



# THE LIBERTY LEGEND

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## NAFD NEWSLETTER

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## THOUGHTS FROM THE PRESIDENT

Not long ago, I had a conversation with a former assistant federal defender who was thinking about re-applying to a defender office. He wondered whether the frustrations of the job had increased significantly with the advent of the sentencing guidelines, and more recently, with the enactment of the Feeney amendment. My gut response was a resounding, "Yes." But that is not what I ended up saying. Instead, I began thinking about how, in many ways, the rewards of the job have never been greater.

You are no doubt wondering whether I have completely lost my marbles or whether I am so old I have forgotten what practice used to be like. It is certainly true that I am old (one way I know this is because, as Andrea Lyon recently pointed out, there was still a fourth amendment when I began practicing law), but I have not forgotten how things used to be. In fact, it is the strength of my recollections that led to my answer.

What I finally said was this. The law has clearly gotten worse and there is little relief in sight. The Department of Justice and its prosecutors have become increasingly focused (some would say fixated) on obtaining longer prison sentences to the virtual exclusion of all

other considerations. Judges have far less discretion now, and many were not even on the bench when meaningful discretion existed.

All of this is bad for our clients.

But in the most important way, nothing has changed. The essence of our job is no different today than it was 30 years ago. We are still here for our clients. Then and now the task is how to convince someone – the prosecutor, the juror, the judge, the probation officer, the agent, the witness – to do justice. Are there more hoops now? Sure there are. Are the stakes higher? Absolutely. But the sad truth is, our clients remain desperate and voiceless. For that reason, it is and always has been our clients who are our *raison d'être*; who inspire us to keep on keepin' on; who give us reason to hope in the face of seemingly insurmountable obstacles.

And we are not alone.

In his most recent book, Studs Terkel explores the power of hope and concludes:

Hope has never trickled down. It has always sprung up. That's what Jessie de la Cruz meant when she said, "I feel there's gonna be a change, but

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we're the ones gonna do it, not the government. With us, there's a saying, 'La esperanza muere ultima. Hope dies last.' You can't lose hope. If you lose hope, you lose everything."<sup>1</sup>

*I love people who harness themselves,  
an ox to a heavy cart,  
who pull like water buffalo, with massive patience,  
who strain in the mud and muck  
to move things forward,  
who do what has to be done, again and again.*

And so my answer was that, in the end, the frustrations of the job are inevitably eclipsed by our collective desire to do what needs to be done to make things right. As Marge Piercy wrote:

That's why the people I love best are federal public defenders.

**Carol A. Brook, President**

*The people I love the best  
jump into work head first  
without dallying in the shallows  
and swim off with sure strokes almost out of sight.  
They seem to become natives of that element,  
the black sleek heads of seals  
bouncing like half-submerged balls.*

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<sup>1</sup> *Hope Dies Last: Keeping the Faith in Difficult Times* (2003).

<sup>2</sup> "To be of use," *Circles on the Water: Selected Poems of Marge Piercy* (1982) (adapted).

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# LIFE AFTER FEENEY:

## Guideline Amendments Effective November 1, 2003

*by Felicia Sarner, Supervisory Assistant Federal Defender, Eastern District of Pennsylvania*

### Introduction

2003 was a whirlwind year for the U.S. Sentencing Commission (USSC), not to mention all of us, mostly because of the PROTECT Act's sweeping restrictions on downward departures. This statute resulted in direct guideline amendments that restricted downward departures in "child crimes and sexual offenses," effective April 30, 2003, a kidnapping amendment effective May 30, 2003, and additional amendments restricting downward departures in all other offense categories effective October 27, 2003. On the heels of that, the Commission passed a series of amendments effective November 1, 2003, pursuant to its regular amendment cycle. In all of the frenzy, these latter amendments have received little attention. What follows is a summary of them.

### Amendments Effective November 1, 2003

1. Amendments Initiated By The Sarbanes-Oxley Act of 2002. This statute, enacted on July 30, 2002, in the wake of the Enron, Arthur Anderson, and WorldCom scandals, targeted massive securities and accounting fraud resulting in catastrophic losses. In addition to creating new offenses and increasing existing statutory penalties, the Act issued numerous directives to the USSC that were promulgated as emergency amendments effective January 25, 2003. All of the emergency amendments were repromulgated as permanent amendments effective November 1, 2003, but the Commission made certain modifications as described below.

A. § 2B1.1: Alternative Base Offense Levels 6 or 7. The 1/25/03 emergency amendments kept the previous base offense level of 6. The USSC's 11/1/03 amendments, however, added the alternative base offense level of 7, which raises penalties at the lowest end of the loss table. The Commission relied on

Senator Biden's delayed (by almost 9-months) "clarification," delivered in an April 2003 speech on the Senate floor, that it was the legislative intent to raise low-end penalties along with those at the high end of the loss table. Consequently, this amendment will detrimentally affect many of our low-level clients.

The new alternative Level 7 applies only if the offense of conviction has a statutory maximum of 20 years or higher. Otherwise, Level 6 applies. The problem is that the statute increased the maximum penalties for mail and wire fraud, as well as for conspiracy and attempt to commit those offenses, from 5 to 20 years. The change means that low-level mail and wire fraud offenders will only be eligible for straight probation (Zone A), even if they accept responsibility, if the loss is \$10,000 or less (previously \$30,000 or less). The change also mandates prison (Zone D), even with acceptance credit, for loss amounts exceeding \$70,000 (previously \$120,000 or less).

B. § 2B1.1: Loss Table and Other Enhancements. Penalties at the high end of the loss table have been greatly increased, from a 26-level to a 30-level enhancement. There is a new 6-level enhancement if the number of victims is at least 250, and a 4-level enhancement for endangering the solvency or financial security of *either* (1) a publicly-traded company; (2) a company with 1000 or more employees; or (3) 100 or more victims. The double counting issue is addressed by providing that the cumulative enhancement for number of victims and endangering the solvency/financial security of 100+ victims cannot exceed 8 levels, with a floor of Level 24.

