



THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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THOUGHTS FROM THE PRESIDENT

NAFD NEWSLETTER

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As we fight to obtain justice for our clients in the face of increasingly repressive legislation, the New York Times reports, to no defender's surprise, that DOJ is using its expanded authority under the PATRIOT Act to investigate drug dealing, white collar offenses, child pornography, money laundering and extortion.

A review of pending legislation reveals bills* with names like the "Antiterrorism Tools Enhancement Act" (another Tom Feeny production), the "Pretrial Detention and Lifetime Supervision of Terrorists Act," the "Terrorist Penalties Enhancement Act of 2003" and the CLEAR Act (the Clear Law Enforcement for Criminal Alien Removal).

A review of recent comments made by our Attorney General reveals his belief that only those of our clients who cooperate with him are entitled to lower sentences, that librarians nationwide are prone to hysteria and that he alone is qualified to determine who should be put to death by our federal government.

And, as if all that were not enough, a review of drafted but not yet proposed legislation reveals a bill entitled the VICTORY Act (Vital Interdiction of Criminal Terrorist Organizations), intended, among other things, "to enact national drug sentencing reform, to prevent drug trafficking to children, to deter drug-related violence, to provide law enforcement with the tools needed to win the war against narco-terrorists and major drug traffickers, and for other purposes."

Each and every one of these new laws will significantly and disparately harm people of color. At the Seventh Circuit Judicial Conference last May, the court sponsored a forum on the impact of increased federal gun prosecutions. Presenters cited statistics showing that those prosecuted under the new firearm initiatives are almost 100% Black and Hispanic. They also noted that virtually no resources have been devoted to treatment or rehabilitation. In 2003, for example, although Project Safe Neighborhoods (PSN) allocated over \$76 million for the prosecution of offenses, it only allocated \$10 million for crime prevention and education.

The response by our U.S. Attorney was, in effect, that the amount of money for prevention and education may have been small, but it was being used well. He told us that some of it was being used to require all recent parolees to attend meetings where law enforcement representatives would inform the parolees of the increased federal firearm penalties and employers would discuss employment opportunities.

I decided to attend one of those meetings, and so, one month later, I found myself in a large, rather stark, conference room at a public hospital on the west side of Chicago. Approximately 40 Black men and one Black woman were seated around the table. Their young faces reflected both fear and, to my amazement, hope.

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The first four speakers were law enforcement representatives. Their message was the same: “We are looking for you. If we catch you with a gun, we will lock you up for a very long time. We don’t want you to carry guns, but we want you to know, that if you do, we will get you and put you away.” You could actually feel the hope seeping out of the room.

Two employers spoke next. One said he would hire convicted felons as long as they had completed college courses in computers. So much for that “opportunity.” The other said he would take anyone, train them and find them a job. I was jubilant . . . until I went home and read the literature. It turns out, the training costs thousands of dollars. Scholarships were available, but only if you were sophisticated enough to read and understand the small print in the literature. I am sure no one showed up for the training.

And so it is left to us not only to defend against the legal barriers placed in front of our clients, but also against the societal barriers – the lack of treatment, the lack of jobs, the lack of respect.

Our organization exists to help support those challenges. So far this year, we have drafted a resolution in support of a proposed amendment (S. 1091) to the Higher Education Act of 1965 that would establish a student loan forgiveness program of up to \$40,000, not just for prosecutors, but also for state, local and federal public defenders. Our Legislative Committee, led by Penny Marshall, is drafting a letter in support of the pending JUDGES Act that would repeal the worst provisions of the Feeney Amendment (it’s hard for me to call it the PROTECT Act). We also intend to actively work against the recently proposed legislation I described above. Our Amicus Committee, led by Henry Bemporad,

David McColgin and Fran Pratt, is looking for cases. Jan Kullberg of our Phoenix office has graciously volunteered to undertake the huge task of updating the directory of all federal public defender organization employees that our organization put together several years ago. Our Diversity Committee, led by Vicky Cody and Carlos Williams, has already met and is looking for volunteers. And finally, we are working to put together a special program to celebrate the 40th anniversary of The Criminal Justice Act, the bill Congress passed that allows us to do the work we do. If any of these projects interest you, please email the committee chairs or let me know.

All of this work is, of course, in addition to the work we do every day representing our clients, teaching young lawyers and law students, speaking at public forums and working on committees. It is amazing, really, to belong to such a talented, committed and energetic group of people.

Several years ago, Michael Tigar gave a speech during which he quoted from an old Quaker hymn often sung by Pete Seeger. The words of that hymn are a reminder of the power of our vision and are as apt today as they were 100 years ago:

What though the tempest round me roar
I hear the truth, it liveth
What though the darkness round me close
Songs in the night it giveth.

From “*How Can I Keep From Singing?*”

Carol Brook, *President*

* *Text of bills at www.bordc.org/patriot2.htm*

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THE SOONER THE BETTER: Jencks Material of Hearsay Declarants in Pretrial Hearings

by Craig Orent, Assistant Federal Public Defender, District of Arizona, Phoenix

Discovery in the federal system is hard to come by, even in districts where the government has an open file policy or where local rules expand Rule 16. Getting the prosecutor to timely disclose its discovery is always an uphill battle and often delays and impedes our ability to investigate and prepare our cases. As a result, any means we can use to get discovery that is not otherwise available or to get discovery sooner than would normally be the case must be exploited. This of course requires good faith, creative lawyering, and fresh interpretations of existing laws and rules. A good example of such an approach is found in the interplay of Fed. R. Crim.P. 26.2 and the Jencks Act, 18 U.S.C. § 3500.

Rule 26.2 concerns statements and disclosure. It incorporated and effectively replaced the Jencks Act and indicates when and under what circumstances witness statements must be disclosed. Throughout this article, references to the Jencks Act and Rule 26.2 are interchangeable unless otherwise noted. The applicable language is virtually identical in both provisions. Rule 26.2(a) states that,

[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

The Rule extended Jencks' reach to preliminary hearings (Rule 26.2(g)(1)) and detention hearings (Rule 26.2(g)(4)). As a result, at least in theory, and in the appropriate circumstances, we should be entitled to pretrial disclosure of witness' prior statements.

