Mass Dissent

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MEMBERSHIP MEETING

October 16, 6:00pm

14 Beacon St., 1st Fl.

Boston

Review of the Supreme Court

Each September we devote *Mass Dissent* to a review of the Supreme Court, and last year we noted that for the first time in 11 years we had a Court with new members. We also noted that while last year's term was mixed, the addition to the Court of Justice Alito clearly moved the Court to the right and that one more Republican appointment may leave us all in peril. In fact, even without that one more Republican appointment, this year was clearly a banner year for conservatives as the Court moved almost uniformly to the right on the important issues (two exceptions are noted below).

At literally the center of the Court, this year as last, was Justice Kennedy, more conservative than former swing vote Justice O'Connor, and a true "bellwether" for the Court, a justice who dissented only twice in 68 opinions and who voted with the conservative bloc (Justices Roberts, Scalia, Thomas and Alito) in eight of the Court's 10 arguably most important decisions (abortion rights, school desegregation, free speech, pay discrimination, separation of church and state, campaign finance reform, criminal law sentencing, and price fixing). Justice Kennedy was also in the majority in every one of the Court's numerous 5-4 decisions. As in their first term together, Chief Justice Roberts and Justice Alito continued to be the justices most often in agreement, finding themselves on the same side 92 percent of the time.

In this issue, of course, we can only comment on a very few of the Court's decisions, and we have focused on three decisions where the Court has moved to the right - on student speech (*Frederick v. Morse*), on school desegregation (*Parents v. Seattle School District*) and on abortion rights (*Gonzales v. Carhart*), while we also write on an upcoming and potentially important decision concerning the sentencing guidelines.

But, while we lack the space to review here a major portion of the Court's important decisions of last term, we should be aware of just how quickly the Court is moving to the right. In various decisions it restricted plaintiffs' rights to get into court or to bring appeals, including limiting shareholder suits against corpo-

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Join a Guild Committee

Street Law Clinic Project: Community legal education workshops on 4th Amendment Rights (Stop & Search), Landlord/Tenant Disputes, Workers' Rights, Civil Disobedience Defense, and Immigration Law. Conceptualized and coordinated by law students, the Street Law Clinic project provides workshops for the Boston community which address community legal needs. Clinics are held at community organizations, youth centers, labor unions, shelters, and pre-release centers. If you are a student, legal worker or attorney interested in leading workshops, contact the Project at 617-723-4330 or nlgmass-slc@igc.org.

"No to MBTA Searches": Works in coalition with the American Arab Anti-Discrimination Committee, American Friends Service Committee and ACLU of Massachusetts to stop searches on the MBTA. If you would like to be involved in the campaign, either on its political or legal end, please call the office at 617-227-7335.

Lawyer Referral Service Panel: Members of the panel provide legal services at reasonable rates. Referral Service Administrative/Oversight Committee members: Neil Burns, Neil Berman, Joshua Goldstein, Jeremy Robin, and Azizah Yasin. For more information, contact the Referral Service Coordinator at 617-227-7008 or nlgmass@igc.org.

Independent Civilian Review Board: In coalition with the American Friends Service Committee and Lawyers' Committee for Civil Rights, the NLG has been pushing for the creation of an independent civilian board to review complaints against Boston police officers. To get involved in the campaign, please contact the office at 617-227-7335.

NLG National Immigration Project: Works to defend and extend the human and civil rights of all immigrants, both documented and undocumented. The Committee works in coalition with community groups to organize support for immigrant rights in the face of right-wing political attacks. Ongoing projects include asylum advocacy and the rights of immigrant minors. For more information contact the NLG National Immigration Project at 617-227-9727.

NLG Military Law Task Force: Provides legal advice and assistance to those in the military and to others, especially members of the GIRights Hotline, who are counseling military personnel on their rights. It also provides legal support and helps to find local legal referrals when needed. The MLTF and the Hotline exchange many questions and information through their listserves. Calls to the GIRights Hotline from phones in New England are handled from the AFSC office in Cambridge. To get involved, please contact Neil Berman (njberman2@juno.com) or Marguerite Helen (mugsm@mindspring.com).

COALITIONS:

Jobs with Justice, a coalition-based organization addressing workers' rights. The NLG is a member of Jobs with Justice; any interested Guild members can attend meetings & events.