The 1/25/03 emergency amendments added a 4-level enhancement for violating securities or commodities law while an officer or director. That

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enhancement remains, but was expanded effective 11/1/03 to include registered broker/dealers. Note that the enhancement does not require a conviction of a securities fraud statute, and commentary addresses the double counting issue by clarifying that if this 4-level enhancement applies, the abuse of trust enhancement in § 3B1.3 does not apply.

C. Obstruction (§ 2J1.2) and Perjury (§ 2J1.3). The base offense level for each was increased from 12 to 14, and a 2-level enhancement was added for document destruction, extensive planning or preparation, etc.

2. Amendments Initiated By The Bipartisan Campaign Finance Act of 2002. This statute increased statutory penalties (formerly misdemeanors) and made numerous directives to the Commission. All of the 1/25/03 emergency amendments were repromulgated without change as permanent amendments effective 11/1/03. New § 2C1.8 addresses these offenses.

3. Terrorism. The 6-level terrorism enhancement in § 2S1.1 (Money Laundering) and § 2S1.3 (Structuring) has been repealed, in light of the terrorism guideline in § 3A1.4. Enhancements were added to the guidelines for Harboring (§ 2X3.1 - Accessory After The Fact); Biological Agents and Toxins (§ 2M6.1); and Water System Tampering and Threatening (§ 2Q1.4).

4. Cybercrime. New enhancements have been added to § 2B1.1 for convictions under 18 U.S.C. § 1030 involving (1) protected computer systems; (2) intent to obtain personal information; and (3) substantial disruption of a critical infrastructure.

5. Body Armor. New § 3B1.5 applies to the use (i.e., “active employment”) of body armor in “drug trafficking crimes” and “crimes of violence.” Commentary clarifies that the statutory (not the guidelines) definition of those terms applies. There is a 2-level enhancement if the *offense* involved the use of body armor, and a 4-level enhancement if the *defendant* used it.

6. Immigration. § 2L1.2 adds definitions of “alien smuggling,” “child pornography,” and “human trafficking.” The definition of “crime of violence” is clarified (includes the enumerated offenses *plus* any offense that has as an element the use, attempted use, or threatened use of physical force against the person of another), as is the term “sentence imposed” (when determining how many levels to add for prior drug conviction). It also clarifies that juvenile adjudications cannot be used to enhance the offense level.

7. Undischarged Terms of Imprisonment. § 5G.3(b) is the subsection mandating when the instant federal sentence must be imposed concurrently with an undischarged sentence. Because of a circuit split, the USSC has removed the “fully taken into account” language and inserted relevant conduct principles. The federal sentence must be imposed concurrently *only* if the undischarged sentence is for conduct that is *both* (1) relevant conduct to the instant offense *and* (2) results in an increase in the offense level for the instant offense under Chapters 2 or 3. If both prongs are met and the court determines that the BOP will not credit the time already served on the undischarged sentence, then the instant sentence must not only be imposed concurrently but must also be “adjusted” downward (i.e., reduced) to give credit for the time already served on the undischarged sentence. Note that this is not a downward departure, and the Statement of Reasons should specify that it is a downward “adjustment” pursuant to subsection (b).

§ 5G1.3(c) is the subsection that leaves to the court’s discretion whether the instant federal sentence should be concurrent, partially concurrent, or consecutive to the undischarged sentence. It has always applied when the undischarged sentence was unrelated to the instant offense, and it will now also apply even if the undischarged sentence is for conduct that is “relevant conduct” to the instant offense, but would not have increased the instant offense level under Chapters 2 or 3. For example, assume the instant offense is a federal conspiracy to distribute 5 kilos of cocaine that involves as an overt act the sale of 1 pound of cocaine. If your client was previously

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convicted of the 1-pound sale and is serving that undischarged sentence at the time of the federal sentencing, the undischarged term is “relevant conduct” to the instant offense but would not have resulted in a higher offense level than the Level 32 applicable to the 5-kilo conspiracy. The scenario falls within subsection (c), not (b), and it is within the court’s discretion to impose a concurrent, partially concurrent, or consecutive sentence.

The amendment resolves a circuit conflict by clarifying that the only time a federal sentence can be “adjusted” downward to credit time already served on an undischarged sentence is under subsection (b). If the court wants to credit for time already served under subsection (c), it can only do so by a *downward departure*. If the undischarged term is a *revocation sentence*, subsection (c) still applies, and although the USSC recommends a consecutive sentence, the court retains discretion to impose a concurrent or partially concurrent sentence. This also resolves a circuit conflict.

8. Discharged Terms of Imprisonment. New § 5K2.23 was added to expressly address the scenario where § 5G1.3(b) would have applied, mandating a concurrent sentence, but the defendant has already *finished* serving the related sentence. A downward departure is encouraged in this scenario.

9. Involuntary Manslaughter. The base offense levels under § 2A1.4 were increased from 10 to 12 if the conduct was criminally negligent, and from 14 to 18 if it was reckless.

10. Oxycodone. This amendment to § 2D1.1 increases penalties for most pills containing oxycodone and decreases penalties for others, because it now bases weight on the actual amount of oxycodone, rather than on the weight of the entire pill. The Drug Equivalency Table now reads that 1 gram of oxycodone (actual) equals 6700 grams of marijuana (previously 1 gram of mixture or substance containing

oxycodone equaled 500 grams of marijuana). This yields the same penalty for 10 mg. “OxyContin” pills, substantially increases penalties for the higher-dose “OxyContin” pills (20 mg., 40mg., 80mg. and 160 mg. dosages), and *reduces penalties* for “Percocet” pills.

The following details are included because it is confusing to sort through these calculations. According to the 2004 Physician’s Desk Reference (PDR), the dosage amounts in OxyContin and Percocet pills refer to the amount of *oxycodone hydrochloride* in each tablet, and the amount of *actual oxycodone* in each tablet is slightly less than 90% (about 89.6%) of the weight of the oxycodone hydrochloride. Thus, 10 mg. OxyContin pills contain a little less than 9 mg. (or .009 grams) of actual oxycodone; 20 mg. pills contain a little less than 18 mg. (or .018 g.) actual; 40 mg. pills a little less than 36 mg. (or .036 g.) actual; 80 mg. pills a little less than 72 mg. (or .072 g.) actual, and 160 mg. pills a little less than 144 mg. (or .144 g.) actual. Likewise, 7.5 mg. Percocet pills contain a little less than 6.72 mg. (or 00672 grams) actual oxycodone; 10 mg. pills a little less than 9 mg. (or .009 g) actual; and generic Percocets a little less than 4.7 mg. (or .0047 grams) actual oxycodone.

