all white jury sentenced African-American Allen Snyder, to death. The prosecutor used five peremptory challenges to strike five qualified African-Americans from the jury pool. During closing argument, the prosecutor argued the case was similar to the O.J. Simpson case and the jurors should not let Snyder “get away” with the crime. The Supreme Court ruled 7-2 that Mr. Snyder should be awarded a new trial because the trial judge allowed a potential African-American juror to be eliminated based “in substantial part [on] discriminatory intent.” In reaching this conclusion, Justice Alito, writing for the majority, engaged in a very detailed, word for word, analysis of the jury voir dire. The opinion may pave the way for a mixed-motive Batson claim, that is, a case where the prosecutor struck a jury for two reasons: one permissible and the other impermissible.

**Indiana v. Edwards, No. 07-208**

**Decided June 19, 2008**

In Faretta v. California, the Supreme Court held that the accused has a Constitutional right to represent himself. 422 U.S. 806 (1975). The Court explained this was so because of “respect for the individual which is the lifeblood of the law.” In Indiana v. Edwards, however, the Court, 7-2, held that the Constitution permits a State to limit a defendant’s self-representation right by insisting upon trial counsel when the defendant lacks the mental competency to conduct his own trial defense. In the majority opinion, Justice Breyer, ruminates upon the nature of mental illness: “Mental illness is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.” The case is also notable for its strong reliance upon an amicus brief filed by the American Psychiatric Association. Justice Scalia, joined by Thomas, J., dissented, complaining the mentally ill were

unfairly singled out for deprivation of a constitutional right and that the holding amounted to “imprison[ing] a man in his privileges and call[ing] it the Constitution.”

**Danforth v. Minnesota, No. 06-8273**

**Decided February 20, 2008**

In Teague v. Lane, the United States Supreme Court held that new constitutional rules do not apply to habeas cases unless they are watershed rules of criminal procedure or they significantly improve the reliability of the fact-finding process. 489 U.S. 288 (1989). In Danforth v. Minnesota, the Court held that Teague’s retroactivity rule does not prohibit state courts conducting collateral review from giving broader retroactive application to federal constitutional rules than what Teague would require of a court conducting federal habeas review.

**Allen v. Seibert, No. 06-1680**

**Decided November 5, 2007**

In a per curiam decision, the Court ruled 7-2 that the running of the one-year filing deadline for pursuing a federal habeas corpus challenge to a state conviction is not interrupted while a defendant pursues an untimely challenge in state court.

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## **COURTROOM TECHNOLOGY SEMINAR**

The district courtrooms in East Tennessee are state-of-the-art facilities where attorneys have an unique opportunity to use technology in telling their clients' story. The first step toward success is learning what technology and equipment are available. The next step is learning how to utilize these powerful tools to your advantage! This seminar is designed to do just that....so that the next time you are confronted with defending a client, you have a skill which could possibly make the difference. You are invited to come and learn about what you can do in every courtroom in the Eastern District of Tennessee and to try out what you have learned as you learn it.

Knoxville, July 31, 2008

Greeneville, August 7, 2008

## **MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR**

This is a seminar sponsored by the Training Branch of the Office of Defender Services. Like the Law and Technology Workshop, it is free to panel lawyers. You just have to get yourself there and pay for your room and board. See [fd.org](http://fd.org) for more details on the agenda. (More details are found on page 10.)

Los Angeles, California, September 4-6, 2008

**ADMINISTRATIVE OFFICE OF THE U.S. COURTS  
OFFICE OF DEFENDER SERVICES TRAINING BRANCH**

***Multi-Track Federal Criminal Defense Seminar:  
Strategies For Defending Complex Cases  
September 4-6, 2008***

*and*

***Persuasive Writing Workshop for Trial Lawyers  
September 4-5, 2008***

**Los Angeles Marriott Downtown  
Los Angeles, California**

The Multi-Track Federal Criminal Defense Seminar is designed to offer in depth instruction in a variety of substantive criminal topic areas. Four of the tracks - Gangs, Computer Crimes, Immigration, and Trial Skills - will be presented in four distinct hour-long time blocks. The sessions will be presented on Thursday, September 4, 2008, and then repeated on Friday, September 5, 2008. This design will allow seminar participants the opportunity to attend two of the separate tracks. In addition, on Thursday, September 4, 2008, there will be a full day track - "Fundamentals of Federal Criminal Practice"- that offers practitioners who are new to federal criminal defense practice the opportunity to receive instruction on the areas most vital to providing an effective defense for their clients. On Saturday, September 6, 2008, seminar participants will have the opportunity to select from four additional tracks, including Mental Health, Noncapital Mitigation, and Mortgage Fraud.