Theory however does not always translate into practice. This is because of the government's routine practice of presenting and relying on "reader cops" to

hearsay-in the statements of non-present declarants.

But our hands do not have to be tied by this practice. FRE 806 indicates that hearsay statements admitted in court can be attacked, impeached, and challenged as if the declarant were a witness actually testifying in court. Specifically it states that "[w]hen a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." Arguably then, Rule 806 equates an admitted hearsay statement with the testimony of a live witness. Therefore, once a hearsay statement is presented to the court during a pretrial hearing, and assuming all other prerequisites are satisfied, we should argue that Rule 26.2 entitles us to the declarant's prior statements. These provisions of course apply equally, if not more so, at trial. So when a hearsay statement is admitted at trial, you should make the same arguments for disclosure as you would make in a pretrial hearing.

A successful argument could result in access to a variety of valuable information, including grand jury transcripts, written statements, and audio or video recordings. Normally, in many districts, we would have to wait until just before or at trial to obtain such important and useful materials. Obviously these provisions can be powerful discovery tools, and should be taken advantage of if possible.

Of course, there will be obstacles. The first, and the one we have most control over, is that we have to recognize the issue and make the arguments when appropriate. As one commentator put it, "the absence of development in the law of hearsay-related discovery stems from a lack of pressure from the defense bar. [D]efense counsel seldom press the limits of the existing rules of discovery in order to pursue prosecution hearsay. . . . [T]here has been little effort to extend the Jencks Act to obtain discovery of prior statements of hearsay declarants

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after their out-of-court statements have been admitted in evidence.” *Balancing Hearsay and Criminal Discovery*, 68 *Fordham L. Rev.* 2097, 2139 (2000). Another commentator expressed similar sentiments, writing, “[t]o make matters worse, judging from the infrequency of reported opinions on the subject, criminal defense counsel seldom attempt to employ the existing rules of discovery—limited as they are—to anticipate the prosecution’s use of hearsay or to obtain material which might serve to impeach an out-of-court declarant once hearsay has been admitted in evidence.” *Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay*, 67 *Geo. Wash. L. Rev.* 191, 272 n.21 (1999).

Few appellate cases have addressed the applicability of Jencks to hearsay statements. *See, e.g., United States v. Williams-Davis*, 90 F.3d 490, 512-513 (D.C.Cir.1996) *cert. denied*, 519 U.S. 1128 (1997) (a co-conspirator’s statement under Rule 801(d)(2)(E) is not a statement of the defendant which he is entitled to discover under the Jencks Act; and, stating that “[a]s far as we can tell, we are the first court of appeals to address this argument.”); *United States v. Edelin*, 128 F.Supp.2d 23 (D.D.C. 2001) (same); *United States v. Cabrera-Ortigoza*, 196 F.R.D. 571, 574 (S.D. Ca. 2000) (holding that the amendments making Rule 26.2 applicable to detention hearings did not invalidate the use of proffers.); *See also, United States v. Padilla*, 1996 WL 389300 (S.D.N.Y. 1996) (avoiding the issue by concluding it was raised in an untimely manner.). Needless to say, unless we repeatedly raise the issue, we will never succeed in this area, and the law will remain undeveloped.

The second hurdle, and one which applies only to the pretrial setting, is the government’s and court’s anticipated argument that the rules of evidence do not apply to pretrial hearings and thus Rule 806 is of no consequence. This argument admittedly is problematic since Rule 1101 clearly states that the rules of evidence do not apply to detention hearings and preliminary hearings. But be sure to research the law and practice in your jurisdiction. For example, contrary to the majority of jurisdictions, in the Ninth Circuit, the rules of evidence apply to suppression hearings. *See United States v. Brewer*, 947 F.2d 404, 410 (9th Cir.1991).

However, Rule 1101’s limitations do not preclude a court from applying Rule 806, or any other rule of evidence, when appropriate to reasonably assure a fair

hearing and outcome. As the Third Circuit noted: “although the [Bail Reform] Act permits the government to proceed by hearsay, it clearly contemplates that the defendant will have some opportunity to confront the evidence offered against him.” *United States v. Accetturo*, 783 F.2d 382, 392 (3rd Cir. 1986).

The Advisory Committee Notes to Rule 46 (relating to detention hearings) sets forth compelling arguments in support of pretrial disclosure, and which can be used to bolster our argument that Rule 806 should apply. In explaining the reasoning of the amendment making Rule 26.2 applicable to detention hearings the Committee said,

[t]here is continuing and compelling need to assess the credibility and reliability of information relied upon by the court, whether the witness’s testimony is being considered at a pretrial proceeding, at trial, or a post-trial proceeding. Production of a witness’s prior statements directly furthers that goal. The need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community. . . . The Committee believes that requiring the production of a witness’s statement will further enhance the fact-finding process.

The Committee notes to Rule 5.1 (relating to preliminary hearings) express identical sentiments.

[t]he primary reason for extending the coverage of Rule 26.2 rested heavily upon the compelling need for accurate information affecting a witness’ credibility. That need, the Committee believes, extends to a preliminary examination under this rule where both the prosecution and the defense have high interests at stake.

These considerations clearly apply to hearsay statements as well.

However, in the Rule 5.1 commentary the committee threw us a curve ball by stating that “[a] witness’ statement must be produced only after the witness

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has personally testified.” Obviously this statement will be raised in opposition to our arguments. It is odd though that the statement is not in the Rule 46 commentary, and may simply be a reminder that disclosure is not required until after the testimony – or hearsay – has been introduced. At the very least, if the preliminary hearing and detention hearing are being held simultaneously we can argue that since the Committee did not include this statement in its commentary to Rule 46, that our arguments apply to any hearsay statements admitted and considered for detention purposes.