Note that the USSC has made this amendment retroactive *effective November 5, 2003*, by adding this amendment (#657) to § 1B1.10. (*See* Appendix C, amendment 662.) If you previously had a client sentenced for percocets who benefits from this change, you should file a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2).

11. Red Phosphorous. This precursor to methamphetamine was added as a listed chemical in § 2D1.11.

12. General Application Instructions. § 1B1.1 was amended to clarify general application instructions.

## WOULD YOU LIKE TO SEE OUR BABY PICTURES?

For all of you who may be interested, FPD Henry Martin created an electronic photo album from the new assistant federal public defender orientation last November. To look at the slide show, download or order prints, go to “<http://picturecenter.kodak.com/target>”, enter “henry\_martin@fd.org”, in the name block and “orientation” in the password block and then select “baby defender 03” from the album box and click on slideshow. Take a look, it’s well done! Thank you Henry!

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## OSTRICHES ARE NOT MERELY CARELESS BIRDS:

### Fighting the Willful Blindness Instruction at Trial<sup>1</sup>

by Alison Siegler, Staff Attorney, Federal Defender Program, N.D. Illinois, Chicago

Securing an acquittal frequently depends on a single judicial decision: whether to instruct jurors that they may *infer* knowledge if they find that the client deliberately ignored or consciously avoided the truth. In the Seventh Circuit, this instruction is commonly known as the “ostrich instruction.”<sup>1-2</sup> The ostrich instruction may become an issue in any case where knowledge is an element of the crime, and is especially

prevalent in drug and fraud cases.

Because the ostrich instruction defines deliberate ignorance as tantamount to actual knowledge, it enables juries to convict defendants without finding that they were actually aware of the existence of illegal conduct. Although, in theory, the ostrich instruction applies only to those limited situations in which the government proves that the defendant actively avoided knowledge, in practice the instruction is given even when there is not sufficient evidence of deliberate ignorance. Giving the instruction when it is not warranted by the evidence effectively lowers the government’s burden by permitting the jury to impute knowledge to unknowing defendants.

It is therefore crucially important for defense counsel to fight the government’s requests for ostrich instructions, and to educate district courts about the dangers inherent in giving them. As is often the case, the battle must be won at the district court level, because it is rare for an appellate court to find that the trial court erred in issuing the instruction, and it is even more unusual for an appellate court to reverse a conviction based on this error.

#### I. The Basic Standard

Every circuit to address this issue has agreed with the basic premise that the ostrich instruction is proper when: (1) the defendant contests the knowledge

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<sup>1</sup>*United States v. Giovannetti*, 919 F.2d 1223, 1228 (7<sup>th</sup> Cir. 1990) (“ostriches . . . are not merely careless birds”).

<sup>2</sup>See *Giovannetti*, 919 F.2d at 1228. Other circuits refer to the instruction as the “willful-blindness instruction,” *United States v. Keene*, 341 F.3d 78, 83 (1<sup>st</sup> Cir. 2003); *United States v. Stewart*, 185 F.3d 112, 126 (3<sup>rd</sup> Cir. 1999); *United States v. Guay*, 108 F.3d 545, 551 (4<sup>th</sup> Cir. 1997); *United States v. Duncan*, 29 F.3d 448, 450 (8<sup>th</sup> Cir. 1994), the “conscious avoidance instruction,” *United States v. Garcia Abreu*, 342 F.3d 183, 188 (2<sup>d</sup> Cir. 2003), the “deliberate ignorance instruction,” *United States v. Alarcon*, 261 F.3d 416, 424-425 (5<sup>th</sup> Cir. 2001); *United States v. Mari*, 47 F.3d 782, 786-787 (6<sup>th</sup> Cir. 1995); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10<sup>th</sup> Cir. 1991); *United States v. Puche*, 350 F.3d 1137, 1149 (11<sup>th</sup> Cir. 2003), and the “*Jewell* instruction,” *United States v. Sanchez-Robles*, 927 F.2d 1070, 1074 (9<sup>th</sup> Cir. 1991), named after a seminal case on the issue, *United States v. Jewell*, 532 F.2d 697 (9<sup>th</sup> Cir. 1976). This article will refer to the instruction as the “ostrich instruction.”

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element of a crime, and (2) the evidence supports an inference that the defendant deliberately ignored, consciously avoided, willfully blinded himself to, or was deliberately indifferent to, criminal activity.<sup>3</sup> Most courts agree that “[e]vidence of *deliberate* ignorance of knowledge may be established by overt, physical acts, as well as by purely psychological avoidance, a cutting off of one’s normal curiosity by an effort of will.” *United States v. Craig*, 178 F.3d 891, 896 (7<sup>th</sup> Cir. 1999) (citations omitted) (emphasis added).<sup>4</sup> However, every circuit also holds that the jury should not conclude that a defendant acted knowingly if the defendant was merely negligent, careless, or stupid in not discovering that criminal activity was afoot. The question for the jury is not whether a reasonable person in the client’s position should have known of the illegality, but rather whether the client himself actively shut his eyes and buried his head in the sand to avoid learning about the illegality. Although all of the circuits adhere to this basic standard, the circuits do not apply the standard uniformly. Instead, different circuits require the government to make vastly different evidentiary showings to receive an ostrich instruction.

### II. Fighting the Ostrich Instruction

Our first battle is to remind district courts that

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<sup>3</sup>See, e.g., *Keene*, 341 F.3d at 83; *Garcia Abreu*, 342 F.3d at 188; *United States v. Caminos*, 770 F.2d 361, 365-66 (3<sup>rd</sup> Cir. 1985); *Guay*, 108 F.3d at 551; *Alarcon*, 261 F.3d at 424-25; *Mari*, 47 F.3d at 786-87; *United States v. Craig*, 178 F.3d 891, 896 (7<sup>th</sup> Cir. 1999); *Duncan*, 29 F.3d at 450; *United States v. Alvarado*, 838 F.2d 311, 314 (9<sup>th</sup> Cir. 1987); *de Francisco-Lopez*, 939 F.2d at 1409; *Puche*, 350 F.3d at 1149. The only District of Columbia Circuit case to address the instruction is an unpublished case, *United States v. Jack*, 1989 U.S. App. LEXIS 17927, at \*8-10 (D.C. Cir. Nov. 29, 1989).