GUILD NEWS

MEMBERSHIP MEETING

All Guild members are invited to the Chapter's Annual Membership Meeting (nlgmass-director@igc.org.), which will take place on **Tuesday, October 16, 2007**. **We'll start at 5:30pm with a 30-minute wine reception and follow with a discussion** of national resolutions and amendments proposed for a debate at the National Convention in Washington, D.C. (more info below).

NATIONAL CONVENTION

In October, the National Lawyers Guild will celebrate its 70th anniversary in Washington, DC at the National Convention titled *Seventy Years of Law for the People*. The Convention, held from **Wednesday, October 31** to **Sunday, November 4, 2007,** at **the Holiday Inn on the Hill** (415 New Jersey Ave., NW.), will honor past women presidents of the Guild: Doris Brin Walker, Mary Alice Theiler, Debra Evanson, Karen Jo Koonan, Catherine Roraback, and Barbara Dudley. The program includes workshops and Major Panels on: Habeas and International Law in Guantanamo; Intersection of the Drug War, Youth, and People of Color; Militarism/Sexual Violence; *and* Global Warming and Public Health.

To register and for more information, please visit www.nlg.org/convention or call the National Office at 212-679-5100.

SLC Report

May 2: Guild criminal defense attorney **Jenn Bills** conducted a Civil Disobedience clinic for Boston activists preparing for events during the bio-industry conference.

May 29: Guild member **Quesiyah Ali** led a Stop & Search clinic for a diverse group of Somerville residents at SCALE - Somerville Center for Adult Learning Experiences.

June 7: Long time Board of Directors member **Neil Berman** presented a Tenant's Rights clinic at the Boston Family Shelter.

WELCOME ROBIN TRANGSRUD

After a year of employment, Ariana Flores, the Chapter's Lawyer Referral Service Coordinator and Administrative Assistant, is leaving the Guild for a more "activist" oriented job (she will be working on same-sex marriage advocacy). We regret seeing Ariana leave but wish her plenty of exciting and fulfilling experiences at her new post.

We are thrilled to announce that in August Robin Trangsrub took over the LRS Coordinator/Administrative Assistant job. Robin is a graduate of Bowdoin College in Brunswick, Maine, where she majored in Government and Legal Studies with a minor in Spanish. She is a recipient of the Surdna Foundation Research Fellowship, which allowed her to intern for Camino Seguro (Safe Passage), a Guatemalan non-governmental organization that provides health and education services to 500 children and families living in the Guatemala City Dump. In 2005, she was a legal volunteer at Maine Volunteer Lawyer's Project in Portland.

We are happy to have Robin on board. Please call her at 617-227-7008 to welcome her to the National Lawyers Guild.

ARTICLES FOR *MASS DISSENT*

The October issue of *Mass Dissent* will focus on **the rights and lives of Massachusetts prisoners.**

If you are interested in submitting an article, essay, analysis, or art work (cartoons, pictures) related to the topic, please e-mail the articles to **nlgmass-director @igc.org.**

The deadline for articles is September 15th.

JOB LISTINGS

Legal Assistance Corporation: STAFF ATTORNEY. *Responsibilities:* Work on employment matters effecting low-wage workers; be involved in individual casework; do systemic advocacy that focuses on employment, including wage and hour claims, wrongful termination, and discrimination; file and litigate cases at the Massachusetts Commission Against Discrimination and state and federal court; some grant-reporting and grant-writing responsibilities. *Qualifications:* Admission to Massachusetts Bar or eligible to sit for next Mass. Bar examination; 2 years of experience in employment law; fluency in Spanish or Vietnamese helpful. Liberal fringe benefits package (four weeks vacation, flex-time policy.) *Apply:* Send resume to Sarah Loy, Executive Assistant, Legal Assistance Corporation of Central Mass., 405 Main St., Worcester, MA 01608 or e-mail to sloy@laccm.org.

Massachusetts Law Reform Institute: IMMIGRATION ATTORNEY. *Responsibilities:* Engage in multi-faceted systemic policy and legislative advocacy on immigration law and immigrant rights issues; conduct impact and appellate litigation; conduct training and legal rights education. *Qualifications:* Min. 3 years of experience in the immigration law/immigrant rights field is required. Excellent benefit package. *Apply by 9/10/2007:* Send resume and 3 work references to Allan Rodgers, Executive Director, Massachusetts Law Reform Institute, 99 Chauncy St., Suite 500, Boston, MA 02111.

