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**Save the Date: Criminal Justice Act
Panel Training in Corpus Christi
on September 11, 2009**

The Federal Public Defender for the Southern District of Texas will sponsor a one-day seminar for current and prospective members of the Criminal Justice Act (“CJA”) Panel in the Southern District of Texas at the Federal Courthouse in Corpus Christi, on Friday, September 11, 2009. The purpose of this seminar is to provide both basic instruction (for newer attorneys) and refresher training (for more experienced attorneys) in federal criminal practice for panel members who accept appointments under the CJA.

At the seminar, experienced federal criminal law practitioners will present papers and lectures about the unique aspects of federal criminal practice. Subjects will include: seminars on pretrial proceedings and child pornography cases; a guide to pretrial motions; an update on recent Supreme Court and Fifth Circuit cases; discussions of current issues involving federal sentencings; and a review of the duties and procedures for representation under the Criminal Justice Act. Additionally, Chief Judge Hayden Head, Judge Janis G. Jack, and Magistrate Judges Janice B. Ellington and Brian L. Owsley will address the attendees.

A flyer with more information on the upcoming Corpus Christi seminar is attached to this edition of the *Bulletin*.

Guideline Amendments 2009

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1. Privacy and Identity

Circuit courts have divided over whether an individual whose means of identification is stolen is a “victim” for purposes of the victim table in USSG § 2B1.1(b)(2). See e.g. United States v. Connor, 537 F.3d 480 (5th Cir. 2008) (credit card company, not identification owner, is the victim); see also United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009) (discussing the cases). The Sentencing Commission has determined that such individuals should be considered victims. USSG § 2B1.1, comment. (n.4(D)) (Nov. 1, 2009).

There is a new two-level enhancement for a person convicted of computer fraud, 18 U.S.C. § 1030, who uses the computer with intent to obtain or disseminate without lawful authority “personal information.” USSG § 2B1.1(B)(15). Information is “personal” only if it involves information of an identifiable individual. *Id.* comment. (n.1). There is also an encouraged upward departure for defendants convicted of interception or disclosure of private or protected information if the offense involved information about a substantial number of individuals. USSG § 2H3.1, comment. (n.4).

Included in this year’s examples of abuse of trust under USSG § 3B1.3 is a defendant who abuses his position to obtain, transfer, or “issue

unlawfully, or use without authority” a means of identification, such as a state motor vehicle department employee who issues a false driver’s license. USSG § 3B1.3, comment. (n.2(B)).

2. Other property crimes

In the intellectual property arena, the 2009 amendments specify that the calculation of loss shall include the fair market value of property that has been copied (in addition to property stolen outright). USSG § 2B1.1, comment. (n.3(C)).

In response to concerns about whether to treat “bleached” notes as counterfeit or forged documents, the 2009 amendments virtually obliterate the distinction. The proposed amendment deletes USSG § 2B5.1, comment. (n.3), which directed courts to USSG § 2B1.1 in cases of altered or forged instruments, and instead defines “counterfeit” to include “an instrument that has been falsely made, manufactured, *or altered.*” USSG § 2B5.1, comment. (n.1) (Nov. 1, 2009) (emphasis added). The amendment also expands the enhancement for use of special counterfeit paper to include use of special ink or other distinctive counterfeit deterrents. USSG § 2B5.1(b)(2) (Nov. 1, 2009).

3. Drugs

Start patrolling the Intracoastal Waterway. There is a two-level enhancement, with a minimum level of 26, if a submersible or semi-submersible vessel (that would be a submarine) was involved in a drug trafficking offense. USSG § 2D1.1(b)(2). A person convicted of the new offense or operating such a vessel to evade detection, 18 U.S.C. § 2285, receives a minimum offense level of 26. USSG § 2X7.2(a). There are graduated enhancements applicable ranging from two levels for failing to heave to when directed by law enforcement officials up to eight levels for sinking the vessel. USSG § 2X7.2(b).

This year’s amendments address the drug du jour and the newest means of distribution, especially of Schedule III controlled substances. The base offense level cap for hydrocodone is raised from 20 to 30. USSG § 2D1.1 (c)(5).

Appendix A is amended to specify that distribution of a controlled substance over the Internet without a valid prescription, in violation of the new 21 U.S.C. § 841(h), is governed by USSG § 2D1.1. Guideline 2D3.1, governing unlawful advertising, will now cover advertising of all scheduled substances.

Finally, the amendments address a new statutory enhancement if death or serious bodily injury results from the use of a Schedule III controlled substance. 21 U.S.C. § 841(b)(1)(E). The base offense level for a first such offense is 26 and is 30 for a second. USSG § 2D1.1(a)(3), (4).

4. Immigration

Guideline 2L1.1(b)(8)(B) provides a two-level enhancement if a harbored alien was involuntarily detained through coercion or threat. The 2009 amendments provide an alternative two-level enhancement if the defendant was convicted of harboring, the harboring was for the purpose of prostitution, *and* the defendant received an aggravating role adjustment. USSG § 2L1.1(b)(1)(8)(B) (Nov. 1, 2009). The enhancement is six levels if the alien was younger than 18. *Id.* If the defendant receives an enhancement for coercion under § 2L1.1(b)(1)(8)(A), the victim restraint adjustment, USSG § 3A1.3, does not apply, but it may apply if the defendant receives the enhancement for harboring prostitutes. USSG § 2L1.1, comment. (n.6).

The amendments also address two new offenses. Foreign labor contracting fraud, 18 U.S.C. § 1351, is governed by USSG § 2B1.1. A conviction for financial participation in a venture that engages in slavery or trafficking in people, 18 U.S.C. § 1593A, is governed by the slavery guideline. USSG § 2H4.1. The Commission encourages a downward departure if the defendant did not know that the venture participated in this criminal activity. *Id.* comment. (n.4).

5. Sex and Children

The statutory rape and child sex trafficking

guidelines contain an enhancement for undue influence on a minor. USSG §§ 2A3.2(b)(2)(ii), 2G1.3(b)(2). While a defendant may be convicted of attempting this offense even if no minor was actually involved, e.g. a sting, the Commission has resolved a three-way circuit split by declaring that the undue influence enhancement does not apply if the only “minor” was a law enforcement officer. USSG § 2A3.2, comment. (n.3(B)), 2G1.3, comment. (n.3(B)).

Addressing transmission of child pornography over the Internet, both Congress and the Commission specify that the guidelines cover transmission of a “live” visual depiction. USSG §§ 2G2.1, 2G2.2.