<sup>4</sup>One Tenth Circuit case holds that “[T]he deliberate ignorance instruction must not be tendered to the jury unless . . . the defendant’s conduct includes *deliberate acts* to avoid actual knowledge of that operant fact,” a position that does not appear to be taken by any other circuit. See *de Francisco-Lopez*, 939 F.2d at 1411 (citations omitted) (emphasis added).

the ostrich instruction should only be given in those rare cases where there is sufficient evidence that the client deliberately ignored or consciously avoided the truth. There are a number of weapons in our arsenal which can help us combat the ostrich instruction at trial. We can highlight the dangers inherent in giving such an instruction. We can also analogize the facts of our case to the facts of circuit court cases which conclude that the instruction was erroneously issued. If we lose the battle to keep out the ostrich instruction altogether, we can limit the harm by convincing the court to issue an ostrich instruction that contains language which truly clarifies the concept of willful blindness. And finally, we can use our clients’ mental and cognitive deficiencies to argue that the ostrich instruction is inappropriate in a given case, and to argue to the jury that it should not find that a given client willfully blinded himself to the truth.

#### A. Illuminate the Dangers of Giving An Unwarranted Ostrich Instruction.

Giving an ostrich instruction absent sufficient evidence of deliberate ignorance poses three significant dangers: it invites the jury to apply a negligence standard, it lowers the government’s burden of proof, and it creates a presumption of guilt.

Issuing the ostrich instruction without sufficient evidence raises the risk that the jury will decide that a reasonable person in the client’s position *should have known* the truth, and will convict based on negligence. “Whether the defendant’s ignorance is deliberate is the key factor separating carelessness from avoidance,” and separating the negligent defendant, in whose case the ostrich instruction is inappropriate, from the deliberately ignorant defendant. *United States v. Neville*, 82 F.3d 750, 760 (7<sup>th</sup> Cir. 1996). One court has clarified the difference between negligence and deliberate ignorance by analogizing to real ostriches: “They do not just fail to follow through on their suspicions of bad things. They are not merely careless birds. They bury their heads in the sand so that they will not see or hear bad things. They deliberately avoid acquiring unpleasant knowledge.” *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7<sup>th</sup> Cir. 1990). Most courts agree that “when the facts require the jury to

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make a ‘binary choice’ between ‘actual knowledge’ and ‘complete innocence,’ the ostrich instruction should not be given,” because it would invite the jury to convict using a negligence standard. *Id.*; see also *United States v. Saucedo-Munoz*, 307 F.3d 344, 348 (2d Cir. 2002); *United States v. Barnhart*, 979 F.2d 647, 651-52 (8<sup>th</sup> Cir. 1992); *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5<sup>th</sup> Cir. 1990).<sup>5</sup>

Another danger inherent in giving an unwarranted ostrich instruction is that it substantially lowers the government’s burden of proof. See, e.g., *United States v. Ramsey*, 785 F.2d 184, 190 (7<sup>th</sup> Cir. 1986) (“[I]t takes a fairly large amount of knowledge to prompt further investigation for the purpose of this instruction; to permit an inference of knowledge from just a little suspicion is to relieve the prosecution of its burden of showing every element of the case beyond a reasonable doubt.”). In addition, erroneously giving an ostrich instruction can eviscerate the presumption of innocence and create a presumption of guilt. See, e.g., *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324 (9<sup>th</sup> Cir. 1977) (“[T]he effect of a *Jewell* instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt.”); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10<sup>th</sup> Cir. 1991) (quoting *Murrieta-Bejarano* for this proposition).

Several circuits recognize the inherent dangers of the ostrich instruction and caution that it should rarely be given. See, e.g., *United States v. Mendoza-Medina*, 346 F.3d 121, 132 (5<sup>th</sup> Cir. 2003); *Barnhart*, 979 F.2d at 651-52; *de Francisco-Lopez*, 939 F.2d at

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<sup>5</sup>However, if the government’s evidence points to two possible theories, the theory that the defendant had actual knowledge of illegal conduct, and also the theory that the defendant was deliberately ignorant of the illegal conduct, most courts approve the ostrich instruction and allow the government to proceed in the alternative. See, e.g., *Saucedo-Munoz*, 307 F.3d at 349; *United States v. Stewart*, 185 F.3d 112, 126 (3<sup>rd</sup> Cir. 1999); *United States v. Mabrook*, 301 F.3d 503, 508 (7<sup>th</sup> Cir. 2002); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1074 (9<sup>th</sup> Cir. 1991); *United States v. Espinoza*, 244 F.3d 1234, 1244 (10<sup>th</sup> Cir. 2001).

1409; *United States v. Alvarado*, 838 F.2d 311, 314 (9<sup>th</sup> Cir. 1987). Other circuits appear to take the ostrich instruction’s dangers less seriously, allowing somewhat weaker formulations of the instruction and allowing it to stand in numerous cases. For example, in the Second Circuit, “a ‘conscious avoidance’ instruction has been authorized somewhat more readily than elsewhere . . . [and] is commonly used.” *United States v. Rodriguez*, 983 F.2d 455 (2d Cir. 1993) (citations omitted). The Seventh Circuit appears to affirm district courts’ decisions to issue the instruction even more frequently than the Second Circuit.<sup>6</sup> The Seventh Circuit has nevertheless held that “evidence that a person suspects wrongdoing, by itself, is not sufficient to justify giving an ostrich instruction.” *United States v. Rodriguez*, 929 F.2d 1224, 1227 (7<sup>th</sup> Cir. 1991). The Sixth Circuit, however, insists that it is never reversible error to issue an ostrich instruction, even when there is no evidence whatsoever of deliberate ignorance. See *United States v. Mari*, 47 F.3d 782, 786-87 (6<sup>th</sup> Cir. 1995).<sup>7</sup>

### **B. Analogize to Cases Finding that an Ostrich Instruction was Improper.**

Those rare cases in which circuit courts conclude that a district court erred in giving an ostrich instruction provide another weapon which defense

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<sup>6</sup>There appear to be only two cases in which the Seventh Circuit has reversed based on the erroneous issuance of an ostrich instruction. See *Giovannetti*, 919 F.2d at 1228-30; *United States v. Bailey*, 859 F.2d 1265, 1275 (7<sup>th</sup> Cir. 1988).

