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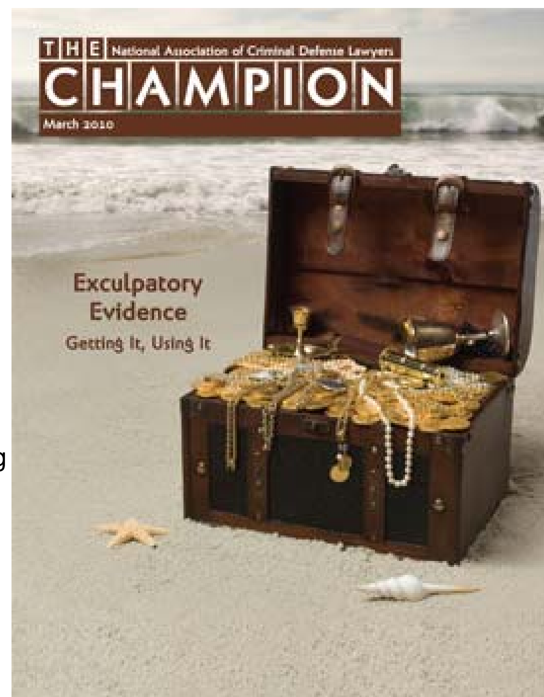

NACDL News
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Report Criticizes Texas Jdge Who Refused After-Hours Filing in 2007 Death Penalty Case

By Jack King

On Sept. 25, 2007, the U.S. Supreme Court announced that it would hear a challenge to the constitutionality of lethal injection in Baze v. Rees, prompting death penalty lawyers all over the country to file for stays of execution pending the high court's decision in that case. Advised by the Texas Court of Criminal Appeals general counsel that the Texas Defender Service would be filing for a stay in the imminent execution of Michael Richard sometime after the court's official closing time of 5:00 p.m., Chief Judge Sharon Keller ordered that the clerk's office be closed at 5:00 and neglected to refer the case to any of the appeals judges in the courthouse, who could have issued an emergency stay. Mr. Richard was executed that evening. As a result, a number of persons and organizations, including NACDL, filed complaints against Judge Keller with the Texas State Commission on Judicial Conduct, which appointed a special master, retired judge David A. Berchelmann Jr., to investigate the matter and make findings of fact.

In light of the special master's findings, NACDL President Cynthia Hujar Orr of San Antonio, released a statement.

"We are encouraged that the special master found that the chief judge of the Texas Court of Criminal Appeals acted in a less than exemplary fashion, 'exhibited poor judgment,' and is unrepentant for her conduct in the Michael Richard death penalty case.

"The findings of fact underscore Judge Sharon Keller's lack of awareness of her responsibility to ensure that the Texas court system is fair and just, and is perceived to be fair and just. The special master was incredulous of her statement under oath that if she could do it all over again she would not change any of her actions. Her words and actions suggest a lack of good judgment in general and grave disrespect for the gravity and finality of the death penalty in particular.

"We do, however, expect that the Commission on Judicial Conduct will exercise its independent judgment and come to its own conclusion on the facts of the case. The fact that Judge Keller still cannot see her errors, seeming to suggest that the rest of the Texas legal community is out of step, not she, is the strongest indication that she needs correction from her peers, who along with the high court, have also suffered disrepute and public suspicion from this most unfortunate

affair."

The special master's findings of fact have been submitted to the Commission on Judicial Conduct, which can accept or reject them, in whole or in part, in rendering its final decision.

Jack T. Litman (1943-2010)

Jack T. Litman, former NACDL Board member, died Jan. 23 in a New York hospital, ending a decade-long battle with lymphoma, according to his family and friends. Best known to the public for his high-profile murder cases, he was better known to his NACDL colleagues for his love of art, literature, and almost everything French. He was 66.

Jack became internationally known for his effective defense of unsympathetic defendants in high-profile trials tailor-made for the tabloids. In the late 1980s, he defended "preppy murderer" Robert Chambers Jr. The victim, 18-year-old Jennifer Levin, was found in Central Park with bruises on her neck and her skirt and shirt pushed up. Chambers, who was seen by several people leaving a bar with Levin the night before, eventually explained to police that Levin had sexually assaulted him in the park, tying his hands with her panties and abusing his genitals. The strangulation was explained as "rough sex."

The jury deadlocked for nine days, and Chambers plea-bargained to one count of manslaughter.

He also represented Columbia graduate student Oliver Jovanovic, who was convicted in 1998 of sexually torturing a woman he "met" on the Internet. An appeals court reversed two years later, ruling that the judge misapplied New York's rape shield law to prevent the defense from publishing sexually explicit e-mails the complainant exchanged with the defendant. As quoted in the New York Times, N.Y. State Supreme Court Justice David B. Saxe wrote for the appellate division, "Given the highly intimate nature of some of this information, the statements, as a practical matter, should be viewed as the equivalent of 'prior sexual conduct with the accused.'"

"America's criminal defense bar has lost one of its giants," said NACDL Executive Director Norman L. Reimer, who practiced in New York for over 30 years. "Jack brought a keen intellect and razor sharp skills to the defense of the accused. He was a leader in our profession. He was dedicated to the defense function and graciously shared his talents with his colleagues. Jack was a true champion of liberty who will be deeply missed."