In addition to the above-referenced tracks, the seminar will also include plenary sessions addressing topics of general interest and importance to criminal defense practitioners, along with the opportunity to attend small group breakouts covering a variety of substantive criminal defense issues.

Also on September 4-5, 2008, in conjunction with the Multi-Track Seminar, the Persuasive Writing Workshop for Trial Lawyers will offer CJA panel attorneys the opportunity to participate in an intensive writing program. During the course of this 1 and a half-day workshop, participants will learn how to use storytelling techniques to make legal writing persuasive, and how to make their writing clear and concise. The workshop combines interactive group discussion with a hands-on exercise in drafting a typical trial level motion and memorandum in support. **Participants will have assignments prior to the start of the workshop. Participation in this workshop is limited to 24 panel attorneys. A separate registration is required.** CJA panel attorneys are welcome to participate in either the Multi-Track Seminar, the Persuasive Writing Workshop, or both.

**AMENDMENTS TO  
THE FEDERAL RULES OF CRIMINAL PROCEDURE  
AND  
THE FEDERAL RULES OF APPELLATE PROCEDURE**

Rules 11(b)(M), 32(d)(1) and (d)(2)(F), and Rule 35(b)(1) have been amended to reflect Booker. Rule 11(b)(M) has been changed to eliminate the requirement that the court advise the defendant of its obligation to apply the Guidelines and instead requires the court to advise the defendant the court must calculate the guideline range and consider it, possible departures and § 3553(a) sentencing factors. With respect to Rule 32 (d)(1), "advisory" is added to the reference to the Guidelines. Rule 32(d)(2)(F) provides that the court may require the presentence report to include information relevant to § 3553(a). The advisory notes state that this means an individual judge could order this in a particular case or the court as a whole could order it for all cases. The Rule 35(b)(1) change eliminates the requirement that the reduced sentence, in light of the defendant's post-sentence cooperation, be in compliance with the Guidelines.

Significantly, Rule 32(h) does not explicitly require notice of a contemplated variance outside the guideline range, even though such a notice requirement was originally proposed. This is apparently because of the severe split in the circuits on the issue. The notes indicate the matter will be given further study.

The amendments to Rule 45 make it clear that the three days for mailing are added after all the other time has run. So, for example, the three days after a 30-day time limit that ends on a Saturday will not start to run until the following Monday, giving the party until Thursday. Hurray.

Rule 49.1 is a new rule governing privacy protection in compliance with the E-Government Act. No complete social security numbers, birth dates or addresses should be available to the public. Exceptions include the address that identifies property to be forfeited, the record of an agency or state court proceeding, a pro se filing, warrants or other court filings on criminal matters made before the filing of criminal charges, and a charging document and affidavit in support of that document. The rule provides for filing under seal and filing documents with an identifier that refers to an identifier reference list that is kept under seal.

Federal Rule of Appellate Procedure

Rule 25(a) provides that an appeal will be governed by the new rule 49.1 privacy provisions if the case was governed by that rule in the district court. As noted above, the 10th Circuit has effectively already instituted the privacy provisions of 49.1.

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*Information for this article compiled by the Federal Public Defender's Office for New Mexico and Rita LaLumia, Assistant Federal Defender ~ Chattanooga*

**CASE UPDATE**  
**JUNE 2008**

*By Julie Anderson, Paralegal ~ Knoxville*

**Supreme Court**

**United States v. Williams, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1830 (May 2008) -**

The pandering and solicitation prohibition in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, 18 U.S.C. § 2252A(a)(3)(B), is neither impermissibly vague under the Due Process Clause, nor overbroad under the First Amendment.

**Snyder v. Louisiana, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1203 (March 2008) -**

State prosecutor's race-neutral explanation supported the peremptory strike of a black prospective juror in the petitioner's capital case. The trial court's failure to make an on-the-record explanation for rejecting the defendant's claim of purposeful discrimination was reversible error.