<sup>7</sup>Surprisingly, certain circuits which readily find reversible error when a specific ostrich instruction is formulated incorrectly nevertheless appear to agree with the Sixth Circuit that any error in giving the instruction without sufficient evidence of deliberate ignorance is harmless. See, e.g., *United States v. Adeniji*, 31 F.3d 58, 63 (2d Cir. 1994); *United States v. Cartwright*, 6 F.3d 294, 301 (5<sup>th</sup> Cir. 1993). Significantly, though, there was overwhelming evidence of actual knowledge in both *Cartwright* and *Adeniji*. See *Adeniji*, 31 F.3d at 64; *Cartwright*, 6 F.3d at 301. This line of cases reinforces the fact that the fight against the ostrich instruction must be won at the district court level.

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counsel can use to fight off the instruction.<sup>8</sup>

A number of decisions in the drug courier context can help defense counsel argue that merely suspicious circumstances do not warrant an ostrich instruction. *See, e.g., Mendoza-Medina*, 346 F.3d at 134 (rejecting the government’s contention that there was evidence which created an inference that the defendant was aware of a high probability that illegal conduct was afoot, despite a fairly suspicious factual scenario); *Adeniji*, 31 F.3d at 63 (holding that there was no evidence of conscious avoidance when a defendant was arrested carrying a garment bag containing suits filled with heroin, because the defendant claimed that the suits did not belong to him and that he had never seen them before); *United States v. Rivera*, 944 F.2d 1563, 1572 (11th Cir. 1991) (holding that the district court erred in giving the ostrich instruction because there was no evidence at trial that the defendants, who were found to be carrying suitcases with cocaine in their false bottoms, had “purposely contrived to avoid learning that their luggage contained contraband”); *Sanchez-Robles*, 927 F.2d at 1075 (reversing on the ground that the strong odor of marijuana emanating from the defendant’s van did not justify the issuance of an ostrich instruction, because if the defendant recognized the smell, then she had actual knowledge of the illegality, and if she did not recognize the smell, then she had no reason to be suspicious); *United States v. Alvarado*, 838 F.2d 311, 315-16 (9<sup>th</sup> Cir. 1987) (holding that although the defendant appeared nervous during his contacts with customs, turned pale when he opened his suitcase (which was found to contain cocaine), and gave a statement that a friend had promised him \$5000 as a gift if he delivered the suitcase, the evidence demonstrated only actual knowledge and did not support a conscious avoidance theory in the alternative).

Two Tenth Circuit cases provide defense counsel with good arguments for opposing the issuance

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<sup>8</sup>These cases commonly arise when courts conclude that the government presented evidence of actual knowledge but either did not present evidence, or presented insufficient evidence, of deliberate ignorance.

of an ostrich instruction in hidden-compartment drug courier cases. *See de Francisco-Lopez*, 939 F.2d at 1411-12 (reversing because there was no evidence of deliberate ignorance, even though the defendant had accepted money from a stranger to repair a car and drive it across the country; did not have much information about where he was to leave the car; and testified that he had suspected the car might contain drugs but had dismissed that notion); *United States v. Galindo-Torres*, 1992 U.S. App. LEXIS 1399, at \*4 (10<sup>th</sup> Cir. Jan. 30, 1992) (unpublished opinion) (reversing even though the evidence demonstrated that the defendant had received a vehicle from a “remote acquaintance for the purpose of driving the vehicle cross-country and leaving it with unnamed and unknown third parties,” the gas tank had obviously been altered, and the defendant denied actual knowledge but testified he had some suspicions of criminal activity).

Finally, in several non-drug cases, courts have found insufficient evidence of conscious avoidance. *See, e.g., United States v. Schlei*, 122 F.3d 944, 973 (11<sup>th</sup> Cir. 1997) (finding error because the evidence demonstrated that the defendant had actual knowledge that certain financial instruments were counterfeit); *United States v. Hilliard*, 31 F.3d 1509, 1514-17 (10<sup>th</sup> Cir. 1994) (finding that giving the ostrich instruction constituted reversible error); *Barnhart*, 979 F.2d at 652 (same); *Giovannetti*, 919 F.2d at 1228-30 (reversing because the defendant’s failure to drive by the house he was renting out to determine if it was being used for illegal purposes was “not the active avoidance with which the ostrich doctrine is concerned”; although the defendant “failed to display curiosity, . . . he did nothing to prevent the truth from being communicated to him. He did not *act* to avoid learning the truth.”); *United States v. Bailey*, 859 F.2d 1265, 1275 (7<sup>th</sup> Cir. 1988) (reversing because “speculation, ‘funny’ looks, and ‘raised eyebrows’ are not sufficient to convict people for knowingly participating in a scheme to defraud”).

The foregoing cases illustrate that courts draw a distinction between defendants who harbor vague suspicions and defendants who assiduously and deliberately avoid knowledge. Defense counsel can effectively oppose the ostrich instruction by arguing that the government has not produced sufficient evidence

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that the particular client willfully blinded himself to the truth.<sup>9</sup>

### C. Propose Your Own Ostrich Instruction to Mitigate Against its Inherent Dangers.

If the district court finds that the government has presented sufficient evidence of deliberate avoidance to justify issuing an ostrich instruction, defense counsel must urge the court to use a formulation of the instruction which will prevent jury confusion, prevent the jury from mistakenly applying a negligence standard to the evidence, and prevent the jury from inadvertently lowering the government's burden of proving knowledge beyond a reasonable doubt.