Regardless, the court has inherent authority to assure fairness in the proceeding and to see that justice is done. Consequently, it may in its discretion order disclosure. *See, e.g., United States v. Terrones*, 712 F.2d 786, 790-791 (9th Cir. 1989) (where the court said that although the rules of evidence do not apply at detention hearings, it may assure “the reliability of the evidence by selectively insisting on the production of evidentiary sources where there is a question as to accuracy.”); and *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987) (indicating that although live testimony at detention hearings is not required, the court may in its discretion require it.).

We should also argue that unless Rule 806 is applied to pretrial proceedings, Rule 26.2 would – because of the government’s practice of relying on hearsay – become obsolete. This result could not have been intended, and defeats the purpose of Rule 26.2’s application to pretrial proceedings: fairness. In fact, the Supreme Court indicated in the Jencks case that the rules it was promulgating were based on the Court’s “standards for the administration of criminal justice in the federal courts.” *Jencks v. United States*, 353 U.S. 657, 668 (1957).

Similarly, we can argue that since there is a relaxed standard of admissibility of hearsay evidence at pretrial hearings that it is even more important that we be permitted, where Jenck’s applies, to access such materials. That is, the applicability of Rule 26.2 and the widespread, unlimited use of hearsay in pretrial proceedings are inconsistent with each other, unless of course Rule 806 is held to apply.

The third obstacle is the language used in both the Jencks Act and Rule 26.2. Both provisions contain language that arguably requires disclosure of prior statements only after the witness has actually testified live,

in court. (e.g., the Jencks Act states, “After a witness . . . has testified on direct examination;” And Rule 26.2 says “after a witness . . . has testified.”). Of course the government will argue that the non-testifying declarant is not a “witness” and thus the disclosure provisions do not apply. This argument has already succeeded in a few published cases. *See, e.g., United States v. Rosa*, 891 F.2d 1071, 1074 (3rd Cir. 1989) (rejecting the defendant’s request for Jenck’s material relating to hearsay statements in the pre-sentence report since the witnesses did not testify at the sentencing hearing); *Williams-Davis*, 90 F.3d at 512-513 (rejecting defendant’s request for Jencks material of non-testifying co-conspirator); *Edelin*, 128 F.Supp.2d at 33 (same); and, *Cabrera-Ortigoza*, 196 F.R.D. at 574-575 (not discussing Rule 806, but holding, in the context of proffers, that Rule 26.2 is triggered only after the witness has actually testified.).

From a practical view though, we should argue that it is disingenuous for the government to submit hearsay in its case-in-chief, ask the court to rely on it in making important decisions against the defendant, and then to argue that such statements are not the equivalent of or on the same footing as a witness testifying. This is especially true given the mere existence of Rule 806, its spirit, and underlying rationale.

Moreover, the United States Supreme Court has held that for confrontation clause purposes a hearsay declarant is a “witness against” the accused. *See White v. Illinois*, 502 U.S. 346, 352 (1992). Applying common sense and standard principles of statutory interpretation, “it takes no large leap to conclude that a declarant is a ‘witness called by the [government]’ under the Jencks Act and that she has in effect ‘testified on direct examination’ once the government has introduced her hearsay statements.” *Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay*, 67 *Geo. Wash. L. Rev.* at 266.

One last obstacle, and one of the reasons, if not the major reason, put forth by the cases cited above for denying access to the hearsay declarant’s Jencks material is a fear of witness intimidation, subornation of perjury, “and other threats to the integrity of the trial process.” *See Williams-Davis*, 90 F.3d at 513 (quoted case omitted). But this makes no sense. The non-testifying declarant’s identity will usually be revealed anyway at the hearing and in the discovery materials, at least in those districts where the government has an open file policy. This concern

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might explain or justify a denial of a request for disclosure prior to the hearsay statement's introduction at the hearing, but does not justify withholding Jencks material once the declarant's identity is known. In this sense, again, the admission of hearsay statements is no different than live testimony.

This article is not intended to be a thorough, in depth review and analysis of the issues. Instead it is intended to enlighten those of you who had not thought of the issues, and to motivate everyone else to start making the arguments.

SENTENCING PROJECT WEB SITE LAUNCHED

The Sentencing Project is pleased to announce the inauguration of its new website at www.sentencingproject.org. The site features news, events, and a variety of downloadable publications concerning sentencing, incarceration, felony disenfranchisement, juvenile justice, drug policy, and other issues.

The Sentencing Project Staff in Washington, D.C. encourages you to visit the site and provide them with feedback.

AWARDS PRESENTED TO OUTSTANDING DEFENDERS, INVESTIGATORS AND PARALEGAL

Sergio Fidel Rodriguez
2003 Outstanding Assistant Federal Defender
Northern District of Illinois

Sergio Rodriguez has been with the Federal Defender Program for the Northern District of Illinois for 22 years. He began his work there when he was an undergraduate student at DePaul University in 1981. He started as a part-time clerk where he was asked to do everything and anything from copying briefs when briefs were still cut and pasted, to figuring out how to file them ten minutes after the clerk's office has closed, to buying the world's greatest Mexican food for those who were on trial. Because of his dedication to the clients and his personality, he was soon promoted to an assistant investigator position.

As is typical of Sergio, he immediately made himself indispensable in that position. No job was too difficult—he never said no. If he was needed to find a witness for whom the attorney only had a vague description and a neighborhood, Sergio would find the witness. If an investigation required driving long into the night, Sergio was always there with a smile on his face. If an attorney needed someone to drive a client to a job interview or a drug treatment program, the attorney knew Sergio would handle it responsibly and with compassion. He continued to work full time (and more) even after he enrolled in night law school.