UPCOMING EVENTS

Saturday, October 13: RESIST's 40th ANNIVERSARY. RESIST celebrates its 40th anniversary with an evening panel (featuring Noam Chomsky, Mandy Carter, Bill Fletcher, and present-day war resister Camilo Mejia) and a reception with resistance music through the decades. *Information:* E-mail Carol Schachet at carols@resistinc.org or call 617-623-5110.

Wednesday, October 24: POET IN THE WORLD. American Friends Service Committee of Massachusetts celebrates the work of Denise Levertov with Jimmy Santiago Baca, Yarrow Cleaves, Martha Collins, X.J. Kennedy, Paul Lacey, Grace Paley, Tino Villanueva, and others. *Information:* Please call 617-6617-6130 or go to www.peaceworkmagazine.org.

Thursday-Sunday, November 8-11: CONSUMER RIGHTS LITIGATION CONFERENCE. National Consumer Law Center organizes this annual conference for lawyers and activists. The Conference provides presentations on cutting-edge law, the latest strategies from leading experts, and valuable insights on trends, tactics and techniques in litigation. This year, the Conference offers a class action symposium, workshops on "Strategies to Stop Foreclosures," "Fighting Predatory Mortgage Lending Through Litigation," and "Attacking Debt Collectors' Suits." *For information and registration on line:* Please go to www.nclc.org.

Review of the Supreme Court

Continued from page 1

rations (*Tellabs v. Makor Issues & Rights Ltd.* and *Credit Suisse Securities v. Billing*); it further resurrected the sentencing guidelines by holding that, while they are not mandatory, a sentence within them is reasonable as a matter of law for appeal purposes (*Rita v. U.S.*); it significantly cutback campaign finance reform enacted in 2002 in *McCain-Feingold* (*FEC v. Wisconsin Right to Life*); and it issued various other decisions making pay discrimination lawsuits more difficult to bring, making it more difficult for taxpayers to challenge federal expenditures arguably offensive to the establishment clause, and making it easier for prosecutors to disqualify jurors ambivalent about the death penalty.

While, it be sure, the last term was not uniformly bad - the Court did rule against the prosecution in a series of Texas death penalty cases, including holding that a delusional convict could not be executed (*Panetti v. Quarterman*), and it also sided with Massachusetts in expanding the EPA's obligation to address global warming (*Massachusetts v. EPA*, requiring the EPA to regulate heat-trapping gases in auto omissions unless it could provide a scientific basis for not doing so) - we should make no mistake: this is the most ideologically conservative and divided Court we have seen in decades.

- David Kelston -

Court Moves to the Right on Fundamental Issues

by David Kelston

Since the 1970s, arguably the most important issues for progressive lawyers to come before the Supreme Court and the lower federal courts have been school desegregation and abortion, matters that have been repeatedly heard by the federal courts and that serve to measure our fidelity to racial justice and equality for women. This term the Court, with Justice Alito having replaced Justice O'Connor, staked out more conservative positions in both of these critical areas.

Parents Involved in Community Schools v. Seattle School District No. 1, handed down on the last day of the term, invalidated school desegregation programs in Seattle and Louisville that had been upheld by the lower federal courts. The Louisville schools, which had previously been segregated by law and then operated under a federal court consent decree for 15 years had, in the face of growing resegregation following termination of the desegregation order, adopted a plan in assigning students to elementary and high schools that required that minority enrollment by school be maintained between 15 and 50 percent. The Seattle school district had also been subject to earlier court decree (and mandatory busing) because of racial imbalance and, in 1996, had adopted an assignment plan for the district's 10 high schools that made race a dispositive factor in filling slots at schools where the number of applicants exceeded enrollment openings and where the school's enrollment deviated by more than 10 percent from the district's overall racial composition. The Court struck down both plans as unconstitutional because, according to Chief Justice Roberts, writing for himself and Justices Scalia, Thomas and Alito, they were directed only to racial balance, a goal he said the constitution forbade since *Brown v. Board of Education*. (Justice Roberts's reliance on *Brown* to strike down laws that serve to decrease racial segregation, and his insistence that he was faithful to *Brown*'s purpose, was likely the most fanciful - even bizarre - aspect of the four-member decision.)