6. Court Security

Guideline 2A6.1 governs threatening and harassing communications. The 2009 amendments add a two-level enhancement if the defendant is convicted of an attack or threat against the family of a federal official, 18 U.S.C. § 115, the defendant made a public threat, *and* the defendant knew or should have known that the threat “created a substantial risk of inciting others” to violate the statute. USSG § 2A6.1(b)(5) (Nov. 1, 2009).

7. Alternatives to Incarceration

Last year the Sentencing Commission held a two-day symposium on alternatives to incarceration which included discussions of promising pilot programs from the states. Federal courts and judges, including Judge Janis G. Jack in Corpus Christi, have also started “re-entry courts,” where the court, the probation office, a prosecutor and a defense attorney work with defendants under supervision to assist them in successfully completing their sentence. The Sentencing Commission has taken a first step toward expanding the availability of alternative sanctions by adding a new guideline that authorizes intermittent confinement as a condition during the first year of probation or supervised release. USSG § 5F1.8.

The Supreme Court Applies the Confrontation Clause to Crime Lab Reports in Melendez-Diaz v. Massachusetts

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Although certified crime lab reports have long been accepted as reliable evidence, the prosecution must now make the analyst available to testify if demanded by the defense. In Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), the Supreme Court held, in a 5-4 decision, that a trial court violated a defendant’s Sixth Amendment right to confrontation by allowing certificates of drug analysis to be admitted without in-court testimony by the analysts who prepared the reports. *Id.* at 2542. Because the lab certificates were testimonial statements and were prepared for use at the trial, they could not be admitted without giving the defendant an opportunity to cross-examine the analysts. *Id.* at 2532.

“The Sixth Amendment’s Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” Crawford v. Washington, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). In Crawford, the Supreme Court made clear that this right is a “bedrock procedural guarantee” and that the Confrontation Clause “applies to ‘witnesses’ against the accused – in other words, those who bear ‘testimony.’ ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” Crawford, 541 U.S. at 42, 51 (brackets in original; citations omitted).

Although the Supreme Court did not provide a comprehensive definition of “testimonial” in Crawford, it did provide examples of “testimonial” statements, including prior

testimony where the defendant was unable to conduct cross-examination, police interrogations, and affidavits that “would be available for use at a later trial.” *Id.* at 51-52. Accordingly, the Court in Crawford held that a witnesses’s statements made during police interrogation were testimonial. *Id.* at 68-69. Later, in Davis v. Washington, 126 S. Ct. 2266 (2006), the Supreme Court held that statements given by a witness to a 911 operator were not testimonial because the witness made them while the events in question were happening and the “elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past.” *Id.* at 2276 (emphasis omitted).

In Melendez-Diaz, the Supreme Court considered whether crime lab reports were “testimonial” for Confrontation Clause purposes. Writing the majority opinion, Justice Scalia concluded there was “little doubt” the certificates of drug analysis fell within the “core class of testimonial statements” described in Crawford. Melendez-Diaz, 129 S. Ct. at 2532. Because the lab certificates were “affidavits,” which had been “made for the purpose of establishing or proving some fact,” and were prepared for use at trial, they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Id.* (citation omitted). Accordingly, the lab certificates were “testimonial,” and the prosecution was required to make the analysts who prepared the report available for on-demand cross-examination by the defense. *Id.*

The potential ramifications of Melendez-Diaz are numerous and broad. The defense may insist in confronting the forensic analysts who prepared certificates or reports for use at trial regarding such evidence as drugs, fingerprints, blood-spatter patterns, blood chemistry, autopsies, guns, and bullets. Beyond lab reports, Melendez-Diaz calls into question whether federal prosecutors may lay the foundation for the admission of business records through the use of a sworn certification or declaration, *see* Fed. R. Evid. 902(11), 902(12), and whether they can show the non-existence of a

government record merely through the introduction of an affidavit to that effect, *see* United States v. Cervantes-Flores, 421 F.3d 825, 830-34 (9th Cir. 2005). In federal illegal reentry cases, the prosecution may no longer be able to rely solely on a Certificate of Nonexistence of Record to prove that a deported defendant did not seek permission to reenter the United States. In sum, defense attorneys should be prepared to challenge under the Confrontation Clause any evidence offered through certifications or affidavits as “testimonial” statements, if the writing was prepared to provide *prima facie* evidence against the defendant at trial.

While Melendez-Diaz is potentially a landmark case in Confrontation Clause analysis, the issue is certainly not settled in light of the Supreme Court’s recent grant of *certiorari* in Briscoe v. Virginia, ___ S. Ct. ___, 2009 WL 1841615 (No. 07-11191) (June 29, 2009). The question presented in Briscoe is: “If a state allows a prosecutor to introduce a certificate of forensic laboratory analysis without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?” Many scholars believe that, because the majority opinion in Melendez-Diaz, 129 S. Ct. at 2532, already decided the issue and the prosecution must have the analyst available for cross-examination, the granting of *certiorari* in Briscoe is a sign that the Supreme Court may revisit the controversial and divided ruling in Melendez-Diaz. In short, criminal defense counsel should monitor the various applications of Melendez-Diaz.

Flores-Figueroa Breathes New Life Into Challenges to Statutes Where Courts Have Not Applied the *Mens Rea* to All Elements

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In Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009), the Supreme Court was tasked with deciding whether the “knowingly” *mens rea* of the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), applied to the element that the means of identification unlawfully used was “of another person.” Flores-Figueroa, 129 S. Ct. at 1888. In other words, to be guilty of aggravated identity theft, must a defendant have known that the identification wrongly used in fact belonged to another person? The Court concluded that, in order to be found guilty, the defendant did have to know he was using another person’s identifying information. Id. at 1888, 1894. The Court’s resolution of this question is vitally important because “[the] federal criminal statute forbidding ‘[a]ggravated identity theft’ imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if*, during (or in relation to) the commission of those other crimes, the offender ‘*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person.*’” Flores-Figueroa, 129 S. Ct. at 1888 (quoting 18 U.S.C. § 1028A(a)(1); all emphasis in opinion).

The Court explained that (1) ordinary English grammar suggested that the word “knowingly” applied to all of the subsequently listed elements of the crime, id. at 1890; and (2) consistent with this ordinary English usage, “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.” Id. at 1891. In other words, the Court adopted a rule that, absent a clear indication to the contrary, a specified *mens rea* is deemed to apply to *all* elements of an offense. Id.; see also id. at 1894

(Scalia, J., concurring in part and concurring in the judgment) (agreeing with what ordinary English usage supports, but taking issue with the statement regarding how courts ordinarily read such introductory *mens rea*); id. at 1895 (Alito, J., concurring in part and concurring in the judgment) (“suspect[ing] that the Court’s opinion will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense,” but agreeing with a rebuttable “general presumption that the specified *mens rea* applies to all the elements of an offense”). The Court rejected the government’s legislative history argument about the purpose of the statute, as well as its argument about the difficulty of proving that the defendant has the necessary knowledge. Id. at 1892-94. In the end, the Court found that any Congressional statements about the statute’s purpose or practical problems of enforcement were insufficient to overcome the clarity of the statutory text. Id. at 1893-94.