When Sergio graduated law school, he formally interviewed with the staff and was hired as a staff attorney. In that position, Sergio has developed into a leader in the office. He has honed his own advocacy skills to the point where he is able to contribute much to other lawyers and law students. In fact, he is now the Director of the Student Intern Program where he has worked hard to maintain both its quality and its diversity. His egalitarian spirit and his love of life have imbued the student program with a wonderful sense of belonging, commitment, and perspective. He has taken the initiative in working with the younger lawyers to help them become better advocates. He has

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become the leading expert in the office on mental health issues, spearheading a task force to create alternatives to prison and speaking at conferences of mental health experts.

In addition to his work inside the office, Sergio has always devoted himself to the community outside the office. He has spent many years working with children and the less fortunate members of the Mexican community. He has worked and continues to work hard to create more educational opportunities for Hispanic youth. He has been a great inspiration to the members of his community. Because of his rare combination of compassion, kindness, generosity, intelligence and analytic ability, Sergio is beloved by all who have the good fortune to come into contact with him. He is most deserving of the Outstanding Assistant Defender Award.



Reuben Camper Cahn and Sergio Fidel Rodriguez

Reuben Camper Cahn 2003 Outstanding Assistant Federal Defender Southern District of Florida

Chief Assistant Federal Public Defender, Reuben Cahn, for the Southern District of Florida, has been with indigent defense programs for the past 17 years and has been Chief Assistant since 1995. Reuben's legal skills meet the highest standards of practice in both public and private sectors and are illustrative of the quality of work the Federal Defender program offers its clients. Reuben has litigated the only two death penalty cases to go to trial in the Southern District and in both cases, his efforts defeated the government in their quest to execute the clients. He is now working on a third death penalty case. Reuben is respected throughout the legal community in Miami and throughout the country, especially in the death penalty field.

The office relies on Reuben's intellect and judgment to steer them through the day-to-day endeavors. Federal Public Defender, Kathleen Williams has told many individuals that the single best decision she has made as a Federal Defender was naming Reuben the Chief Assistant. He is an exceptional lawyer and most deserving of the award for Outstanding Federal Defender.

Tom Mc Inerney 2003 Outstanding Investigator District of Nevada

Tom McInerney has been an investigator with the Federal Public Defender's Office in Nevada since 1990. Tom as been described as a pillar in the office and in the defender community. He has an innate ability to talk with people of all backgrounds and walks of life. Tom spends the time necessary, be it during the regular work day, after hours, or on weekends to find witnesses and talk with them. He understands intuitively that sometimes the complete story to an event is pieced together from different sources each of which contribute significantly to the whole. He does not lose track of the objective to the investigation and through herculean efforts puts defense cases together to the benefit of the client. In one of his notable cases, a client was set free because of Tom's extraordinary efforts and his refusal to allow the client to spend the remainder of his life in prison for a crime he did not commit. The

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case came to the office by way of a § 2254 petition after the client had been convicted in state court for the rape of a child for which he was serving multiple life sentences. Tom discovered through his diligent investigation that the victim was suffering from AIDS, a disease his client did not have. He learned through developed sources that the child's step-father had died of AIDS. His persistent efforts lead to the discovery that the victim had secretly recanted her trial testimony, and he eventually was able to get the child to admit to him that she had testified falsely and that it was the stepfather who had committed the crime. The case was returned to state court where it languished for a number of years until Tom brought it to the attention of the Defender who intervened. Ultimately, the conviction was overturned, and the client was released.

Tom's work on Indian Country cases also sets him apart from others. The office routinely handles these cases which are often emotionally charged and logistically difficult to prepare because witnesses and victims often reside on reservations in remote parts of Nevada and several extend into other states. The witnesses are extremely suspicious of anyone from outside of the reservation and the culture. Through the years, Tom has developed a network of contacts that facilitate his investigative work. Tom has the respect of many of the elders and of the law enforcement officers on the reservations. This makes his ability to talk with sometimes difficult individuals a lot easier.

There are numerous other examples of Tom's dedicated work which could fill more pages. Each and every trial acquittal of the office, from bank robbery to straw-man purchases, is attributable in large part to Tom's dedicated and unceasing efforts on the clients' behalf. His insight into crime scenes, crime reports and witness statements makes him indispensable to the office.

Charlie Fulgieri **2003 Outstanding Investigator** **Middle District of Florida**

Charlie Fulgieri has been an investigator with the Federal Public Defender's Office for the Middle District of Florida for the past eleven years. Charlie enjoys widespread respect among his fellow investigators and attorneys.



He was a New York City Police Officer prior to becoming an investigator where he proudly served for many years. Charlie is as zealous about defending the accused as he was about being a police officer. His career in major metropolitan law enforcement has made him one of the best connected investigators in the office. He is as comfortable and proficient working a major white collar crime case as he is investigating a relatively simple street crime. Charlie thoroughly investigates almost every single case that comes through the Ft. Myers office, and he has the successes to prove it. No one has to ask Charlie to do anything. If there is something to be done, it is a given that Charlie will do it with the same degree of expertise, professionalism and good cheer each time. In an age where most people rely on the computers to do their work, Charlie has preserved the street

instincts and knowledge that makes him so good at what he does. He stays current and informed on the new information technology that has shaped our profession these past years, but he has not forgotten his roots.

One of Charlie's big moments came in state court last year. A federal habeas client, convicted of a violent

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rape, had his conviction overturned and sent back to state court for retrial because of the persistent efforts of Charlie. The client had spent a number of years in prison for a crime he steadfastly maintained that he did not commit. During his investigation, Charlie uncovered evidence that was not made available to the defense in the original trial. There had, in fact, been another suspect. The original suspect was in the vicinity of the victim at the time of the assault, and he closely matched the physical description the victim had originally given police. This other person was a strong suspect until the police suddenly shifted gears and began focusing on his client. The client was convicted and sent to prison, and while there, the real rapist died a free man. During the retrial last fall, a second jury acquitted the client and set him free. Charlie's investigation yielded the key that literally opened the client's cell to freedom.