**Baze v. Rees, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1520 (April 2008) -**

The three-drug lethal injection protocol used by a majority of jurisdictions with the death penalty does not constitute cruel and unusual punishment.

**Burgess v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1572(April 2008) -**

A state drug offense punishable by more than one year of imprisonment is a "felony drug offense" for purposes of 21 U.S.C. § 841(b)(1)(A), regardless of whether state law classifies the offense as a misdemeanor.

**United States v. Ressam, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1858 (May 2008) -**

The prosecution need only prove that the defendant's carrying of explosives occurred contemporaneously with another other felony offense to convict under 18 U.S.C. § 844(h)(2).

**Virginia v. Moore, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1598 (April 2008) -**

State police officers did not violate a defendant's Fourth Amendment rights by searching their vehicle following an arrest for a citation-only offense under state law.

**Kimbrough v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 558 (December 2007) -**

A sentencing court may consider the disparity in the guidelines for crack and powder cocaine offenses to impose a below-guidelines sentence after the Booker decision which found the guidelines to be advisory only.

**Gall v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 586 (December 2007) -**

Post-Booker, federal courts of appeal are to review all sentences under a deferential abuse-of-discretion standard and "extraordinary" circumstances are not required for a below-guidelines sentence to be considered reasonable.

**Gonzalez v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1765 (May 2008) -**

The personal consent of the defendant is not required for a magistrate to preside over jury selection in a federal criminal trial.

**Begay v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 581 (April 2008) -**

A prior felony conviction for driving under the influence of alcohol does not constitute a previous "violent felony" for purposes of sentencing under the Armed Career Criminal Act.

**Logan v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 475 (December 2007) -**

The "civil rights restored" exemption of the Armed Career Criminal Act, 18 U.S.C. § 921(a)(20), does not apply to a prior conviction for which the defendant never lost his civil rights.

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**United States v. Rodriguez, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1783 (May 2008) -**

The district court's determination that a prior conviction constitutes a "serious drug offense" for purposes of enhancement under the Armed Career Criminal Act must be made while taking into consideration the applicable statutory recidivist enhancements.

**Watson v. United States, \_\_\_ U. S. \_\_\_, 128 S.Ct. 579 (December 2007) -**

A person who receives a gun in exchange for drugs has not "used" that firearm "during and in relation to [a] drug tracking crime" under 18 U.S.C. § 924(c)(1) (A).

**Sixth Circuit**

**United States v. Odeneal, 517 F.3d 406 (6<sup>th</sup> Cir. 2008) -**

The prosecutor's race-neutral reasons for exercising peremptory strike against African-American prospective juror were a pretext for race discrimination and required a reversal of the defendant's conviction and a remand for new trial.

**United States v. Conrad, 507 F.3d 424 (6<sup>th</sup> Cir. 2007) -**

Remand was required for the district court to determine whether the out-of-court statement admitted during the defendant's trial was made in furtherance of the conspiracy to possess with intent to distribute methamphetamine for which the defendant had been convicted. Should the court find that the statement falls within the coconspirator's exception to the hearsay exception rule under FRE 801(d)(2)(E), the defendant's conviction will stand. If the out-of-court statement was not made in the course of and in furtherance of the conspiracy, a new trial would be warranted.

**United States v. West, 520 F.3d 604 (6<sup>th</sup> Cir. 2008) -**

The affidavit in support of the search warrants for the defendant's residence and vehicle failed to provide the court with probable cause to believe that evidence of any crime would be found in either of those places, and the evidence seized was tainted fruit of the poisonous tree. The affidavits were "bare bones," and the good faith exception would not apply.

**United States v. Blair, 524 F.3d 740 (6<sup>th</sup> Cir. 2008) -**

The fact that the defendant was driving in a "bad neighborhood" at 10:30 at night did not provide the police officer with reasonable suspicion for a Terry stop of the defendant's vehicle. The appellate panel found the officer's other purported reason for the stop – an inoperable tag-light – to be "questionable" in light of the fact that the light was fully functional on the video-taped recording of the stop. The officer did not have reasonable suspicion to believe that a crime had been committed to warrant the continued detention of the defendant while a drug dog was brought to the scene. Evidence discovered during the illegal detention and search should have been suppressed.