Significantly, and in spite of vigorous government objections, the Court adopted the rule that an introductory *mens rea* applies to each element of the offense – without any qualification that the element mean the difference between innocent conduct and wrongful conduct. In resisting the rule ultimately adopted in Flores-Figueroa, the government warned that “[t]he most notable potential consequences” of such a rule “would relate to the federal drug statutes,” id. at 46, among other things, “with respect to determinations regarding drug quantity.” Id. at 47. Referencing the no-*mens-rea*-for-drug-quantity holdings of the lower federal courts, the government implied that a presumption that *mens rea* applies to all statutory elements would disrupt these holdings. Id. at 46-47.

As the government predicted, the reasoning of Flores-Figueroa may indeed breathe new life into challenges to statutes, such as 21 U.S.C. § 841, in which courts have not applied the *mens rea* to all of the elements of the offense. See, e.g., United States v. Gamez-Gonzalez, 319 F.3d 695 (5th Cir. 2003). Justice Alito’s concurrence offered the

following examples of statutes ripe for such a challenge: 18 U.S.C. § 2423(a) (knowingly transporting an individual under the age of 18 with the intent that the person engage in criminal sexual activity, where courts have not required proof that the defendant knew the person’s age); 21 U.S.C. § 861(a)(1) (knowingly enticing a person under the age of 18 to violate drug laws, where courts have not required proof that the defendant knew the person’s age); and 8 U.S.C. § 1327 (knowingly assisting an alien who is ineligible to enter the United States because the alien had been convicted of an aggravated felony, where courts do not require proof that the defendant knew the alien had been convicted of an aggravated felony).

The upshot is, as Justice Alito predicted, practitioners generally should “cite [Flores-Figueroa] for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense.” Flores-Figueroa, 129 S. Ct. at 1895 (Alito, J., concurring in part and concurring in the judgment).

Variations Are Not Departures by Another Name

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1. Background

The mandatory federal sentencing guideline scheme required a sentencing court to impose a sentence within the guideline range unless the court determined that there was a circumstance of a kind or to a degree that had not been adequately considered by the Sentencing Commission. 18 U.S.C. § 3553(b). In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court held that this mandatory guideline regime violated the Sixth Amendment. 543 U.S. at 233-35, 244. The Court judicially excised section 3553(b), declared the Guidelines advisory, and instructed judges to

sentences in accordance with 18 U.S.C. § 3553(a). 543 U.S. at 245, 259-61.

Section 3553(a) commences by directing courts to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2).” 18 U.S.C. § 3553(a). This parsimony provision is the “overarching provision instructing district courts” how to impose a sentence. Kimrough v. United States, 128 S. Ct. 558, 570 (2007); see also Gall v. United States, 128 S. Ct. 586, 596 (2007); Rita v. United States, 551 U.S. 338, ___, 127 S. Ct. 2456, 2463 (2007). The court is to consider the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1). The court must then consider (1) the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law and provide just punishment, (2) to provide general and individual deterrence, and (3) to provide treatment and rehabilitation to the defendant “in the most effective manner.” 18 U.S.C. § 3553(a)(2). The court must also consider the kinds of sentences available, the guidelines and policy statements, the need to avoid “unwarranted” disparity and to provide restitution. 18 U.S.C. § 3553(a)(3)-(7).

The Guidelines are still an integral part of any post-Booker sentencing: they are the “starting point” and “initial benchmark.” Gall, 128 S. Ct. at 596. The district court’s discretion, however, is “significantly broadened,” and the sentencing judge must make an individualized assessment of the facts of each case. Id. Moreover, the sentencing court shall not presume that the advisory Guideline range is appropriate in an individual case. Nelson v. United States, 129 S. Ct. 890, 892 (2009); Rita, 127 S. Ct. at 2465.

2. Circumstances Need Not Be Exceptional to Warrant a Variance

Before Booker, a sentencing court’s authority to depart depended on whether a factor was prohibited, encouraged, discouraged, or not mentioned by the Sentencing Commission. Koon v. United States, 518 U.S. 81, 93-96 (1996).

Encouraged departures were permitted if not already adequately considered and “warranted.” USSG § 2K2.0(a)(2)(A); Koon, 518 U.S. at 96. Discouraged and unmentioned departures were permissible only if present “to an exceptional degree,” USSG § 2K2.0(a)(4); Koon, 518 U.S. at 95-96, in other words, if the circumstances were “extraordinary.” See, e.g., United States v. Simmons (“Simmons I”), 470 F.3d 1115, 1130 (5th Cir. 2006), cert. denied, 127 S. Ct. 3002 (2007).

In rendering the Guidelines advisory, the Supreme Court authorized sentencing courts, not only to depart from the Guidelines, but also to vary from the recommended ranges in accordance with 18 U.S.C. § 3553(a). After Booker, it should be “pellucidly clear” that the particular factors in any given case need not be “extraordinary” to warrant a variance from the Guidelines. Gall, 128 S. Ct. at 595.

Indeed, the Fifth Circuit has held unequivocally that after Gall and Kimbrough, “[w]ithout a doubt, the requirement of ‘extraordinary circumstances’ is no longer the law.” United States v. Simmons (“Simmons II”), 568 F.3d 564, 568 (5th Cir. 2009) (citing United States v. Rodriguez-Rodriguez, 530 F.3d 381, 384 n.4 (5th Cir. 2008)). In Simmons II, the court of appeals announced the “death of the ‘extraordinary circumstances’ language from Simmons I,” and remanded the case to allow the district court to consider whether a downward variance based on age – a discouraged factor under USSG § 5H1.1 – was warranted. Simmons II, 568 F.3d at 568, 570.

Other circuit courts have likewise made it clear that a defendant’s individual circumstances need not be extraordinary to justify a non-Guideline sentence. The Seventh Circuit deems “[t]he concept of departures . . . *obsolete* in post-Booker sentencing . . . [although] the district court may apply those departure guidelines by way of analogy in analyzing the section 3553(a) factors.” United States v. Schroeder, 536 F.3d 746, 755-56 (7th Cir. 2008) (emphasis added) (agreeing with

district court that defendant’s family circumstances including adopted daughter with immune deficiency were extraordinary).