Joe Phelan, Jr.
2003 Outstanding Paralegal

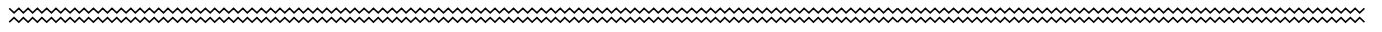
Western District of Tennessee

Prior to working with the Federal Public Defender's Office, Joe Phelan, Jr., worked as a deputy court clerk doing routine clerical duties for the court when it was discovered that he had a seemingly peculiar and unique talent, that is, legal research and writing. With a father as a lawyer and a cousin as a lawyer, Joe had developed an interest in legal issues and was very active in doing research for his father on civil related issues. Joe began as a paralegal in the Federal Public Defender's Office for the Western District of Tennessee in 1989. Over the years, Joe has written the overwhelming majority of the briefs in the office, and not only in an exemplary manner, but more thoroughly than many lawyers. With no formal training, Joe has incredible insight into the cases and an uncanny ability to spot issues in a record. His knowledge of cases, statutes, and regulations is amazing.



Although Joe does an outstanding job in every submission to both the local District Court and Court of Appeals, one case in particular deserves mention. In the appeal of a sentencing issue which involved what can only be described as "extremely bazaar behavior" by the district court judge involved, Joe was able to weave both a legal argument into the brief and deal with the underlying problem without offending the Court of Appeals, or anyone else. Ultimately, he fashioned a marvelous brief which resulted in a remand for re-sentencing, but re-sentencing before a different judge.

Joe has won more than his share, and has provided incredible support to the attorneys in the office as well as private criminal defense attorneys. His knowledge of the law, his ability to research, and his ability to write, putting together facts and law is simply unparalleled.



OUR VERY OWN “CHAMPION OF THE CONSTITUTION”

Last June, the National Association of Federal Defenders presented Carmen Hernandez with its first ever, “Champion of the Constitution Award.” The award, which was presented at the Federal Defender Advanced Training Seminar in Portland, Oregon, recognizes outstanding contributions to the cause of justice.



We do not have the space to describe all that Carmen Hernandez has done, not only for our Association, but for defense lawyers everywhere, to further the cause of justice and fairness for all. She advises us about proposed legislation before it hits the listserves, helps write our position papers (ok, sometimes more than helps), shapes our written testimony, takes emergency phone calls, trains lawyers across the country, and, through it all, keeps on smiling. When Carmen recognizes you at a conference, she always bestows upon you her wonderful smile that makes you glad to be there and to know her. Carmen is not content to just tell you what the law is, she goes on to advise you on how best to make your argument and then she asks about your family. You can't beat that!

An Assistant Federal Public Defender since 1989, a position she calls “that noblest of criminal defense lawyers,” first in Maryland and more recently in Washington, D.C., Carmen has represented hundreds of persons charged with offenses ranging from weapons possession to large-scale fraud conspiracies. As a member of the Federal Defender Training Group, she has organized some of our most successful CJA training programs. She now shares her expertise on sentencing issues with lawyers across the country, and despite her packed schedule, Carmen is always available to travel to your jurisdiction to teach.

In her free time, Carmen serves as a member of the Practitioner’s Advisory Group of the United States Sentencing Commission, Chairs NACDL’s Continuing Legal Education Committee and Co-Chairs its Federal Sentencing Guidelines Committee. She continues to serve as a member of the Board of NACDL. A 1982 graduate of the University of Maryland School of Law, she served as a Law Clerk to the Hon. Herbert F. Murray, United States District Court Judge for the District of Maryland. Following her clerkship, she spent two years at the law firm of Brown, Goldstein & Levy in Baltimore. Carmen has taught as an adjunct professor at the University of Maryland School of Law and the Columbus School of Law, Catholic University of America.

We are far from the first to recognize Carmen’s enormous contribution to creating justice for all. In 2002, Carmen received the Robert C. Heeney Award from NACDL, the highest honor it bestows.

Nonetheless, although we may not have been first in time, we like to think we are first in her heart.

The Liberty Legend thanks all of those who have contributed to this publication. The NAFD and the editors encourage your contributions of articles for publication as well as suggestions for articles. Additionally, If you know an individual or team deserving a KUDO, e-mail your suggestion anytime to the editors.

THE FEDERAL DEFENDER FUNDING WORKING GROUP

by Penny Marshall, Federal Defender for the District of Delaware

As federal defenders we think of our Johnny Cochran courtroom performances, client interaction, moving sentencing departure hearings, and even an appeal win here and there. Less exciting but equally important is the job of ensuring that there is money to fund our fine performances, to have a supporting cast and office space, to hire experts when needed in cases and also to keep us up to date on the latest law and technology relevant to our work.

The job of fighting for our piece of the pie has rested primarily with Theodore J. Lidz, Chief of Defender Services, Steven G. Asin, Deputy Chief, and others at Defender Services. Recently, in order to keep defenders better informed about the budget process and to encourage their participation in the process, Defender Services established the Federal Defender Funding Working Group. Its members, appointed by AO Director Leonidas (Ralph) Mecham, are as follows: Lucien Cambell, Roland Dahlin, Barry Portman, Maureen Rowley, Carlos Williams, Kathleen Williams, Jim Wyda, and Penny Marshall.

Roland Dahlin serves as chair of the Working Group. Meetings are held monthly by tele-conference or as needed in person in Washington, D. C.

The new Working Group began with an education on the workings of the budget process. The group is aided by the fact that some of its members serve on other AO working groups that also concern themselves with the budget, e.g., Kathy Williams serves on DSAG (Defender Services Advisory Group). At the same time, the group was confronted with a recent budgetary crises for FY 2003 and 2004. As you know, our 2003 allotments were reduced by 3% and no panel payments will be made until October 1, the first day of FY 2004.

The Working Group has been gathering data on the impact the budget cuts have had on our offices. We have been evaluating this data to ensure that our clients continue to receive quality representation and are not short changed this year or with future budgets. Given the current atmosphere, this has been no easy task.