Jack was a 1964 graduate of Cornell University and was a member of the Harvard Law class of 1967. After graduating law school, he attended the University of Paris as a Fulbright Scholar. He was a founder and past president of the New York State Association of Criminal Defense Lawyers and also a past president of the New York Criminal Bar Association, both NACDL affiliate organizations.

He is survived by two sons, Benjamin and Sacha.

Contributions in Jack's memory may be made to Harvard Defenders, a student-run legal clinic that provides legal services to indigent defendants in criminal cases, 1511 Massachusetts Ave., Cambridge, MA 02138, (617) 495-3051 and to the Society for the Advancement of Judaism, 15 W. 86th St., New York, NY 10024, (212) 724-7000.

Recent NACDL Amicus Curiae Briefs Now Available on Web

Barber v. Thomas, U.S. Sup. Ct., No. 09-5201, consolidated from published and unpublished cases below, see, e.g., Tablada v. Thomas, 533 F.3d 800 (9th Cir. 2008), brief filed 01/21/10. Prisons — Federal imprisonment — Good time credit calculation. Amicus curiae brief of NACDL, the National Association of Federal Defenders, the Federal and Public Community Defenders in the United States, Families Against Mandatory Minimums, the American Civil Liberties Union, and Law Deans and Faculty in support of petitioners. Argument: The text of 18 U.S.C. § 3624(B)(1) unambiguously requires good time credits (GTCs) to be awarded for each year of the sentence imposed, not the time served; if the statute is ambiguous, the rule of lenity requires that the statute be construed in petitioners' favor and precludes deference to the Bureau of Prisons' interpretation. Moreover, correctly calculating the GTCs will conserve federal

resources and reduce prison overcrowding. Authors: Jeffrey T. Green, Sidley Austin LLC, Washington, D.C., et al. See also NACDL's Good Time Credit page and Stephen R. Sady's article in The Champion magazine, Misinterpretation of the Federal Good Time Statute Costs Prisoners Seven Days Every Year (Sept/Oct 2002).

Price v. Turner, S.C., No. 03-DR-37-472, brief filed 10/29/09. Right to Counsel — Indigents — Child support nonpayment proceedings. Amicus curiae brief of the ACLU Foundation, South Carolina National Office, the Brennan Center for Justice, NACDL, the National Legal Aid and Defender Association, and the South Carolina Association of Criminal Defense Lawyers in support of appellant Michael Turner. Argument: Because the Sixth Amendment requires that courts appoint counsel for indigent defendants where imprisonment is a possibility, South Carolina family courts are required to appoint counsel to represent indigent defendants in family court child support nonpayment proceedings where imprisonment is a possibility. Authors: Stephen J. McConnell and Meghan Rohling Kelly, Dechert LLP, Philadelphia, Pa.

United States v. Berger, 9th Cir., No. 08-50171, brief filed 01/21/10. Federal sentencing guidelines — Securities fraud — Loss calculation. NACDL amicus curiae brief in support of petition for rehearing or rehearing en banc. Argument: A defendant should not be punished based on victims' losses that were not proximately caused by the defendant's wrongdoing. Such losses include, for example, losses resulting from a general downturn in the relevant market (e.g., securities, real estate, currency), unforeseeable intervening events, or manipulation of the time period used by prosecutors to compute victims' losses. The panel decision misapprehends the Supreme Court's decision in Dura Pharmaceuticals Inc. v. Broudo (2005), causing it to reject decisions of the Second and Fifth Circuits citing Dura in discussing loss causation in securities fraud cases; if left uncorrected, the panel opinion will effect a circuit split on an issue as to which there is no substantive disagreement and deter sentencing courts from adopting a reasonable economic approach to calculating loss under the federal sentencing guidelines in securities fraud cases. Authors: William J. Genego, Nasatir, Hirsch, Podberesky & Genego, Santa Monica, Calif., Evan Jenness, Santa Monica, Calif., Sheryl Gordon McCloud, Seattle, Wash.

United States v. Johnson, 9th Cir., No. 08-30094, panel decision 581 F.3d 994, brief filed 10/19/09. Federal sentencing guidelines — Acceptance of responsibility — Conditional plea. Amicus curiae brief of the Ninth Circuit Federal Public and Community Defenders and NACDL in support of defendant-appellant's petition for rehearing en banc. Argument: The panel majority erroneously upheld denial of the third level for acceptance of responsibility (Guidelines § 3E1.1) where the defendant entered a conditional guilty plea in order to appeal his Fourth Amendment claim. Author: Stephen Sady, Federal Public Defender Office, Portland, Ore.

United States v. O'Brien, U.S. Sup. Ct., No. 08-1569, decision below 542 F.3d 921 (1st Cir. 2008), brief filed 01/21/10, argument 02/23/10. Sentencing — Mandatory minimums — Firearms — Machine gun. Amicus curiae brief of Families Against Mandatory Minimums and NACDL. Argument: Under Apprendi v. New Jersey (2000), if a sentence would be unreasonable absent a particular fact neither found by the jury or admitted by the defendant, the sentence would violate the defendant's Sixth Amendment jury trial right; in the instant case, whether the defendant brandished a "machine gun" during a robbery, triggering a 30-year mandatory minimum sentence, must be treated as an element of the offense. Authors: Samuel J. Buffone and Aaron M. Katz, Ropes & Gray LLP, Washington, D.C.

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