In United States v. Chase, 560 F.3d 828 (8th Cir. 2009), the Eighth Circuit vacated a sentence where the district court erroneously equated variances and departures. The court of appeals emphasized:

Variations do differ from departures. . . . Factors ordinarily considered irrelevant in calculating the advisory guideline range, or in determining whether a guideline departure is warranted, can be relevant in deciding whether to grant a variance. . . .

560 F.3d at 830 (citations omitted). The Eighth Circuit went on to address not only the propriety but the necessity of addressing the types of personal circumstances in a given case:

In fashioning a “sentence sufficient, but not greater than necessary,” 18 U.S.C. § 3553(a), “district courts are not only permitted, but *required to consider ‘the history and characteristics of the defendant.’*” . . . As a consequence, factors such as a defendant’s age, medical condition, prior military service, *family obligations*, entrepreneurial spirit, etc. can form the bases for a variance even though they would not justify a departure.

Chase, 560 F.3d at 830-31 (emphasis added) (citing, inter alia, United States v. Lamoreaux, 422 F.3d 750, 756 (8th Cir. 2005) (approving consideration of military service, pregnancy of defendant’s wife, his need to care for his children, and his “entrepreneurial spirit”). Rejecting the government’s reliance on pre-Booker case law, the Eighth Circuit clarified that “departure precedent does not *bind* district courts with respect to variance decisions, it is merely persuasive authority.” Id. at 832 (emphasis in original).

Similarly in United States v. Jones, 460 F.3d 191 (2d Cir. 2008), the Second Circuit affirmed a district court’s variance from a thirty-to-thirty-seven-month Guideline range to a sentence of fifteen months for a defendant convicted of being a felon in possession of a firearm and possession of five bags of marijuana based on the defendant’s “consistent work ethic,” his family obligations and support, his father’s recent death and his efforts at rehabilitation. Jones, 460 F.3d at 194. The government argued that the sentence was not permissible because the Sentencing Commission had discouraged departures based on a defendant’s education, emotional condition, employment record, family ties and good works. Jones, 460 F.3d at 194 (citing USSG §§ 5H1.2, 5H1.3, 5H1.5, 5H1.6, 5H1.11). As the Second Circuit recognized, the government’s reliance on pre-Booker policy statements and court decisions revealed a fundamental “misconception” concerning today’s non-Guideline sentences. 460 F.3d at 194-95. The court explained:

By citing the Guidelines’ departure standards, however, the Government fails to appreciate that Jones’s post-Booker sentence is not a Guidelines departure; it is a non-Guidelines sentence. . . . With the entire Guidelines scheme rendered advisory by the Supreme Court’s decision in Booker, the Guidelines limitations on the use of factors to permit departures *are no more binding* on sentencing judges than the calculated Guidelines ranges themselves. Of course, a sentencing judge’s obligation to “consider” the Guidelines . . . includes the obligation to consider the Commission’s relevant policy statements as well as the calculated Guideline range. *But “consideration” does not mean mandatory adherence.*

Id. at 194 (emphasis added, citations omitted).

In United States v. Martin, 520 F.3d 87, 93-95 (1st Cir. 2008), the First Circuit approved a district court’s ninety-one-month variance, which was based in part on the defendant’s family

circumstances and support. The court of appeals indicated that the Sentencing Commission’s policy statements were still pertinent but “normally not decisive as to what may constitute a permissible ground for a variant sentence in a given case.” 520 F.3d at 93. The appellate court added that a district court may take “idiosyncratic family circumstances into account, at least to some extent, in fashioning a variance sentence.” Id. (citations omitted).

The Sixth Circuit anticipated the Supreme Court’s rejection in Gall of mathematical ratios in upholding a sixty-eight-month variance to the mandatory 120-month minimum for a defendant convicted of possession of 203 grams of crack with intent to distribute it, who also possessed four firearms including a loaded machine gun and a pipe bomb. United States v. Collington, 461 F.3d 805, 807 (6th Cir. 2006). The variance was based on the defendant’s age, his minimal criminal record, and family circumstances including the fact that his father had been murdered when he was nine and his mother died of cancer two years later. Id. at 809.

In summary, the sentencing court has an obligation to consider all “nonfrivolous reasons” proffered by the parties for a non-Guideline sentence. Rita, 127 S. Ct. at 2468. In doing so, the court must not focus solely on the offense to the exclusion of consideration of the circumstances of the offender. United States v. Olhovsky, 562 F.3d 530, 549-50 (3d Cir. 2009). It is not “*severe* punishment that promotes respect for the law, it is *appropriate* punishment,” id. at 551 (emphasis in original), that is, punishment that is “sufficient, but not greater than necessary,” to comply with the purposes set forth in the statute. 18 U.S.C. § 3553(a).

Arizona v. Gant: Limits on Warrantless Automobile Searches

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In Arizona v. Gant, 129 S. Ct. 1710 (2009), the Supreme Court placed important limits on warrantless searches of automobiles incident to arrest. Rejecting a broad reading of its prior decision in New York v. Belton, 453 U.S. 454 (1981), and relying on the rationale of Chimel v. California, 395 U.S. 752 (1969), the Court held that police may conduct a warrantless search of an automobile's passenger compartment only if (1) the arrestee is unsecured and within reaching distance of the car, or (2) the officers have a reasonable belief that evidence relevant to the offense of arrest might be found in the car.

In Gant, police officers acting on a tip went to a house suspected of being used for narcotics activity. When an officer knocked on the door and asked to speak with the homeowner, Gant identified himself and told the officer that the homeowner would be back later. The officers left and, after running a check on Gant, found that he had an outstanding warrant for driving with a suspended license. The officers returned to the house later that evening and arrested two drug suspects. While the officers were at the house, Gant drove up, parked his car in the driveway, and got out of his car. When an officer summoned him, Gant walked eight or twelve paces towards the officer and was immediately arrested. He was placed in the back of a locked patrol car under the supervision of one of the officers. The police then searched the passenger compartment of Gant's car and found a plastic baggie containing cocaine. At the time of the search, the area was secure and all the suspects had been handcuffed and placed in patrol cars.

The Supreme Court held that the search of the automobile's passenger compartment violated the Fourth Amendment. The Court noted that Belton

had frequently been given an expansive reading, even to the extent of courts upholding searches when the arrestee had already left the scene. Gant, 129 S. Ct. at 1719. The Court rejected these broad readings as "clearly incompatible" with its statement in Belton that Belton does not alter the fundamental principles established in Chimel regarding the permissible scope of searches incident to arrest. Id. Instead, the Court held that under the rationale of Chimel, police may search a vehicle incident to a recent occupant's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Id. However, relying on Justice Scalia's concurrence in Thornton v. United States, 541 U.S. 615 (2004), the Court held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Gant, 129 S. Ct. at 1719 (quoting Thornton, 541 U.S. at 632 (Scalia, J., concurring)). Because neither of these rationales was present in Gant's case, the search was unreasonable and thus unconstitutional.