In addition to trying to ward off monetary cuts, the Working Group has also been proactive. Information on the rising budgets and staff of United States Attorney offices have been reviewed for comparison and the results have been incorporated into the Defender Services Division's advocacy on behalf of our funding needs. Efforts have also been made to get a sense of what factors affect the cost of our representation beyond the "workload factors" we collect in our TimeKeeper/Case Management system. As we examine these factors, we are, of course, looking for any ways to reduce our costs without compromising the representation we provide.

In order to promote efficiency, one of the projects initiated by the Working Group has been to find ways to assist chief defenders and assistants in identifying the "best practices" affecting management and financial matters. The Working Group anticipates assisting Defender Services in setting up a Website which lists both widely accepted and innovative management practices. The purpose is not to create requirements for offices, but rather to provide information on what has worked in order to make the best use of our limited funds.

The Working Group is committed to maintaining funding for quality representation and keeping you informed. Your feedback, ideas and questions would be appreciated.

FEDERAL DEFENDER OFFICE IN THE NORTHERN DISTRICT OF WEST VIRGINIA OPEN FOR BUSINESS

A new Federal Defender Office opened its doors in the Northern District of West Virginia on December 16, 2002. It comes on the heels of the Defender Office in Mississippi Southern, and was just ahead of a new office slated for the District of Rhode Island. The Northern District of West Virginia covers a rather large, rural expanse of the country with court locations at Clarksburg, Wheeling, Elkins and Martinsburg. It took new Federal Public Defender Brian J. Kornbrath, who used to be an AFPD in the Southern District of West Virginia, just a few weeks to reach a rather startling conclusion: "AFPD's basically have it made; the logistics involved in running an office are rough." Only a temporary, unfurnished basement office in the U.S. Courthouse awaited him, along with several unopened boxes containing the Guide to Judiciary Policies and Procedures. It could only go up from there, right?

Brian spent the next several months meeting with judges and court personnel from all the other agencies involved, making basic office procurement decisions, meeting with other Defender Offices to see how each operates, opening a dialogue with the district's CJA panel attorneys, and advertising for, interviewing, and hiring a staff. He said the assistance and advice received from Program Analyst Kate Ratiner at Defender Services and other Defenders who opened new offices was invaluable and very much appreciated. According to Brian, by far the best line came from the person at the A.O. who was asked the purpose of a GSA Activity Access Code: "Honey, I don't know, I just hand the darn things out!"

The NDWV office started taking case appointments in April of this year after the following staff came on board: Administrative Officer Eugene Weekley, who previously held the position of clerk-in-charge at the U.S. Courthouse in Martinsburg; Assistant Federal Public Defender L. Richard Walker, who spent three years with the Miami-Dade County



Clockwise from top left: L. Richard Walker, Brian Kornbrath, Eugene Weekley, Sharron Callis and Lisa Coleman.

Public Defender Office before spending time as an associate in private practice where he specialized in federal criminal defense; Sharron Callis, an Investigator who finally returned home after working for several years with the Federal Defender Office in Tacoma, Washington; and Lisa Coleman, Legal Secretary who left from the local Harrison County Public Defender Office. In addition, the NDWV office is fortunate enough to borrow the services of Computer Services Administrator Mark Ganley from the Pittsburgh FPD Office (worth his weight in gold, says Brian).

It has taken months to wrestle a long-term lease agreement from GSA for suitable permanent office space in the business district of Clarksburg. The build-out is slated for completion in February 2004. After a federal annex project is completed in Wheeling next July, a staffed FPD Office will open inside the courthouse there. Hopefully, funding will be available for another AFPD and staff position in Martinsburg, as court appearances there presently require a round trip of 365 miles, and the case numbers so far would certainly support such continued growth. Welcome aboard!

KUDOSKORNER

As difficult as it is to win habeas corpus cases, AFD Tony Bornstein, District of Oregon, Portland Office, won the trifecta in July and August - 3 grants of habeas! In *Bailey v. Rae*, 2003 WL 21920243 (9th Cir. 2003), the Ninth Circuit ruled in a 20 page opinion that a state prosecutor's failure to disclose therapy reports concerning a victim's mental capacity to consent to sexual activity constituted a violation of due process, noting that the "State downplay[ed] the exculpatory nature of the evidence by cherry-picking isolated references from the reports." In *Bowen v. Lampert*, No. 00-1596, the district court was so upset at the failings of state counsel that the court excused the procedural default finding, "the alleged ineffective assistance of counsel, which pervaded every level of the state proceedings from the criminal trial through the filing of the amended petition for post-conviction, caused the default." He then went on to find that trial and appellate counsel's failures to object to jury instructions, including the state's duty to prove its case "within a reasonable doubt", rendered the representation ineffective and granted the writ. In the third leg of the trifecta, the magistrate judge wrote a 39 page opinion in *Weaver v. Palmateer*, No. 99-1045, holding that trial counsel "wished to rid himself of the case as quickly as possible with the least amount of work" and that trial counsel's "overall lack of diligence, erroneous advice and unwillingness to investigate the case is apparent." Well done, Tony!

Gun? What Gun? Congratulations to AFD Doug Passon, District of Arizona, Phoenix, who recently got an acquittal in a felon-in-possession case. There were two guns in the defendant's coat jacket hanging in his bedroom, but, as Doug argued, it was a party house, and had lots of access. There was conflicting evidence as to whether the guns were actually found in the jacket as ATF bungled the investigation. The AUSA called Doug's client a "weasel" and "rat", but the jury was unpersuaded. They were out 1-1/2 hours with the acquittal. The jury commented that the ATF may have a tough job, but they could do better. They also thought the AUSA was condescending. On the other hand, they shook Doug's hand, and two asked for his card. A job well done.

