The Champion

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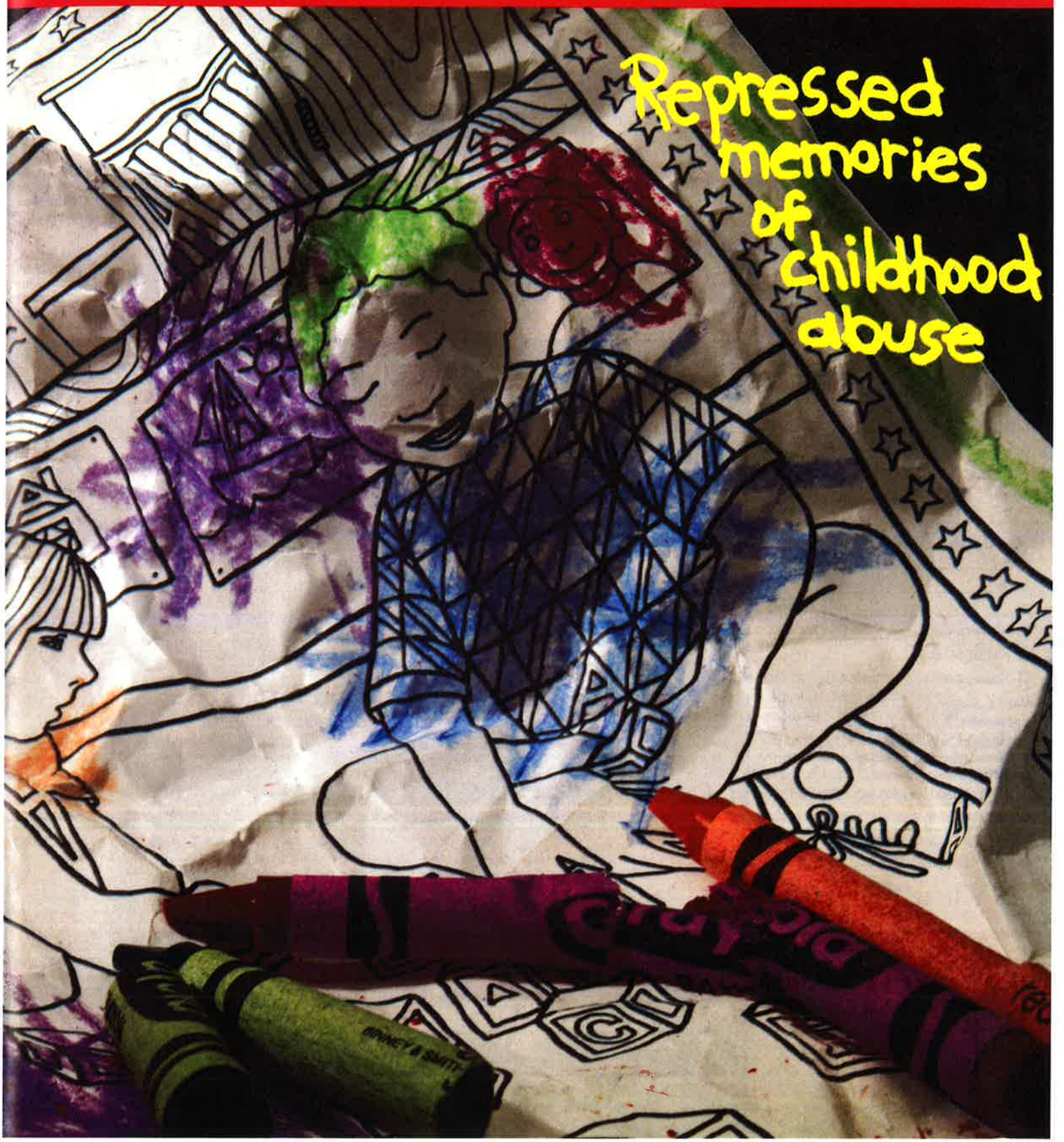

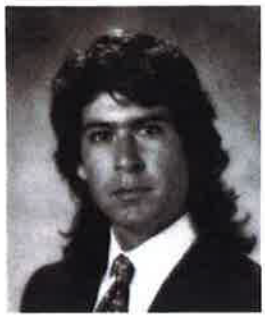

FOURTH AMENDMENT FORUM

Can't Win For Losing: Moving For Judicial Use Immunity At Sentencing

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Your client is guilty. The evidence is overwhelming. All you've got going for you is a colorable motion to suppress and the fact that your client was wise enough not to make any incriminating statements.