Gant means that it will no longer be legitimate for officers to search an arrestee's vehicle "incident to arrest" once the arrestee has been secured, unless the officers have a reason to believe that evidence related to the offense of arrest will be found in the vehicle. As the Court noted, in many cases, such as when the police arrest an occupant for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. 129 S. Ct. at 1719. However, while Belton limited the permissible search to the passenger compartment, Gant's exception for searches "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle" is not so expressly limited. Thus, Gant may permit the police to search anywhere in the vehicle for evidence relevant to the crime of arrest, rather than just the passenger compartment. Also, the opinion does not specify whether the "reasonable to believe" test requires the same level of certainty as probable cause or reasonable suspicion, or some

lesser standard. It is likely that this issue, as well as the scope of the permissible search, will be argued in future cases in the lower courts.

Practical Implications of Recent Developments in the Sex Offender Registration and Notification Act

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The Sex Offender Registration and Notification Act (“SORNA”) went into effect three years ago with the purpose of creating a national sex offender registry. In addition to creating a federal duty for sex offenders to register with the state and to update that registration after moving between states, see 42 U.S.C. § 16913, SORNA set forth requirements for state registration schemes. While no state has complied with SORNA’s requirements, leading Congress to grant the states a one-year extension on implementing its provisions, there have been numerous prosecutions of people who failed to register or failed to update registration after moving between states or after a prior federal conviction for a sex offense. See 18 U.S.C. § 2250(a). Successful challenges to SORNA have been few and far between and constitutional challenges to the statute will likely reach the Supreme Court soon. Below is an overview of several challenges to SORNA percolating among the lower federal courts.

I. The Prior Offense Was Not One That Required Registration under 42 U.S.C. § 16911(5).

This argument has not been widely made, but warrants investigation. A panel of the Eleventh Circuit initially reversed a conviction on this basis. The full court, however, decided to rehear the matter en banc and vacated the panel’s decision. The decision of the en banc Eleventh Circuit in this matter has not yet been released.

See United States v. Dodge, 554 F.3d 1357 (11th Cir.), vacated, 566 F.3d 976 (11th Cir. 2009) (en banc).

II. The Travel Occurred Pre-SORNA.

Defendants who traveled prior to SORNA’s enactment on July 27, 2006 have successfully challenged the application of SORNA to them as an unconstitutional ex post facto law. See, e.g., United States v. Davis, No. 07-60003, 2008 WL 510599 (W.D. La. Jan. 22, 2008). Defendants who traveled prior to the Attorney General’s February 28, 2007, decision to apply SORNA retroactively to those convicted of sex offenses have also prevailed on an ex post facto claim. See, e.g., United States v. Madera, 528 F.3d 852, 857 (11th Cir. 2008); United States v. Barnes, No. 07 Cr. 187, 2007 WL 2119895, at *4 (S.D.N.Y. Jul. 23, 2007) (unpublished); but see United States v. May, 535 F.3d 912, 915, 919-920 (8th Cir. 2008). If the travel occurred after February 28, 2007, there is not a basis to bring an ex post facto challenge, because the event triggering the need to register or update registration occurred after SORNA’s effective date and the Attorney General decided to apply it to people convicted previously of sex offenses. See May, 535 F.3d at 915, 919-920.

III. Congress Lacked Jurisdiction to Enact SORNA.

Although several circuits have concluded otherwise, there remains an argument that Congress exceeded its authority to regulate under the Commerce Clause by requiring sex offenders to register. At least a few district courts have reached this conclusion. See, e.g., United States v. Waybright, 561 F. Supp. 2d 1154 (D. Mont. 2008). Several courts of appeals, including the Fifth Circuit, have rejected this argument. These circuits, however, have not accounted for the fact that SORNA is unique in that it does not require that the channels of interstate commerce be used for illegal purposes and regulates inherently uncommercial activity. See, e.g., United States v. Whaley, ___ F.3d ___, 2009 WL 2153651, at *3-

*6 (5th Cir. July 21, 2009); United States v. Gould, ___ F.3d ___, 2009 WL 1703205, at *9-*17 (4th Cir. June 28, 2009) ; United States v. Dixon, 551 F.3d 578, 583 (7th Cir. 2008); United States v. May, 535 F.3d 912, 921-22 (8th Cir. 2008). A person need not travel with the intent to evade registration, see 18 U.S.C. § 2250(a), and the statute thus does not regulate the channels of interstate commerce.

IV. SORNA Violates Due Process.

This argument can be phrased as an insufficiency of the evidence claim or as a violation of due process. A person violates SORNA by “knowingly failing to register or update a registration as required by the Sex Offender Registration and Notification Act.” See 18 U.S.C. § 2250(a). Thus, by the plain text of the statute, it is not enough that a person had a duty to register under state registration requirements and failed to do so. After Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009), the mens rea of “knowingly” arguably applies to all elements, including “as required by” SORNA. As applied to people convicted of sex offenses prior to the enactment of SORNA, it is unlikely that they were aware of a duty to register under federal law. Although the Attorney General was tasked with prescribing rules for notifying previously convicted of sex offenses, see 42 U.S.C. § 16917(b), he has failed to do so. Under Flores-Figueroa, awareness of a duty under state law does not satisfy the knowledge element. Nonetheless, the Fifth Circuit has rejected this argument, albeit without addressing the affect of Flores-Figueroa on its analysis. See Whaley, 2009 WL 2153651, at *6.

V. SORNA Violates the Anti-Delegation Doctrine.

Congress delegated to the Attorney General the decision of whether SORNA’s registration requirements apply to persons convicted of sex offenses prior to the effective date of SORNA. See 42 U.S.C. § 16913(d). And on February 28, 2007, the Attorney General decided that SORNA

applies retroactively. 28 C.F.R. § 72.3. Because Congress delegated a key legislative function – i.e., this decision about SORNA’s applicability – to the executive branch without articulating any policy or standard, SORNA violates the non-delegation doctrine. See Mistretta v. United States, 488 U.S. 361, 371 (1989); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Congress’s action in enacting SORNA is distinguishable from other cases permitting delegations because it does not involve a uniquely executive sphere of influence, such as foreign policy. See United States v. Dhafir, 461 F.3d 211, 217 (2d Cir. 2006). The Fifth Circuit has recently rejected this argument. See Whaley, 2009 WL 2153651, at *7-*9.