Besides trying to get The Liberty Legend out by its targeted publication dates, AFD Tony Lacy, Western District of Oklahoma, has been trying a few cases along the way. While jury acquittals are sweet, judgments of acquittal pursuant Rule 29 look just as good

pinned on the bulletin board. Tony picked up two within a very short time of one another. The first was in a mail fraud case where an incarcerated defendant and a co-conspirator cashed over a hundred thousand dollars worth of retirement checks. At the end of the government's case, the Judge found the government had missed the statute of limitations by two days. In the second case, a defendant obtained medical services and prescription narcotics from hospitals in over thirty states. In each instance, the defendant provided fictitious addresses to the hospitals for billing purposes. The government argued the defendant committed mail fraud by causing the mailings of the statements from the hospitals. The Court ruled that at the time the mailings were made by the hospitals, the services were fully rendered and therefore the mailings were not "in furtherance" of the fraud. Atta boy!

AFD June Tyhurst, Western District of Oklahoma, fought hard and was awarded with a jury acquittal in a case involving threatening communications. June's client was said to have faxed bomb threats to her ex-husband's employer and to the A.T.F. The case was marred by some questionable police forensic work. Word from the courtroom says it was June's closing argument that brought it all together and convinced the solemn twelve a not guilty verdict was in order.

The Habeas Unit in the **Western District of Oklahoma** is enjoying success. **AFD Randy Bauman** has a new sentencing coming to his Oklahoma Death Row client. The Tenth Circuit recently affirmed the District Court's order granting habeas relief in *Spears v. Mullins*, 343 F.3rd 1215. The photographs introduced during the sentencing stage of the trial rendered the sentencing stage fundamentally unfair. **AFD Scott Braden** has been notified the Supreme Court denied the State of Oklahoma's cert petition in *Ellis v. Mullins*, 312 F.3rd 1201. Mr. Ellis will be getting a new trial because the state trial court improperly excluded evidence of Mr. Ellis' insanity in violation of *Chambers v. Mississippi*.

Book Review - The Death Penalty: An American History

By Stuart Banner

Harvard University Press, Cambridge, MA, 2002. 385 pages, \$29.95.

Reviewed by Jon M. Sands, Assistant Federal Public Defender, District of Arizona, Phoenix

This review appeared in THE FEDERAL LAWYER

The juvenile was set to be executed. Clemency had been denied, and the hour of his death approached. The arguments for clemency had focused on his youth and lack of criminal record. The

arguments for the penalty had pointed to deterrence and society's need for protection. Even by 1821, in Massachusetts, the arguments on both sides of the death penalty were familiar. The execution occurred

by hanging, but the issue would not die with the defendant. Though he had been found guilty of arson, and had confessed, he had, after all, burnt only a barn, and no one had died. He was 16 years old. This execution of the boy was not soon forgotten and it became the signature argument for the abolition of the death penalty in Massachusetts. The scene, and arguments, were to be repeated again and again throughout our history.

The Death Penalty is a history of the 250 years of capital punishment in America. Stuart Banner takes the death penalty as a means of both crime control and social control, and follows its course through a substantial, complex, and erudite study. His book is interesting even when one does not agree with its emphases. Its judicious mapping of the debate, and the death penalty's supporters and opponents, is fair and balanced. It performs the valuable service of providing a historical context for the arguments. It is a masterful and lucid account.

In Banner's historical sweep, the death penalty in America can be said to fall into three main phases. There was the founding period, from the 17th until the early 19th centuries, when the death penalty was the preferred, and at times the only, means of punishment for serious crime. This was followed by a penological age, from the 19th to late 20th centuries, which saw use of the penalty generally wane, until, in the 1960s, it became virtually nonexistent. The third period, the politicalization of penalty, occurred, paradoxically, with the Supreme Court's invalidating all death penalties in 1972 in *Furman v. Georgia*. This invalidation did not forbid capital punishment, but required standards and regulations so that the death penalty would not be considered freakish and random. The modern death penalty advocacy movement grew from the reaction to the *Furman* decision and the politicalization of crime.

Capital punishment was common in the European legal tradition, especially in England. This is not surprising. It was quick, certain, and cheap, whereas prisons and rehabilitation were expensive. In the American colonies, with jails few and far apart,

law enforcement minimal, and the perceived need for deterrence strong, the death penalty was the preferred method for most felonies. And, for the death penalty to serve as a warning, it had to be public.

In colonial and early America, the death penalty was mandated for many offenses and was imposed on many defendants. There was almost no appellate recourse, but clemency reprieved half of those sentenced. Clemency by the governor followed its own customs, with community members weighing in, and the defendant's contrition being required. The frequent use of clemency then stands in stark contrast to its rare use today, when political considerations and procedural requirements (parole or clemency board recommendations) govern. Clemency today is extolled as the last resort by the courts, but in practice it is almost non-existent. The archetypical phone in the death chamber now never rings at the last minute with a clemency reprieve from the governor. The phone call, if it comes at all, is usually from an appellate court instead.

Beginning with the founding period, and throughout his study, Banner focuses on the day of execution, discussing both the technological changes, from rope to gas to injection, and the social changes, from the very public spectacle of execution to its occurrence today inside of prisons. Execution once had an air of celebration, with the rites of the walk and the defendant's last words, but modern sensibilities require specially constructed execution chambers, with carefully screened and limited witnesses.

On the "hanging day" in the colonies and early republic, all were expected to pay witness, and religion was front and center. The deterrent aspect was stressed, with calls to beware, and the condemned expected to make a stock speech, warning others to avoid what had led him to his fate. Ministers used the occasion to preach to the multitude about sins. It is telling, as Banner points out, that executions were not uncommon, but were not so common so that the singularity of the event was lost on the social consciousness. He recounts travelers' journals and diaries where landmarks are identified as

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being the site where so and so was hanged for such and such an offense.