Your motion is granted — in part. The court finds a Fourth Amendment violation and suppresses some, but not all, of the evidence you sought to suppress. Because the rules of procedure do not provide for an interlocutory appeal, you cannot obtain appellate review of the partial denial of your motion to suppress until after trial — after your client is convicted!

No one doubts the guilt of your client — not you, not the judge, not even your client. Had you lost the motion, your client surely would have taken a conditional plea (a plea of guilty conditioned on the right to appellate review of the denial of the motion). But you won the motion. Evidence was suppressed. Now your client cannot plead guilty — cannot accept responsibility — without waiving the appellate issue. So, to preserve the Fourth Amendment issue, you must take the case to trial and try to persuade the jury that the constitutionally admissible evidence does not support a guilty verdict.

Unfortunately, the evidence proves too much, and your client is convicted. Now you must prepare for sentencing, mindful that you will appeal the partial denial of your motion to suppress. You face a dilemma. You desperately want your client to allocute at sentencing so that the court will show leniency upon her. It may be her only opportunity to accept responsibility and express remorse for her misdeeds. At the same time, you are loathe to advise your client to waive her Fifth Amendment right to remain silent at sentencing lest her statements at sentencing be used against her at a new trial, should you prevail on appeal.

What's your move?

Allocute Or Appeal?

A defendant has "the constitutional right as a matter of procedural due process to be heard on the issue of punishment." *McGautha v. California*, 91 S. Ct. 1454, 1482 (1971) (Douglas, J., dissenting); *United States v. Taylor* slip op. 92-6829 (11th Cir. Jan. 12, 1994) (citing cases). In order to meaningfully exercise that right, a defendant ordinarily must surrender her Fifth Amendment privilege to remain silent, accept responsibility for her crimes, and voice her contrition and remorse to the sentencing court. *See* United States Sentencing Guidelines § 3E1.1. Even a defendant who has put the government to its proof and has lost can make an indelible impression on the court if, at time of sentencing, she shows the court that she has seen the error of her ways. As the late Judge Sirica admitted candidly:

> I have said more than one time, I have said it in open court, it is a strange thing to me that a defendant who comes up after getting the benefit of good representation, trial before jury, the evidence being overwhelming as it is in this case, I hope sometime I hear some defendant say, "Judge, I am sorry, I am sorry for what I did."

Scott v. United States, 419 F.2d 264, 281 n.1 (D.C. Cir. 1969) (quoted in concurring opinion of Judge Leventhal).

A defendant who wishes to demonstrate her contrition at sentencing but simultaneously seeks to appeal a constitutional issue raised at trial faces a Hobson's choice. To obtain leniency from the sentencing court (not to mention a two-level reduction of a federal defendant's offense level under the United States Sen-

tencing Guidelines, USSG § 3E1.1), the defendant must "come clean" — waive her right to remain silent, confess her guilt, and demonstrate sincere remorse. *See Thomas v. United States*, 368 F.2d 941, 945 n.10 (5th Cir. 1966) ("If you will come clean and make a clean breast of this thing for once and for all, the Court will take into account in the length of sentence to be imposed."); *cf. United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989) (§ 3E1.1 not unconstitutional simply because it burdens a defendant's right to a trial by requiring that a defendant admit responsibility for offense). Where the defendant has never before incriminated herself (i.e., no tapes, no confessions, no statements), doing so can essentially moot the appeal, for even if the appellate court orders a new trial, the government is sure to use the allocution colloquy against the accused at the retrial. Thus, any inculpatory remarks by the defendant at sentencing may render the Fourth Amendment issue academic and an appellate victory a Pyrrhic one. With a sworn admission of guilt in hand (from the sentencing proceeding), the government can prove its case upon retrial without resort to the suppressed evidence.

Absent some assurance that the defendant's statements at sentencing will not be used against her at a retrial, the defendant is caught between a rock and a hard place — forced to choose between obtaining leniency at sentencing and pursuing a constitutional claim through appeal and retrial. It pits the right of allocution against the right to a retrial free from the admission of unconstitutionally seized evidence.

Motion For Protective Order

The tension between these two constitutional rights can be alleviated by "making a defendant's statement at his allocution inadmissible in other proceedings" — essentially, a grant of judicial use immunity to the defendant for the sentencing hearing. *See Scott v. United States*, 419 F.2d 264, 268 (D.C. Cir. 1969) (Bazelon, J.) ("It might be argued that the dilemma between waiving Fifth Amendment rights and receiving a harsher sentence might be eliminated by a rule making a defendant's statement at his allocution inadmissible in other proceedings.") The authority for such a grant of use immunity follows from Supreme Court and circuit court precedent.