VI. Conclusion

This represents a quick overview of selected challenges to SORNA, not an exhaustive list. For more in-depth analysis, see Corey Rayburn Yung, One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions, 46 Harv. J. on Legis. 369 (2009). As with all foreclosed arguments, if defense counsel advances an argument that is foreclosed by binding precedent, counsel should expressly acknowledge the applicable precedent and note that the issue is raised to preserve it for review in the court of appeals or the Supreme Court.

Is Your Illegal Reentry Client Really an Alien? Confirming Lack of Citizenship

Andres Sanchez-Ross
Assistant Federal Public Defender

The first element of an illegal reentry charge under 8 U.S.C. § 1326 is that the defendant is an “alien.” Someone is an “alien” if he is not a citizen or national of the United States. A citizen can be deported, return and eventually be charged

with illegal reentry all while unaware that he is, in fact, a United States citizen. Most people know that if they were born in the United States they are automatically a citizen, but few are aware that they may have acquired citizenship through a citizen parent even though they were born abroad.

A defendant may not only be unaware that he acquired citizenship from his parent, but may also be unaware that, because his grandparent was a citizen, his parent was also a citizen, and therefore he is a citizen. A person may automatically be a citizen if his mother or father was a citizen at the time of his birth, one or both parents became naturalized citizens before he turned 18, or he was adopted by United States citizens. Additionally, courts have long recognized dual citizenship. See Kwakita v. United States, 343 U.S. 717, 733-34 (1952). Even if your client is convinced that he is a citizen of the country he was born in, he may still be a United States citizen.

Because an illegal reentry client may be unaware that he is a citizen, it is not enough to simply ask whether he is a citizen. During the initial interview, counsel should ask for information regarding a client's parents and grandparents to determine whether to research the possibility that he is a citizen and, thus, not guilty of an illegal reentry charge. See United States v. Garcia-Mancha, 2001 WL 282769 (N.D. Tex. 2001) (reasoning that trial counsel's failure to investigate the defendant's alleged derivative citizenship as a defense to a charge of illegal reentry under § 1326 could support habeas relief on a claim of ineffective assistance of counsel); see also Jimenez v. United States, 2008 WL 2607262 (11th Cir. 2008) (addressing, after granting a certificate of appealability, the defendant's claim that his counsel was ineffective "for failing to investigate and advise him of a possible defense to the unlawful re-entry charge against him: that he might have been a United States citizen because his biological parents may have been married under Texas common law")

If at least one of a defendant's parents was a citizen at the time his birth, he may have been

born a U.S. citizen. In these situations, the law that was in effect at the time of his birth controls (currently 8 U.S.C. §§ 1401-1409). The requirements necessary to pass citizenship from parent to child vary depending on the date of birth of the child, and whether the child was born in wedlock. In most cases, the citizen parent must have resided for a certain period of time in the United States prior to the birth of the child. A child born before October 11, 1952, must also meet additional requirements, including that he lived in the United States for a certain period of time in order to retain his citizenship. Congress repealed this retention requirement, however, for children born after October 11, 1952. Charts that summarize the laws in effect during various periods of time can be found at Appendix 71 of the U.S. Citizenship and Immigration Service's Adjudicator's Field manual (available at www.uscis.gov).

If a defendant's parents were not citizens when he was born but they became citizens before he turned 18, he may also have automatically acquired citizenship. In most situations, the law in effect at the time the defendant turned 18 applies. If he was born on or after February 27, 1983, he automatically became a citizen if one parent became a citizen and, before he turns 18, he was both admitted to the United States as a legal permanent resident and he resided with the citizen parent. See 8 U.S.C. § 1431. For persons born before that date, with some exceptions, both parents would have had to become citizens before the client turns 18 (see the version of 8 U.S.C. § 1432 which was in effect at the time of a defendant's 18th birthday). These statutes also apply to children adopted by United States citizens.

If a person meets the statutory requirements for United States citizenship, either at birth or through the naturalization of his parents, that person is automatically a citizen regardless of whether he has received a certificate of citizenship from the Immigration Service. See United States v. Smith-Baltiher, 424 F.3d 913, 920-21 (9th Cir. 2005). However, when applying for a certificate

of citizenship, the applicant has the burden to prove that he is a citizen. See Matter of Tijerina-Villarreal, 13 I & N Dec. 327, 330-31 (BIA 1969). Thus, a denial of the application does not necessarily mean that the applicant is not a citizen – the Immigration Service may have denied his application merely because he failed to provide sufficient evidence to support his claim.

Although every illegal reentry client normally will have been previously deported, the prior deportation and any previous litigation about it do not preclude the client from raising a claim of citizenship in his federal criminal proceeding. Unlike in a federal criminal case, in deportation proceedings, once the government proves that a person was born abroad, the burden shifts to that person to show by a preponderance of the evidence that he is a derivative citizen. See Leal Santos v. Mukasey, 516 F.3d 1, 4 (1st Cir. 2008).

Because it is the government’s burden in a criminal proceeding to prove lack of citizenship and to convince a jury of this beyond a reasonable doubt, if defense counsel introduces some evidence that a defendant meets the statutory requirements for United States citizenship, the government will have the difficult task of proving a negative, *i.e.*, that a defendant is not a citizen. Citizenship is not an affirmative defense; lack of citizenship is an element of the crime.

Failures to Report and Unauthorized Use of Motor Vehicles: More Crime of Violence Developments

Philip G. Gallagher
Assistant Federal Public Defender

In its last Term, the Supreme Court held that a state conviction for failure to report to custody was not a “violent felony” for purposes of the Armed Career Criminal Act (“ACCA”). See

Chambers v. United States, 129 S. Ct. 687 (2009). In reaching this decision, the Court relied heavily on data collected by the Sentencing Commission analyzing the incidence of violence in various escape-related federal offenses over a two-year period. This research showed that, of the 160 federal convictions of defendants who either failed to report or failed to return to custody, not a single offense involved violent conduct (even though five of the defendants were armed at the time of their apprehension). *Id.* at 692. In light of this stark data, the Supreme Court concluded that Chambers’s failure to report conviction was not a “violent felony.” Accordingly, previous lower court decisions that had treated such convictions as “violent felonies” or “crimes of violence” were likely incorrectly decided. See, e.g., United States v. Pettigrew, 133 Fed. App’x 94 (5th Cir. 2005) (rejecting defendant’s argument that his failure to report conviction was not a “crime of violence”).