The founding period also saw the beginnings of the abolitionist movement. As the 18th century ended, a shift in sensibility slowly began toward a recognition of the humanity of the condemned, even in such a wretched form. This recognition, combined with the Enlightenment belief in rationality and the possibility of reform, and the development of penal alternatives (imprisonment leading to rehabilitation), made it seem scientific and progressive to seek reform or even abolition of the death penalty. Starting in the 1790s, college students were writing essays predicting that capital punishment would soon be abolished. Their essays put forth many of the same arguments that are raised today, including the lack of deterrence, the risk of executing innocents, and the irrationality of the death penalty.

The penalogical period, when use of the death penalty waned, mirrored the social times. Examples, such as the execution of the 16-year-old arsonist in Massachusetts, gave a human face to the proponents against death, and the limiting of capital offenses began. The anti-death penalty movement also gained support from anti-slavery sentiment. Some states, such as Massachusetts, in light of the *cause celebre* of the juvenile case, abolished capital punishment. But other states, notably in the South and West, continued to use capital punishment widely, as a means of deterrence and punishment, and of social control of minorities and immigrants. Banner traces the predilection for capital punishment in the South throughout American history. He sees the South's greater prevalence of violence and its more agrarian culture as relevant. But the key factor, as so often in American history, has been race.

The penalogical period's limiting of capital punishment proceeded in fits and starts. Crimes waves, labor wars, and political terrorism lent support to the ultimate punishment, but the reform tide continued to swell. The 1860s to the 1960s saw a steep decline in capital punishment from the hundreds, if not thousands, to a mere unlucky few.

Executions became freakish in nature, and seemingly random, though it was usually the poor and minorities who were struck. The death penalty could be seen as a remnant of an earlier time.

The Supreme Court issued what it likely thought the end of capital punishment in its 1972 *Furman* decision. Throwing out all death penalties because of unguided discretion, the Court acknowledged that death was indeed different. It demanded channeled discretion, and a means of weighing the ultimate penalties with aggravating and mitigating factors. *Furman* proved, however, not to be the victorious end of the reform movement, but rather, ironically, the starting point of the modern death penalty.

Furman became a challenge to "law and order" advocates to enact a death penalty that met the more stringent due process requirements. Georgia adopted a plan that enumerated aggravating and mitigating factors to be found, weighed, and balanced by the jury. This plan came before the court in *Gregg v. Georgia*.

In *Gregg*, the Court affirmed the use of structured penalties, approving a weighing of factors, and the calibrating of discretion. Banner charts the upsurge of death penalty support, citing possible reasons for such support, from the surge in crime, to racial issues, to exploitation by politicians. Banner rightfully cannot conclusively say why the death penalty became such an emotional political issue, but a coalescing of circumstances gave capital punishment a new life. This time though, as the death rows filled, clemency was not so forthcoming, and the traditional safety valves for the penalties were slowly cut off by legislation and politics. The poor and minorities, of course, continue to be disproportionately executed.

Banner, perhaps, could have emphasized more the disproportionate number of minorities sentenced to death. The use of execution against the disenfranchised and disempowered makes it a potent political as well as penal weapon. This is especially true in the South. While Banner notes this, this reviewer would have underscored it more, both

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historically and in the modern imposition of the death penalty.

Banner does not view capital punishment as a uniquely American phenomenon. He astutely acknowledges support for the death penalty in other countries that have outlawed capital punishment. Western European rank-and-file citizens may favor the death penalty, while its elites do not. As Banner points out, America may still have the death penalty because it is more democratic than other Western nations. Nevertheless, the company that the United States keeps, with various despotic regimes, in imposing the death penalty, does give one pause.

Banner weaves the arguments for and against the death penalty throughout his study. He does not take sides, but points out that the debate has been and will continue to be political; it is untenable for the courts to dismantle the judicial apparatus they have erected, though they can remove select classes, such as the mentally handicapped or juveniles, from among those eligible for the death penalty. The real battle must be in public opinion, as it has been for the past 250 years, with the nation's becoming increasingly skeptical of the death penalty in the middle of the 20th century, and perhaps now becoming so again, with the realization that numerous innocent people have been condemned to death.

These concerns over the fairness of the system and the possibility of error may well have contributed to the decline in the number of capital convictions for the first time in a generation. Indeed, the number of new death row inmates in 2001 was the lowest since 1973. These concerns, moreover, were the prime factors in the recent decision of Governor Ryan to commute all 167 Illinois state death sentences. His view of the death penalty system as fundamentally flawed and unfair, "haunted," in his words, "by the demon of error" in determining guilt and determining which of those convicted would die, may presage yet a new phase in the death penalty debate.

This phase, as Banner notes in his epilogue, comes with the realization that the judicial creation of an intricate death penalty jurisprudence fails to address the ultimately moral decision that surrounds the issue. No amount of tinkering with the judicial "machinery of death," in Justice Blackmun's words, can absolve society from its responsibility for this decision. It is a decision that will continue to be debated, because the death penalty, despite its admitted flaws, continues to have popular support, increased by the war against terrorism and the fear inspired by the sniper murders in the D.C. area last October.

The opposing strains are reflected in the issue of juvenile eligibility for the death penalty. Execution of the young has always furnished the abolitionist movement with one of its strongest emotional arguments. The world in general is opposed to the death penalty, but is appalled at the penalty for those under 18. The tide against allowing such executions in America seemed to be gaining much momentum that it was realistic to believe that juveniles would be found ineligible for capital punishment under an evolving "cruel and unusual standard," as the mentally retarded recently were in the Supreme Court's *Atkins* decision. Yet attention is now focused on the juvenile D.C. sniper, Lee Malvo, who is to be prosecuted first by a state (Virginia) that allows juveniles to be executed rather than by a state (Maryland) that does not. The calls for his death are not slackened by his age.

In charting and covering the breadth and depth of the death penalty debate, one can ask for no better guide than *The Death Penalty: An American History*. Banner's accomplishment in providing a historical dimension to the issue cannot be underestimated. If we are to debate the death penalty, we must have a historical sense of where it came from, and how it has evolved. In his somber, solid, and dispassionate account of a most passionate subject, Banner has provided a record that both sides must take into account in arguing their convictions and making their appeals.