> ***This term the Court, with Justice Alito having replaced Justice O'Connor, staked out more conservative positions in extremely important cases - school desegregation and abortion.***

While Chief Justice Roberts's opinion staked out the conservative position, a position which would appear to invalidate any plan whose explicit purpose is racial balance (*i.e.*, virtually every known and effective desegregation plan), the majority opinion was softened somewhat by Justice Kennedy's separate concurrence, agreeing that the Seattle and Louisville plans were unconstitutional, but also acknowledging that avoiding or undoing racial segregation in schools is a compelling state interest that can be pursued through narrowly tailored means like the redrawing of school zones, strategic site selection for new school construction to increase student body diversity, and directing resources to special programs aimed at increasing diversity. But while Kennedy's language criticizing Roberts, et al as too dismissive of the goal of desegregation was sometimes strong, the list of the kinds of programs he would find constitutional were hardly expansive or, it would seem, likely to achieve *Brown*'s actual goals.

While *the Parents*' minority, Justices Breyer, Stevens, Souter and Ginsburg, were strong in dissent, with the usually mild-mannered and consensus-building Justice Breyer in particular writing sharply that Justice Kennedy's alternatives were ineffective and that the Court was profoundly mistaken, the fact is that the conservatives successfully staked out major new ground that will henceforth make any school desegregation effort significantly more difficult. Tellingly, just last term the Court refused even to hear a case from Massachusetts not unlike the Seattle and Louisville cases, and

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Court Moves to the Right on Fundamental Issues

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there was at that time no split in the circuits for the Court to address.

In *Gonzales v. Carhart*, the same majority upheld the Court's first-ever prohibition on a specific method of abortion in the course of upholding the Bush administration's "Partial-Birth Abortion Ban" statute, enacted in 2003 and subjecting doctors to fines and prison time for performing certain second trimester abortions. Justice Kennedy's majority opinion, joined by the Chief Justice and Justices Scalia, Thomas and Alito, emphasized "ethical and moral concerns" while purporting to protect women who would have such abortions from their own, later "regret," "grief" and "sorrow" (indeed the opinion's paternalism was as striking as its unique holding).

In *Carhart*, four doctors and Planned Parenthood had challenged the federal statute, in significant part relying on *Stenberg v. Carhart*, 530 U.S. 914 (2000), where the Court earlier struck down a similar Nebraska statute. Two district courts, each after trial, enjoined the federal statute, and the Eighth and Ninth Circuits affirmed.

In reversing, Justice Kennedy began with graphic and lengthy descriptions of the abortions at issue (*e.g.*, "The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus ..."), then (unconvincingly) distinguished the Nebraska statute from the federal law, then essentially concluded that the government's "legitimate and substantial interest in preserving and promoting fetal life" would be repudiated by affirming the Courts of Appeal, finding in the process that, though the federal act lacked an exception for the health of the mother, there was medical disagreement whether this omission actually imposed "significant health risks on women."

Justice Ginsburg, writing for herself and the more liberal bloc, began with <u>Roe v. Wade</u>, and saw the federal act for what it is: an undue state interference with a woman's once-fundamental right to choose.

Justice Ginsburg, writing for herself and the more liberal bloc (Stevens, Souter and Breyer), began with *Roe v. Wade*, and saw the federal act for what it is: an undue state interference with a woman's once-fundamental right to choose and, for the first time, a Court-endorsed restriction on abortion with no exception safeguarding a woman's health. The minority also put the matter in perspective, noting that Congress passed the act a few years after the Court's ruling in *Stenberg*, and did so in an environment more polemical and partisan than medical and with the support of various recitations simply incorrect factually (*e.g.*, that no medical schools provide instruction on "intact D&E," one of the two banned abortion methods).

The fact is - the fact as established at two district court trials and as recited by the *Carhart* minority - that "intact D&E" abortions are, in certain circumstances, both safer than alternate procedures and necessary to protect women's health. These benefits, obviously, were lost when the Court upheld the statute's nationwide ban. And equally important and distressing is the *Carhart* majority's clear grounding of its decision not in reliable medical evidence but in its own determination of which "moral concerns" are of ultimate importance and its obvious paternalism.

The two decisions here - *Parents* and *Carhart* - also illustrate how important has been Justice O'Connor's replacement by Justice Alito, for it was Justice O'Connor, then the Court's swing vote (a function now filled by the more conservative Justice Kennedy) who authored the Court's 2000 opinion striking down the Nebraska abortion ban and its 2003 opinion upholding the University of Michigan's Law School's affirmative action program, *Grutter v. Bollinger*.