In at least one unpublished decision, the Fifth Circuit has rejected the argument that Chambers affects its previous holding in United States v. Ruiz, 180 F.3d 675, 676-77 (5th Cir. 1999), that all escape offenses are “crimes of violence.” See United States v. Delgado, 320 Fed. App’x 286 (5th Cir. 2009). This result is in tension with other statistics included in the Supreme Court’s Chambers opinion which show that, of the sixty-four federal escape convictions involving a defendant leaving secure custody, only about ten percent involved any injury and about fifteen percent involved any force. Chambers, 129 S. Ct. at 693 (quoting United States Sentencing Commission, Report on Federal Escape Offenses in Fiscal Years 2006 and 2007, p. 7, fig. 1 (Nov. 2008)); see also United States v. Harrison, 558 F.3d 1280 (11th Cir. 2009) (considering Chambers and statistics to conclude that Florida conviction for willful fleeing from law enforcement was not a “violent felony”).

Particularly in combination with the Court’s decision the previous Term in Begay v. United States, 128 S. Ct. 1581 (2008), Chambers makes it less likely an offense will be considered a “violent felony” because it falls within ACCA’s

“otherwise” clause. In Begay, the Supreme Court held that a drunk driving conviction was not a “violent felony” because it did not “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.” Id. at 1584 (quoting 18 U.S.C. § 924(e)(2)(B)). The Court reasoned that, although drunk driving might indeed present a serious risk of physical injury to another, that offense was too dissimilar to others specifically listed by Congress in this particular subdivision (*i.e.*, burglary, arson, and extortion) to conclude that Congress intended drunk driving to also be included on this list. Id. at 1585.

This statutory construction of Chambers and Begay has already borne fruit. In United States v. Armendariz-Moreno, ___ F.3d ___, 2009 WL 1653551 (5th Cir. 2009), the Fifth Circuit reversed course and held, in reliance upon Begay and Chambers, that the Texas offense of unauthorized use of a motor vehicle is not a “crime of violence” and, thus, not an “aggravated felony” as defined at 8 U.S.C. § 1101(a)(43)(F). The Fifth Circuit had previously – and repeatedly – rejected this argument. See Brieva-Perez v. Gonzales, 482 F.3d 356, 360-61 (5th Cir. 2007); United States v. Galvan-Rodriguez, 169 F.3d 217, 219-20 (5th Cir. 1999).

Upcoming Changes to the Federal Rules

Federal criminal defense counsel should note that a number of significant changes to the procedural rules governing federal criminal prosecutions and appeals are effective December 1, 2009, absent contrary Congressional action. The most significant changes are to Criminal Rule 45(a)(1)(B) and Appellate Rule 26(a)(1)(B), which both adopt a new “days-are-days” approach to calculating court deadlines. Whereas previously Saturdays, Sundays, and holidays were excluded from calculating time periods less than 11 days, under the new rules *all* days will count.

In anticipation of these changes to the Federal Rules, the Southern District of Texas has recently proposed changes to its local rules. Any comments on these proposed amendments must be submitted in writing to the Clerk’s Office by September 25, 2009.

The following list of changes does not include all changes to the rules, but does include the most significant changes.

1. Fed. R. Crim. P. 5.1 -- new: 14 days to conduct a preliminary hearing if in custody and 21 days if not in custody (old was 10 and 20 days).
2. Fed. R. Crim. P. 29(c) -- new: 14 days after verdict in which to file or renew a motion for a judgment of acquittal (old was 7 days).
3. Fed. R. Crim. P. 33(b)(2) -- new: 14 days after verdict to file a motion for a new trial on grounds other than newly discovered evidence (old was 7 days).
4. Fed. R. Crim. P. 34(b) -- new: 14 days after verdict to file a motion for arrest of judgment (old was 7 days).
5. Fed. R. Crim. P. 35(a) -- new: 14 days after sentencing for court to correct clear, arithmetical, or technical error (old was 7 days).
6. Fed. R. Crim. P. 45(a)(1)(B) -- new: count every intermediate Saturday, Sunday, and holiday (old was do not count them if the time period was less than 11 days).
7. Fed. R. Crim. P. 47(c) -- new: must file a motion at least 7 days before any hearing date unless a rule or court order sets a different time period (old was at least 5 days before).
8. Fed. R. Crim. P. 58(g)(2) -- new: appeal from magistrate’s order or judgment of conviction and sentence within 14 days from entry (old was 10 days).
9. Fed. R. Crim. P. 59(b)(2) -- new: must object

within 14 days to magistrate's findings and recommendations (old was 10 days).

10. Fed. R. App. P. 4(b)(1) & (3) -- new: notice of appeal must be filed within 14 days after entry of judgment or order or 14 days after disposition of motions under Fed. R. Crim. P. 29, 33, and 34 (old was 10 days).

11. Fed. R. App. P. 26(a)(1)(B) -- new: count every intermediate Saturday, Sunday, and holiday (old was do not count them if the time period was less than 11 days).

12. Fed. R. App. P. 27(a)(3)(A) -- new: 10 days to respond to a motion (old was 8 days).

13. Fed. R. App. P. 31(a)(1) -- new: must file reply brief 14 days after service of appellee's brief but at least 7 days before argument (old was 14 days but at least 3 days before argument).

THE ETHICSMEISTER

"Ethical healing through legal research."

Dear Ethicsmeister:

I have been thinking about something lately, and it really has been gnawing at me. Since the government gets to use undercover stings all the time, are we as defense counsel allowed to do the same? For example, can I have an investigator pose as someone else and approach or even befriend a government witness to obtain impeaching information?

Very truly yours,

Sly Leica-Phaqs

Dear Mr. Leica-Phaqs,

Your question is a good one and raises an issue on which there is a division among jurisdictions.

The plain language of Rule 4.1 of the ABA Annotated Model Rules of Professional Conduct ("ABA Rule") and Rule 4.01 of the Texas Disciplinary Rules of Professional Conduct ("Texas Rule") appears to bar criminal defense counsel (and all lawyers) from engaging in undercover investigations involving deception of third parties. Both ABA Rule 4.1 and Texas Rule 4.01 expressly state that, "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." In addition, both ABA Rule 4.3 and Texas Rule 4.03 state that, "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." And, of course, when a lawyer is prohibited from engaging in some act, he or she may not instruct someone else to do that act for him or her. See ABA Rule 8.4(a); Texas Rule 8.04(a)(1).

In light of the foregoing rules, it is not surprising that a number of authorities have held that a lawyer trying to assist his or her client's cause cannot engage in an undercover investigation that involves deceiving third persons. For example, recently, the Philadelphia Bar Association Professional Guidance Committee in Opinion No. 2009-02 (Mar. 2009) ruled that a lawyer could not have a third person befriend a witness who was unfavorable to his client in order to gain permission to access and find impeaching information on the witness's restricted Myspace and Facebook pages. The Committee ruled that such conduct was unethical because it would violate the prohibition against a lawyer making or having someone make a false statement of material fact to a third person.