In his dissent in *United States v. Jewell*, 532 F.2d 697 (9<sup>th</sup> Cir. 1976), now-Justice Kennedy posited that the only way to guard against the inherent dangers of the ostrich instruction was to adopt the Model Penal Code's formulation. *Id.* at 706-07. That instruction reads: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* (quoting M.P.C. § 2.02(7)). As Kennedy explained: "This provision requires an awareness of a high probability that a fact exists, not merely a reckless disregard, or a suspicion followed by a failure to make further inquiry. . . . It is not culpable to form 'a conscious purpose to avoid learning the truth' unless one is aware of facts indicating a high probability of that truth." *Id.* at 707. Kennedy also emphasized that a proper ostrich instruction must inform the jury that it cannot convict the defendant if he "actually believes" that, for example, a given package does not contain a controlled substance. Kennedy explained that

without this "actual belief" prong, the jury could convict based on what a reasonable person should have done, instead of basing its decision on the subjective belief of the particular defendant on trial.

A number of circuits have incorporated the "high probability" and "actual belief" concepts from the Model Penal Code's formulation and Kennedy's *Jewell* dissent into their ostrich instructions. Several circuits either require that these two elements be included in every conscious avoidance instruction or include them in their pattern instruction. *See United States v. Sicignano*, 78 F.3d 69, 71 (2d Cir. 1996) (holding that the failure to include "a proviso advising the jury that it cannot find knowledge of the fact if the defendant actually believed the contrary" constitutes reversible error); *see also Mendoza-Medina*, 346 F.3d at 132-33; *United States v. Fulbright*, 105 F.3d 443, 447 (9<sup>th</sup> Cir. 1997); *Barnhart*, 979 F.2d at 651-52. Several other circuits have also applied (but do not mandate) the "high probability" and "actual belief" concepts. *See, e.g., United States v. Caminos*, 770 F.2d 361, 366 (3<sup>rd</sup> Cir. 1985); *United States v. Stewart*, 185 F.3d 112, 126 (3d Cir. 1999); *United States v. Guay*, 108 F.3d 545, 551 (4<sup>th</sup> Cir. 1997). Although the Tenth Circuit does not appear to require the "high probability" and "actual belief" prongs, it has applied the ostrich instruction far more cautiously than most other circuits. *See, e.g., de Francisco-Lopez*, 939 F.2d at 1409. In contrast, the Seventh Circuit's pattern instruction is one of the least stringent, allowing juries to "infer knowledge from a combination of suspicion and indifference to the truth," Fed. Crim. Jury Instructions of the Seventh Circuit § 4.06 (1999), without incorporating the "high probability" or "actual belief" requirements.

### D. Raise Your Client's Mental and Cognitive Deficiencies.

An additional weapon for combating the issuance of the ostrich instruction is derived from the fact that the instruction necessarily focuses on the subjective state of mind of a particular client. Many of our clients suffer from mental health disorders and cognitive deficiencies. Defense counsel can fight the ostrich instruction by marshaling evidence about the client's particular mental health problems or cognitive

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<sup>9</sup>Attorney in our office recently convinced a district court judge to deny the government's request for an ostrich instruction in a drug courier case by highlighting its inherent dangers and arguing that the government had not presented sufficient evidence that the client strongly suspected she was carrying drugs. The case resulted in a mistrial, with six jurors voting for acquittal.

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limitations, and arguing that these deficiencies cut against an inference that the client *deliberately* avoided knowledge. If the trial court insists on issuing the ostrich instruction over the defense's objection, the defense can present evidence of the client's psychological or cognitive deficiencies at trial and argue in closing argument that these problems prevent a finding that the client willfully or deliberately blinded himself to the truth.

It is a central tenet of ostrich instruction case law that the jury cannot find that a client deliberately avoided knowledge if he was simply stupid or careless. *See, e.g., Caminos*, 770 F.2d at 366 (approving the following language in an ostrich instruction: "if the evidence indicates that he was very stupid in the action he took, or ignorant, he cannot be convicted"). The defense can use this tenet to argue that a specific client was merely stupid, careless, or ignorant in not discovering criminal activity, and can point to the client's documented mental deficiencies—such as mental retardation or a very low IQ—to support this argument. The client's mental or cognitive limitations arguably negate any inference that the client deliberately cut off his curiosity, and instead create the opposite inference that the client was genuinely unaware or oblivious to the underlying realities of the situation. For example, a mentally retarded client or a client with a very low IQ may simply be too unenlightened about the way the world works to recognize that criminal activity is afoot in a given situation, even under circumstances that would raise the suspicions of an ordinary person.

To further this argument, counsel could obtain a psychological and cognitive evaluation of the client to demonstrate that the client does not process evidence about the world around him in the way an ordinary person would. The evaluation could show, for example, that when this particular client is presented with a factual scenario that would make an ordinary person suspicious, this client remains oblivious to the suspicious implications. The defense can then argue that giving the ostrich instruction when a client is mentally deficient creates the risk that the jury will decide that the client should have known that criminal activity was afoot, and will convict based on a

negligence standard, thus impermissibly lowering the government's burden of proof.

If the trial court issues an ostrich instruction despite evidence that the client is mentally or cognitively deficient, defense counsel should call the evaluating doctor to provide expert testimony about the client's particular limitations. Such testimony is clearly relevant, because the knowledge element puts the client's mental state at issue. Such testimony is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and F.R.E. 702 as long as the defense can show: (1) that the field of psychology or psychiatry is a sufficiently reliable body of specialized knowledge and the expert is properly qualified to give the proffered testimony, and (2) that the evidence will assist the trier of fact to understand the evidence or determine a fact at issue. *See, e.g., United States v. Hall*, 93 F.3d 1337, 1342-44 (7<sup>th</sup> Cir. 1996). *Hall* supports the argument that expert testimony about a client's mental deficiencies meets the first prong of the *Daubert* test. The Seventh Circuit affirmed "the utility of valid social science" to help juries understand a defendant's behavior or thought processes, and reversed a district court's decision to exclude expert psychological testimony because the "testimony went to the heart of [the] defense." *Id.* at 1345. With regard to the second prong of *Daubert*, evidence of a client's mental deficiencies will help the jury determine whether the client deliberately avoided knowledge or was instead genuinely oblivious, a crucial fact at issue whenever the ostrich instruction is given.