David Kelston is a Co-Chair of the Massachusetts Chapter of the National Laweyrs Guild and a law partner at Adkins Kelston & Zavez in Boston.

Further Restrictions on Free Speech

by Rohan Grant

On June 25, 2007, the United States Supreme Court struck another blow to free speech in it its *Frederick v. Morse* decision. The Plaintiff in *Frederick*, a high school student, claimed that his First Amendment rights had been violated when he was suspended for ten days for displaying a banner at an off-campus, school-approved activity. In a 6-3 decision, the Court disagreed with the student, holding that school officials may restrict student speech that they reasonably view as promoting illegal drug use.

On January 24, 2002, the Olympic Torch Relay passed through Alaska in front of Juneau-Douglas High School. The principal, Deborah Morse, permitted students to leave class to observe the Torch Relay. Joseph Frederick did not go classes that day, but joined his classmates in watching the Torch Relay. As torchbearers and camera crews passed by, Frederick and his friends held up a banner with the message, "BONG HITS 4 JESUS". Principal Morse demanded that Frederick put the banner down, believing he was promoting drug use through the banner, and suspended him. Throughout his appeals of the suspension, Frederick continually stated that "the words were just nonsense meant to attract television cameras."

Prior to this case, it was established that students' First Amendment rights to freedom of speech or expression do not simply cease to exist while they are at school, but those rights are not absolute and must be applied in light of the special circumstances of the school environment. *Tinker v. Des Moines Independent Committee School Dist*rict, 393 U.S. 503 (1969). A trilogy of Supreme Court cases established the situations in which school officials could censor student speech without violating the students' First Amendment rights. *Tinker*, 393 U.S.503 (student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school"); *Bethel School District v. Fraser*, 478 U.S. 675 (1983) (school officials may prohibit student speech that is lewd, vulgar, or patently offensive); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (school officials may censor student speech that is school sponsored).

In reaching its opinion in *Frederick*, the Court had to determine whether the banner could reasonably be viewed as promoting illegal drug use and whether Fredericks' First Amendment rights were violated. The Court believed that the banner promoted drug use and therefore was not protected speech, basing its analysis largely on what a "reasonable" adult could view as promoting drug use, with the Court spending significant time discussing drug use among high school students and the strong role peer pressure plays in encouraging drug use.

But the Court, with its decision in Frederick, has treaded on dangerous ground by further scaling back First Amendment protections available to students. In a disturbing concurrence Justice Thomas made clear his belief that that while at school, students have no First Amendment rights. Justice Thomas based his opinion on a number of lower court opinions from the 1800's up to the President Coolidge era (1925). One such case involved the affirmance of a school's expulsion of a student for complaining that the school building was unsafe for not being up to the fire code. Justice Thomas's backward logic is grounded in colonial school ideology that "schools were not places for freewheeling debates or exploration of competing ideas."

The *Tinker* Court and successive cases emphasize that protecting unpopular viewpoints is at the heart of the First Amendment, and school officials cannot restrict student speech simply because they disagree with or do not like the speech.

Additionally, an inherent problem with the Court's analysis lies in the disconnect between older generations of adults and contemporary teenagers. Phrases that could have been improper years ago may presently have a completely different meaning, and vice versa. If, in fact, there is to be a special and particular analysis of First Amendment rights within schools, it would seem that the analysis must at least attempt to acknowledge the often idiosyncratic meaning of youthful speech rather than applying conventional (and adult) stereotypical meaning to it, with a broad-brush approach and analysis that threatens significantly to undercut the more subtle analysis that had been required by the *Tinker*, *Fraser* and *Hazelwood* cases.

Rohan Grant is a third year student at Suffolk University Law School.

Law for the People.

NLG Convention

1937 - 2007

Seventy Years of Law for the People!

SAVE THE DATE!

October 31 – November 4

70th Anniversary Convention

at the

Holiday Inn on the Hill
415 New Jersey Avenue NW.
Washington, D.C.