**United States v. Wilson, 506 F.3d 488 (6<sup>th</sup> Cir. 2007) -**

Police officers did not have a reason to believe that the defendant, a passenger in a vehicle stopped for a seat-belt violation, was armed and dangerous to justify a patdown for weapons under Terry.

**United States v. Urrieta, \_\_\_ F.3d \_\_\_, 2008 WL 731224 (6<sup>th</sup> Cir. 2008) -**

A police officer's mistaken belief that it is illegal to operate a vehicle in the United States using a Mexican driver's license, and his hunch that the defendant was in the country illegally and might be transporting drugs, failed to provide reasonable suspicion for the continued detention of the defendant beyond the scope of a valid traffic stop for an expired temporary registration tag.

**United States v. Geerken, 506 F.3d 461 (6<sup>th</sup> Cir. 2007) -**

After Booker, a sentencing court may increase a defendant's sentencing guidelines offense level based on facts found by the court by a preponderance of the evidence as long as the court considers the guidelines advisory.

**United States v. Christman, 509 F.3d 299 (6<sup>th</sup> Cir. 2007) -**

In sentencing the defendant for possession of materials constituting child pornography, the district court erroneously relied upon information received during ex parte communications with the defendant's probation and pretrial services officers which contradicted information included in the record and in the presentence report.

(Continued on page 17)

**United States v. Peters, 512 F.3d 787 (6<sup>th</sup> Cir. 2008)**

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The district court's failure to address the defendant's argument for a sentence of "time served" did not satisfy the "procedural reasonableness" argument of Rita v. United States, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2456 (2007), and warranted a remand for resentencing.

**United States v. King, 516 F.3d 425 (6<sup>th</sup> Cir. 2008) -**

In a matter of first impression, the Sixth Circuit held that the guideline language for a "prior conviction for a similar offense" under the Sentencing Guideline implementing sentences for offenses involving illegal drugs, U.S.S.G. § 2D1.1, contains no implicit time limit on the age of the prior conviction.

**United States v. Vicol, 514 F.3d 559 (6<sup>th</sup> Cir. 2008), cert. denied, \_\_\_ S.Ct. \_\_\_, 2008 WL 189569 (2008)**

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The district court's failure to apply the version of the Sentencing Guidelines in effect at the time of the defendant's offense was reversible error.

**United States v. Vonner, 516 F.3d 382 (6<sup>th</sup> Cir. 2008), pet. for cert. filed (May 07, 2008) (NO. 07-1391) -**

Where the defendant fails to preserve an objection to the procedural adequacy of the district court's sentence, the Court of Appeals will review the case for plain error.

**United States v. Rivera, 516 F.3d 500 (6<sup>th</sup> Cir. 2008)**

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The district court's reliance on the guideline provision for fraudulent documents related to naturalization to determine the defendant's sentence was reversible error requiring a remand for resentencing under U.S.S.G. § 2B1.1, the provision applicable to generic fraud and forgery.

**United States v. Alexander (Donald Wayne), 517 F.3d 887 (6<sup>th</sup> Cir. 2008) -**

The district court's failure to provide the defendant with notice of its intent to depart upward from a sentence of 18 to 24 months to 42 months – sufficient for the defendant to receive appropriate rehabilitation following his conviction for sexual abuse of a minor – was reversible error. Had the defendant received

proper notice, he could have presented an argument that some sex offender treatment programs require less than 42 months to complete so that a lesser sentence might have been imposed.

**Benitez v. United States, 521 F.3d 625 (6<sup>th</sup> Cir. 2008) -**

The defendant adequately expressed his desire to represent himself and the district court should have inquired further to determine whether his waiver of counsel was knowing and intelligent.

**United States v. Grubbs, 506 F.3d 434 (6<sup>th</sup> Cir. 2007) -**

The defendant's guilty plea failed to establish that he constructively possessed the firearm for which he had been charged under 18 U.S.C. § 922(g) where the government failed to produce evidence that the handgun possessed by the defendant was the same one identified in the indictment against him.

**Parker v. Renico, 506 F.3d 444 (6<sup>th</sup> Cir. 2007) -**

The petitioner's mere presence near firearms in the vehicle in which four individuals had fled shortly after a murder had been committed did not establish his constructive possession of the weapons.