If the court admits the proposed expert testimony at trial, counsel can elicit evidence about the particular client's mental or cognitive deficiencies and how those deficiencies affect the way the client interprets situations. Counsel can also use the expert testimony to formulate a carefully-tailored ostrich instruction which takes into account the particular client's specific limitations. Counsel can then argue in closing argument that the expert testimony supports the client's position that he was genuinely oblivious to the presence of illegal activity, and cuts against the government's position that the client deliberately avoided knowledge. This argument will be especially strong in circuits which use the formulation of the

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ostrich instruction which instructs the jury that it cannot convict the client if he has an “actual belief” that criminal activity was *not* afoot.

### III. Conclusion

Although the current ostrich instruction case law is somewhat disheartening, there are weapons we can use to combat the use of the instruction and to blunt

its force. Fighting the ostrich instruction is an uphill battle, but it is also a critical one, because it can singlehandedly determine a client’s future. The more we fight the ostrich instruction at the district court level, the better chance we have of keeping it out at trial. The more we preserve our objections to the instruction in the trial court, the better record we create for appeal. And the more we fight the instruction in individual cases, the better chance we have of effecting systemic change.

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## “THIRTEEN WAYS TO GET THE WITNESS”

*by Carol A. Brook, Deputy Director of the Federal Defender Program in the Northern District of Illinois  
and President of the National Association of Federal Defenders*

**Homage to Terry MacCarthy’s newest work on impeachment  
Sung to the tune of “50 Ways to Leave Your Lover,”  
(With apologies to Paul Simon)**

The problem is all inside their heads  
TFM said to me,  
The answer is easy if you take it all in threes,  
I’d like to help you in your fight to set them free,  
There must be 13 ways to get the witness.

He said it’s always been my habit to intrude,  
Just to insure the lying snitch is not misconstrued,  
So he repeated himself, the aura of truth he did exude,  
There must be 13 ways to get the witness.

Just catch him in a lie, Hy,  
Show his mistake, Jake,  
Bring out his fee, Lee,  
And set your client free.

Tell about his deal, Jameel,  
Show he spoke out of hate, Nate,  
Or found a new girl, Earl,  
And set your client free.

He said it grieves me so to see you cross in vain,  
I know there’s something I can do to help you yank his chain,  
I said I appreciate that,  
And would you please explain about the 13 ways?

He said why don’t we both just sit down one more time?  
If you take good notes I think your cross will come out fine,  
And I realized some tweaking would soon get me what was mine,  
I learned there were 13 ways to get the witness.

Show he fails to speak truth, Ruth,  
Just got out of the pen, Len,  
The tests were not done, Son,  
And set your client free.

The cops were overworked, Kirk,  
Her glasses were cracked, Jack,  
His story is new, Lew,  
And set your client free.

Say he’s running a scam, Sam,  
She does it each day, Fay,  
His memory is bad, Brad,  
And set your client free.

He already said, Fred,  
It’s not in the book, Brooke,  
You’re lacking in skill, Bill,  
And get a not guilty-----ty.

# REPORT OF THE AMICUS COMMITTEE

by David McColgin, Co-chair of Amicus Committee, Assistant Federal Defender, Eastern District of Pennsylvania, Philadelphia

The NAFD participated or is currently participating as amicus in the following three cases:

Goodine v. United States, (No. 03-596, Sup. Ct. Cert. Pet.)

The NAFD joined with NACDL and FAMM in a brief in support of a cert petition from a decision of the First Circuit which held that drug quantity under 21 U.S.C. § 841 is a sentencing factor to be determined by the judge by a preponderance of the evidence, rather than an element of the offense to be determined by the jury beyond a reasonable doubt. 326 F.3d 26. The amicus brief argued that the language of the statute, its legislative history, and the doctrine of avoiding constitutionally doubtful constructions, all establish that the drug quantities in § 841 are elements of the offense. The circuits have taken differing approaches on the issue. The Supreme Court denied the cert. petition on March 8, 2004. The amicus brief was prepared by Douglas Dunham and Ellen Quackenbos in New York.

Kowalski v. Tesmer, (No. 03-407, Sup. Ct.).

The NAFD is currently working with NACDL on an amicus brief in this case in which the Court will consider whether indigent defendants have a right to free legal help in appealing guilty pleas. This case challenges a Michigan law that restricts the appointing of attorneys in those cases. The lower court opinion

is at 333 F.3d 683 (6th Cir. 2003) (en banc). Paul Rashkind, Chief of Appeals for the Miami Federal Defender Office, is coordinating the NAFD's contribution to the brief.

United States v. Esparza-Mendoza, (10<sup>th</sup> Cir., No. 03-4218).

The NAFD joined in an amicus brief in this case involving whether aliens are entitled to Fourth Amendment protections. Utah District Court Judge Cassel had ruled that "as a previously-removed alien felon, Esparza-Mendoza cannot assert a violation of the *Fourth Amendment* because he is not one of 'the People' the Amendment protects." 265 F. Supp.2d 1254. The amicus brief was written for the ACLU, NAFD, and NACDL and by Cecilia Wang, an attorney currently in private practice who used to be an AFD with the Legal Aid Society in New York City.

If you know of any cases in which you think NAFD's amicus participation would be appropriate, please contact one of the co-chairs of the Amicus Committee with the details.

- David McColgin, Philadelphia, PA
  - Fran Pratt, Alexandria, VA
  - Henry Bemporad, San Antonio, TX
- Co-Chairs, Amicus Committee.

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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.

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# CHALLENGES TO THE BUREAU OF PRISON'S HALFWAY HOUSE POLICY

*by Kelli McTaggart, Assistant Federal Public Defender, District of Maryland*

## Introduction

Going back for at least forty years, the Bureau of Prisons ("BOP"), when designating certain inmates to correctional facilities, would routinely designate inmates who were given short sentences of imprisonment (and who were otherwise good candidates) to a community correction center ("CCC") or halfway house. Most recently, this rule was applied to those who received sentences that were twelve months or less (after good time credit), regardless of the sentencing "zone" the person was in.

The BOP's authority to do this derives from 18 U.S.C. § 3621(b), which states that the BOP "shall designate the place of the prisoner's imprisonment" and the BOP "may designate any available penal or correctional facility" that meets certain health and safety standards. For years, the BOP rule was that a halfway house was a "penal or correctional facility" and thus that it could directly place inmates who were sentenced to terms of "imprisonment" to halfway houses. Even as recently as 1992, the Department of Justice determined that, under the statute, "imprisonment" could be satisfied by halfway house placement.