For more information,
check http://nlg.org/convention

STUDENTS IN ACTION

THE NEW ENGLAND SCHOOL OF LAW chapter of the National Lawyers Guild finished up the academic year with a **panel on same sex adoption**, headed by Justice Robert Cordy of the SJC. Other panelists included Attorney Katherine Triantafillou, from the Adoption of Tammy F., Attorney Joyce Kauffman, and Evelyn Reilly, the Director of Public Policy at the Massachusetts Family Institute. Although we had limited financial resources, the panel was a tremendous success, engaging students, professors, and the community and increasing awareness of the Guild at NESL. We were especially pleased that many first year students attended and actively participated in a dialogue about the issues. We also had attendance from within the NESL alumnae community and from several public interest organizations in Boston.

Additionally, over the last year we were excited by the response to and interest in the Street Law Clinics among first and second year students. Our chapter hosted several trainings on Landlord/Tenant disputes and an additional training on Stop and Search Law. Several students reported their enthusiasm for the program and their desire to maintain involved with the Clinics.

In the coming year, Sarah Roxburgh and Lauren Vitale will serve as Co-Presidents for the NESL Chapter. Additionally, we have some terrific Guild students interested in joining us on the Exec. Board: third year student Nancy Wheeler, who served as Treasurer for our Chapter last year, and second year students Caitlin Cianflone and Laura Mannion. We are currently in the process of matching each student to the position that is the best fit. We're all very excited about the possibilities for activism in the upcoming year, and are anxious to get started!

Our academic year will begin with promoting the Guild to incoming students, and we will have a presence at all appropriate orientation events. We will continue to highlight the Street Law Clinics as an excellent opportunity for outreach. This year, we plan to maintain the level of Street Law trainings at our school. Although we would like to continue to offer trainings on Landlord/Tenant Law and Stop and Search Law, we are open to offering trainings on other topics.

Although it is too early to determine what issue we will focus on for our annual spring panel, we are currently considering collaborating with another NESL student group, Children's Law Society, to host a conference relating to juvenile law. Finally, we are also interested in offering local speaker events to increase student awareness of local/regional public interest opportunities and career paths.

Lauren Vitale, Sarah Roxburgh, Lucy Cheung, and Nancy Wheeler are students at New England Schoold of Law.

Over this summer quarter, the **NORTHEASTERN SCHOOL OF LAW CHAPTER** of NLG has been busy with two major projects.

The first is our annual project of **putting together an orientation guide for the incoming 1L class**. This includes information on everything from classroom dynamics, to parenting at law school, to Northeastern's history of student activism. Most 1Ls find this book extremely helpful in their preparation for a life at law school, and it also works as a great recruiting tool for our group.

Along with our work on the orientation guide, members of NLG are also **immersed in research for the San Francisco 8 case**. This is the case of eight former members of the Black Panther party that were arrested this year on charges related to the 1971 killing of a San Francisco police officer. The men were arrested in January, despite the fact that similar charges were thrown out in 1973 when it was revealed that police had used torture to elicit confessions from these same men. Members of our group have been working to review and index many years of FBI surveillance reports, researching for other pre-trial motions and doing general support work for the defendants.

For more info on the case see www.cdhrsupport.org.

Blythe Taplin is a second year student at Northeastern University School of Law.

by Tony Naro

For years progressive criminal defense lawyers have been concerned with the federal sentencing disparities between offenses involving crack cocaine and those involving powder cocaine and the accompanying racial disparities in sentencing.

In June, 2007 the United States Supreme Court agreed to hear the case of *Kimbrough v. U.S*. *Kimbrough* involves a man sentenced to 15 years in prison for two counts of possession and distribution of more than 50 grams of crack cocaine. The Fourth Circuit Court of Appeals deemed this sentence unreasonably lenient in light of the sentencing guidelines, and remanded the case back to the district court for resentencing within the sentencing guidelines.

In Mr. Kimbrough's case, the federal sentencing guidelines called for a sentencing range of 19 to 22 years. Federal district court Judge Raymond Jackson in Richmond, Virginia characterized the range as "ridiculous" and "clearly inappropriate." Rejecting the guidelines, the court sentenced Kimbrough to the lowest sentence possible, the mandatory minimum of 15 years, a sentence which the district court still found to be "too long."

The Government, unsatisfied with the 15-year sentence, appealed the district court's ruling to the Fourth Circuit and sought to have the sentence vacated. The three judge panel held that, "[b]ecause the district court concluded that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range, we are constrained to vacate Kimbrough's sentence and to remand the case for resentencing."