Similarly, in In re Gatti, 8 P.3d 966 (Or. 2000) (en banc), the Supreme Court of Oregon held that an attorney, who was representing chiropractors charged with racketeering and fraud concerning

workers' compensation claims, had violated the rules of professional conduct by representing himself to be a chiropractor in order to investigate the processing of medical insurance claims by third parties. In addition to holding that the attorney had violated the rules of professional conduct by making false statements of fact to a third party during his undercover investigation, the Oregon Supreme Court also concluded that there were no exceptions that allowed even government lawyers conducting investigations to make false statements of fact to third persons. See id. at 974-76. Interestingly, following the opinion in Gatti, Oregon amended its rules of professional conduct to create an exception that allows a lawyer to engage in covert activity (otherwise in compliance with the ethics rules) in the investigation of violations of civil or criminal law or constitutional rights. See Philadelphia Bar Association Professional Guidance Committee Opinion No. 2009-02, at 6 (Mar. 2009) (discussing exception to Oregon rule created after Gatti); see also Oregon Rules of Professional Conduct, Rule 8.4(b).

And, a prosecutor was found to have violated the rules of professional conduct by lying to an accused murderer on the run in order to get him to turn himself in. See In re Paulter, 47 P.3d 1175 (Colo. 2002) (en banc). In In re Paulter, witnesses told law enforcement that William Neal had murdered the three women found at an apartment. When Neal told a police officer during a phone call that he would turn himself in if he could have his former attorney or a public defender represent him, the prosecutor tried unsuccessfully to contact Neal's former lawyer. On the phone, the prosecutor then represented himself to be a public defender and, while evading Neal's questions about his rights, convinced Neal to turn himself in. Rejecting an argument for a law enforcement exception to the ethical rules, the Colorado Supreme Court held that the prosecutor had violated the rules of professional conduct.

Contrary to these cases, the Wisconsin Supreme Court recently held that an attorney, who was representing a client charged with sexual assault

of a child, exhibiting harmful materials to a child, and possession of child pornography, had not violated the rules of professional conduct by having his investigator conduct an undercover investigation that tricked the child and his mother into giving up the child's computer so that the attorney could examine the computer's hard drive. See Office of Lawyer Regulation v. Stephen P. Hurley, No. 2007AP478-D (Wisc. Sup. Ct. Feb 11, 2009) (available as an order in letter format via internet search by case name); see also Office of Lawyer Regulation v. Stephen P. Hurley, Case No. 07 AP 478-D (Wisc. Sup. Ct. Feb. 5, 2008) (Referee's Report) (available at <http://www.thedailypage.com/media/2008/02/06/WI%20OLR%20Hurley%20report%20020508.pdf>) (last visited July 31, 2009). Because the attorney believed that the child was lying about his client and had an independent interest in child pornography, he wanted to inspect the hard drive on the child's computer to show the child's independent interest in pornographic materials. To this end, the lawyer's investigator sent the child a letter from a company claiming to be conducting research and offering the child a new computer in exchange for his old computer. After the investigator met with the child and his mother and obtained the child's computer in exchange for a new one, the attorney had the computer analyzed and found on its hard drive numerous pornographic images involving adults, children, and animals. When the attorney informed the prosecutor of the result of his investigation, the prosecutor filed a grievance against the attorney. As noted previously, the Wisconsin Supreme Court found that the attorney had violated no rules of professional conduct, and it quoted the referee's finding that the attorney had made a reasonable choice in light of his obligations under the Sixth Amendment and the vagueness of the rules of professional conduct. The Supreme Court further noted that prosecutors traditionally have been allowed to use dissemblance in order to collect evidence and that neither the District Attorney nor the Office of Lawyer Regulation had pointed to any Wisconsin precedent drawing a distinction between prosecutors and other attorneys in that regard. The Supreme Court also

noted that the Wisconsin rules of professional conduct had been revised effective July 1, 2007, and that the Office of Lawyer regulation did not contend that the attorney's conduct would violate the current version of the rules. See Wisconsin Rules of Professional Conduct, Rule 4.1 (20 Wisc. S. Ct. R. 4.1).

Finally, on June 16, 2009, the Virginia State Bar Standing Committee on Legal Ethics in Opinion 1845 concluded that it was not unethical for the state bar's staff counsel to direct a lay investigator to engage in a covert investigation into the unauthorized practice of law. The Committee held that an undercover sting investigation into the unauthorized practice of law did not violate the rules of professional conduct because: (a) the unauthorized practice of law is a crime; (b) staff counsel was charged by law with a duty to investigate conduct that is unlawful or criminal; (c) the only viable means to discover the criminal or illegal activity was to have an investigator pose as a prospective client; (d) it is generally known and very well accepted that law enforcement authorities, including government lawyers, are authorized to conduct or supervise undercover operations using deception to gather information about criminal conduct; and (e) such conduct does not "reflect[] adversely on the . . . fitness," Virginia Rules of Professional Conduct, Rule 8.4(c), or character of the lawyer directing or supervising a lawful criminal investigation.

Texas authorities do not appear to have addressed this issue, but have mentioned it in passing. See *Kean v. State*, 85 S.W.3d 405, (Tex. App.—Tyler 2002, pet. ref'd). (assuming arguendo that law enforcement's use of confidential informants violated Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct, but holding that the assumed violation had no bearing on the disposition of this criminal appeal because the disciplinary rules do not provide for the exclusion of evidence); *Franklin v. State*, No. 12-01-00016-CR, 2002 WL 818862, at *3 n.1 (Tex. App.—Tyler Apr. 30, 2002) (same). In sum, the majority of the opinions discussed above and the plain language of ABA Rule 4.1 and Texas

Rule 4.01 counsel against conducting undercover investigations that involve the deception of third parties. In light of your desire to conduct undercover investigations, you might view the glass as half full rather than as half empty since at least two states now recognize that a lawyer may conduct or supervise covert investigative activities. See Oregon Rules of Professional Conduct, Rule 8.4(b); Wisconsin Rules of Professional Conduct, Rule 4.1(b) (20 Wisc. S. Ct. R. 4.1(b)).

Best of luck with all of your sleuthing!

Ciao,
EM

Save the Date

The Bar Association of the Fifth Federal Circuit is sponsoring a Day Inside the Fifth Circuit on October 8, 2009, in New Orleans, LA. Plans call for the day to qualify for at least five hours of CLE credit, including one hour of ethics. The cost is \$100.

Questions should be directed to Mary Gorman Douglas: 504-586-8185 or Mary@baffc.org.

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