In *Simmons v. United States*, 88 S. Ct 967, 976 (1968), the Supreme Court held that the testimony of a defendant who takes the stand at a pretrial suppression hearing to assert a Fourth Amendment claim may not be used against the defendant at trial. The *Simmons* Court reasoned that absent such a ruling, a defendant seeking to litigate a motion to suppress would be left with the unacceptable proposition of choosing between Fourth and Fifth Amendment rights: Fearful that suppression hearing testimony could be used against her at the trial, the defendant would be reluctant to take the stand at the suppression hearing and thereby forfeit her Fourth Amendment claim.

Similar reasoning supported the Supreme Court's decisions in another line of cases holding that testimony given under threat of non-criminal sanctions is inadmissible in subsequent criminal proceedings. *See, e.g., Lefkowitz v. Cunningham*, 97 S. Ct. 2132 (1977) (disapproving state statute which required persons holding office to testify before a grand jury or face losing their public office); *Garrity v. New Jersey*, 87 S. Ct. 616 (1967) (statements given by police officer under threat of discharge inadmissible). These cases stress that the Constitution forbids any sanction against the defendant for exercising his Fifth Amendment privilege to remain silent.

Seizing on these principles, the circuit courts — although not altogether in agreement — have conferred judicial use immunity to defendants testifying at hearings relating to pretrial detention,[1] competency,[2] double jeopardy,[3] parole revocation,[4] the appointment of counsel,[5] and the voluntariness of a confession.[6] Courts have reasoned that defendants should not be forced to relinquish their Fifth Amendment right not to incriminate themselves in order to secure other constitutional rights, particularly where testimony on the ultimate facts of the case is critical to the exercise of the other constitutional right.

A defendant's sentencing hearing ranks highest among proceedings at which the defendant's testimony on the ultimate facts of the case is critical, for in meting out punishment, a judge cannot help but factor in whether the defendant has admitted to, and shown contrition for, her misdeeds. *See generally United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), *cert. filed* (September 28, 1993); *United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989). Given the import that sentencing jurisprudence — and the United States Sentencing Guidelines, USSG § 3E1.1 — attach to a defendant's affirmative acceptance of responsibility at sentencing, one can hardly imagine a proceeding "in which there would be *more* compelling need for a defendant to testify on [her] own behalf, unless perhaps it were a crime to be a deaf-mute and the defendant were on trial for it." *United States v. Dohm*, 597 F.2d 535, 548 (5th Cir. 1979) (Goldberg, J. dissenting) (emphasis in original).

Of course, the dispensation of leniency should not come at the expense of a defendant's right to pursue a Fourth Amendment claim through appeal and retrial. *Cf. United States v. Rodriguez*, 959 F.2d 193 (11th Cir. 1992) (court cannot condition downward adjustment for acceptance of responsibility on waiver of appellate rights), *cert. denied*, 113 S. Ct. 649 (1992); *United States v. LaPierre*, 998 F.2d 1460, 1467 (9th Cir. 1993) (same); *Scott v. United States*, 419 F.2d 264, 282 (D.C. Cir. 1969) (Bazelon, J.); *id.* (Leventhal, J., concurring); *Worcester v. C.I.R.*, 370 F.2d 713, 718 (1st Cir. 1966); *Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966). A price tag on leniency that renders appellate rights insolvent is constitutionally bankrupt. For that reason, courts should permit defendants to allocute without forfeiting the relief to which they are entitled if their constitutional claim prevails on appeal. They should not be placed in any worse position — should they succeed on appeal — than they would be in if the district court had ruled in their favor in the first place. Their retrial should proceed as if it were their first trial, without any incriminating statements being offered against them.

Judicial use immunity at sentencing, moreover, jibes with the well-accepted practice of federal courts accepting conditional pleas of guilty under Rule 11(a)(2), Fed. R. Crim. P. A defendant whose motion to suppress is denied can plead guilty, accept responsibility, and preserve for appellate review the denial of her pretrial motion. Should she prevail on appeal, the appellate court renders judgment in her favor, notwithstanding her admission of guilt at the plea colloquy and sentencing. *See generally United States v. Bell*, 966 F.2d 914, 915-16 (5th Cir. 1992) (explaining that the pretrial issue preserved for appellate review following a conditional plea must be "case dispositive").

On the other hand, a defendant whose motion to suppress is granted in part must take the case to trial to vindicate the constitutional claim, given the unavailability of an interlocutory appeal on the partial denial of the motion to suppress. It is ironic, indeed, that a defen-

dant whose pretrial motion is *granted* in part fares worse should she prevail on appeal than a defendant whose motion is *denied* outright by the district court. Absent a protective order conferring judicial use immunity at sentencing, however, such an anomaly seems unavoidable.