[...] the panel held that "district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate in the sentencing process."

The Supreme Court will be seeking to answer two questions:

1. In carrying out the mandate of 18 U.S.C. 3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant, may a district court consider either the impact of the so-called "100:1 crack/powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

2. In carrying out the mandate of 3553(a) to impose a sentence that is "sufficient but not greater than necessary" upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct?

In *Kimbrough*, the Fourth Circuit relied solely on the holding in a recently decided case, *United States v. Eura*, which adopted the position of the First Circuit that "a district court's categorical rejection of the 100:1 ratio impermissibly usurps Congress's judgment about the proper sentencing policy for cocaine offenses." See 440 F.3d 625, 634 (4th Cir. 2006) (Citing *U.S. v. Pho*, 433 F.3d 53, 63 (1st Cir. 2006)).

Since *Pho*, however, the Third Circuit overturned a defendant's 24 year sentence, where a district court judge believed that he was constrained from considering the unjustifiable disparity between crack and cocaine sentences under the Guidelines. *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006). The sentencing judge used similar reasoning in his decision not to consider the disparity as the First and Fourth Circuits, citing Congressional intent to treat crack harsher than cocaine. *Id*. at 239. In reversing the sentence, the panel held that "district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate in the sentencing process." *Id*. at 249. The *Gunter*

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Massachusetts Chapter Sustainers

In the spring of 2003, the Massachusetts Chapter of the NLG initiated its new Chapter Sustainer Program.

Since its inception, the Program has been very successful and has been enthusiastically joined by the following Guild members:

Adkins, Kelston & Zavez; Jane Alper; Michael Avery, Samuel Berk; Neil Berman; Melinda Drew & Jeff Feuer; Howard Friedman; Benjie Hiller; David Hoffman; Stephen Hrones; Martin Kantrovitz; David Kelston; Leslee Klein & Mark Stern; William Newman; Petrucelly & Nadler; Allan Rodgers; Martin Rosenthal; Sharryn Ross; Anne Sills & Howard Silverman; Judy Somberg; *and* Stern, Shapiro, Weissberg & Garin.

This is one of the most important initiatives the Chapter has undertaken to secure its future existence. Please consider joining the Program. We need you in order to have a strong and active Guild!

YES, INCLUDE MY NAME AMONG NLG MASSACHUSETTS CHAPTER SUSTAINERS

I, ______________________________, am making a commitment to support the Massachusetts Chapter of the Guild with an annual contribution of:

_____ $500 (not including my membership dues)

$__________ (Other above $500)

As a Sustainer I will receive:

- Special listing in the Dinner Program;
- 1/8 page ad in the Dinner Program;
- Acknowledgement in every issue of *Mass Dissent*;
- Two free raffle tickets for a December Holiday Party;
- Invitation to a Guild reception.

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Looking Ahead - Criminal Law

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decision, however, certainly was not a refutation of the *Pho* and *Eura* decisions, since the panel recognized that "federal courts of appeal have unanimously held that sentencing courts may not craft their own ratio as a substitute for the 100:1 ratio chosen by Congress."

Regardless of what the Supreme Court does in *Kimbrough*, it appears that both the Sentencing Commission and Congress have begun to see the error in their ways and institute changes which would either lessen or completely abolish the crack/powder disparity. This past April the Sentencing Commission, by a vote of 6-1, decided modestly to amend its guidelines for crack cocaine offenses. The guidelines, which currently call for a sentencing range of 63 to 78 months for five grams and 121 to 151 months for 50 grams of crack cocaine, would now be 51 to 63 months and 97 to 121 months, respectively. These changes will go into effect November 1, 2007, unless blocked by Congress, an act which experts and advocates do not foresee. Additionally there are currently three proposed bills in Congress, two from Republicans and one from a Democrat, which would reduce the disparity to 20:1 (R bills) or eliminate the disparity altogether (D bill).

Nevertheless, *Kimbrough* will be a significant decision that will address the scope of a district court judge's discretion in handing down a sentence outside of the guidelines. Now that, in the present term, the Court has held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," criminal defendants will need district court judges to have as much discretion as possible when departing from the guidelines. *Rita v. U.S.*, 2007 U.S. LEXIS 8269 at *15 (June 21, 2007).

Tony Naro is a thrid year student at Suffolk University Law School and student representative to the Board of Directors.

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