Slow Motion

Insofar as judicial use immunity has been conferred in a variety of judicial proceedings, it should likewise extend to sentencing, particularly when a defendant seeks to preserve a constitutional issue for appellate review. A modest application of judicial immunity to sentencing is especially sensible in a case in which the constitutional issue that the defendant seeks to preserve is, like in *Simmons* itself, a Fourth Amendment claim.

The grant of immunity contemplated will, in all likelihood, be circumscribed by the court. For one thing, the court will seek to insure that the grant of immunity not be "converted" into a license for false representations." *United States v. Kahan*, 94 S. Ct. 1179, 1181 (1974). Toward that end, the court may limit the scope of the immunity, allowing the government to impeach with testimony elicited at the sentencing hearing or to prosecute the defendant for perjury should the testimony prove materially false. *E.g., In re Federal Grand Jury Proceedings (Veal)*, 975 F.2d 1488, 1492-93 (11th Cir. 1992) (declining to extend *Simmons* to protect testimony provided at a pretrial hearing, when such testimony is later offered to a grand jury investigating whether the testimony was perjurious); *United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990) (approving district court's protective order which provided use immunity to a claimant in a forfeiture case but which did not prevent the government from impeaching defendant with that testimony or bringing perjury charges if the testimony was untruthful). The parameters of the immunity, however, are subject to debate.

The one court that has confronted a pre-sentencing motion for a protective order has expressed concern that a ruling on such a motion would amount to an advisory opinion. The motion is not ripe, in the court's view, until the government seeks to introduce the sentencing statements at the retrial. Accordingly, the court would have the defendant decide whether or not to allocute without the benefit of a presentencing ruling. *United States v. Lopez-Ramirez*, 93-380-Cr-Marcus (S.D. Fla. Jan. 7, 1994) (unpublished transcript).

This concern for "ripeness" vividly highlights the predicament that the defendant seeks to resolve by filing such a motion. Until the court rules on the propriety of judicial use immunity at sentencing, defendants will be reluctant to allocute for fear that the statements will be introduced at the subsequent proceeding. Postponing a ruling on the issue under the guise of "ripeness" only perpetuates the dilemma.

A request for a protective order is ripe for review at the time the testimony is to be given. *See, e.g., United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990) (embracing the district court's protective order prohibiting later use of a civil forfeiture claimant's deposition testimony by the U.S. Attorney's Office in that district). A witness subpoenaed to testify before a grand or petit jury, for example, demands that immunity be conferred when her testimony is sought, not when the government later seeks to use it against her. Likewise, a defendant on the verge of sentencing needs a ruling before she testifies, otherwise she runs the gauntlet of trading one constitutional right for another. ■

Notes

1. United States v. Perry, 788 F.2d 100, 115 (3d Cir.) (upholding pretrial detention statute's "presumption of dangerousness on the ground that the defendant enjoys "use-fruits immunity" for testimony he offers to rebut presumption), cert. denied, 107 S. Ct. 218 (1986); *But cf.* United States v. Dohm, 618 F.2d 1169, 1174 (5th Cir. 1979) (en banc) (declining to extend Simmons protection to statements made by a defendant at an ordinary bail hearing, because "[a] defendant at a bail bond hearing need not divulge the facts in his case in order to receive the benefits of the Eighth Amendment right to bail."); United States v. Ingraham, 832 F.2d 229, 237-38 (1987) (denying use immunity at bail hearing because defendant himself need not testify and testimony regarding facts of case are largely irrelevant).

2. Pedrero v. Wainwright, 590 F.2d 1383, 1388 n.3 (5th Cir.), *cert. denied*, 100 S. Ct. 299 (1979).

3. United States v. Stricklin, 591 F.2d 1112, 1118 (5th Cir. 1979); United States v. Inmon, 568 F.2d 326 (3d Cir. 1977).

4. Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968). Contra Lynott v. Story, 929 F.2d 228, 231 (6th Cir. 1991); Ryan v. Montana, 580 F.2d 988, 993-94 (9th Cir.), *cert. denied*, 99 S. Ct. 1548 (1979).

5. Davis v. Wainwright, 469 F.2d 1405 (5th Cir. 1972); United States v. Gravatt, 868 F.2d 585 (3d Cir. 1989). *See* United States v. Kahan, 94 S. Ct. 1179, 1181 (1974) (assuming without deciding that Simmons principle applies to Sixth Amendment right to appointment of counsel).

6. United States v. Harrison, 461 F.2d 1127 (5th Cir. 1972).