Recently, however, the BOP changed course. On December 13, 2002, the Office of Legal Counsel ("OLC") of the Department of Justice issued an opinion stating that the BOP's practice was contrary to law because halfway houses did not constitute imprisonment. Thus, the BOP did not have the legal authority to send these defendants to halfway houses, and must instead designate them to federal prison camps. On December 20, 2002, the BOP sent a letter to all federal judges telling them that it would no longer honor judicial recommendations for halfway house placement.

## The reach of the new rule

The new rule affects anyone who is sentenced to a term of "imprisonment" in BOP custody (which, after good time credit, would be twelve months or less, and who would otherwise be a good candidate for a halfway house). The rule appears to target Zone C & D offenders, (the perception being that white collar cases often fell in that range and that they were getting lenient treatment), but the new rule can also affect those in Zone A & B. For example, in most Zone A or B cases, the judge can make halfway house placement a condition of probation. But if the underlying offense of conviction is one for which probation is not permitted (e.g., Class B felonies like bank fraud), and the defendant is in Zone A or B, the defendant will serve that time, even a weekend, at a federal prison camp.

The new rule also affects those who, upon revocation of probation or supervised release, receive a term of imprisonment, even if the judge recommends a halfway house. Thus, unless a halfway house is ordered as a condition of an extended period of release or probation, that time will likewise be served in a federal prison.

Finally, the new rule also affects the "back-end" of inmates' sentences. Under 18 U.S.C. § 3624(c), the BOP is directed to begin to transition inmates into the community via halfway house or home confinement for at least the last 10%, but no more than 6 months, of the end of his sentence. Prior to the new rule, inmates were getting longer transition periods because halfway houses were still considered "imprisonment." Now, the BOP is strictly enforcing the rule to mean 10% or 6 months, whatever is less.

## The rationale behind the BOP's position

There is a lot of speculation about the

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political motivation behind the government's actions, and whether, as the OLC memo implies, it was the BOP which initiated the inquiry as to whether this practice was legal. Nevertheless, the BOP has taken the position, based on the OLC memo, that it is legally prohibited from placing anyone sentenced to a term of imprisonment to a halfway house.

The legal basis underlying the Justice Department's position is that the Sentencing Guidelines require judges to order sentences of "imprisonment," and the Guidelines distinguish "imprisonment" from community confinement. In particular, the government points to various provisions of U.S.S.G. § 5C1.1, and case law interpreting that guideline, to conclude that imprisonment and community confinement are two different things, and that a sentence of imprisonment, as required under the guidelines, means a federal prison camp.

### Reaction to the Policy Change and the Response by the Courts

The change in practice prompted a flurry of litigation by those immediately affected, namely, individuals already in halfway houses whom the BOP was trying to remove retroactively to prison camps. Most legal challenges in those circumstances were successful. Since that time, a number of other lawsuits have been filed by those who, for example, were pending designation when the rule was changed, had pled guilty before the change, or whose conduct occurred before the rule change.

Nationwide, most challenges to the rule have been successful at the district court level, although some district courts have upheld the new rule. As of the date of this article, no federal court of appeals has weighed in on the issue, although a case is currently pending before the Second Circuit. Notably, the BOP has not appealed any of the adverse rulings against it. Thus, it appears that the BOP's approach is to fight this battle on a case-by-case basis at the district court level, and to try to avoid a higher court ruling on the rule.

The courts that invalidated the BOP's new rule did so on a number of grounds, most of which apply regardless of the posture the defendant was in when the change was announced. The primary, and arguably strongest, argument, is that the new rule is contrary to the governing statute, 18 U.S.C. § 3621(b). The statute unambiguously requires the BOP to designate the place of the defendant's "imprisonment," and directs it to consider "any available penal or correctional facility." The BOP's argument is that the statute is ambiguous. The BOP agrees that halfway houses constitute penal or correctional facilities. It contends, however, that the term "imprisonment" in the statute is ambiguous. And instead of looking to the terms "penal or correctional facility" which follow the term "imprisonment" to help define this allegedly ambiguous term, the BOP instead looks to the Sentencing Guidelines for clarity. As one court has noted, the BOP has created an ambiguity where none exists.

The other primary legal bases cited in striking down the rule are these: (1) the new policy constitutes a new "rule" under the Administrative Procedures Act ("APA"), and the BOP, as the issuing agency, cannot promulgate a new rule without notice and comment, which was not done; (2) the new rule violates the APA because it exceeds the BOP's authority to impose retroactive rules; (3) the new policy is "arbitrary and capricious," and (4) the new policy violates important constitutional protections, including Due Process, Equal Protection, and Ex Post Facto. For two thorough opinions flushing out the legal issues involved, see *Iacoboni v. United States*, 251 F.Supp.2d 1015 (D. Mass. 2003) (striking down the "front-end" application of the rule), and *Zucker v. Menifee*, 2004 WL 102779 (S.D.N.Y., Jan. 21, 2004) (striking down the "back-end" application of the rule).

With respect to the BOP's Guidelines' argument, as several courts have noted, it is true that § 5C1.1 refers to "imprisonment" and "community confinement" separately. However, even if one reads the guidelines to mean that imprisonment and community confinement are not the same for

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guidelines purposes, that distinction does not affect the BOP because the Guidelines bind the courts, not the BOP. Instead, the BOP's authority is governed by 18 U.S.C. § 3621, which plainly permits placement in any "penal or correctional facility." If there is a conflict between the statute and the guidelines, the statute prevails. Thus, although a judge may be constrained to order a sentence of imprisonment under the guidelines, the guidelines do not prohibit the BOP from placing an inmate in a CCC to serve that term of imprisonment.

### Conclusion

The struggle with the BOP will likely continue until appellate courts begin to rule on the issue or the BOP decides to go back to its former practice. In the meantime, attorneys interested in preserving halfway house options for their clients should remain vigilant in litigating the issue. Attorneys should continue to seek judicial recommendations for halfway houses and pursue appropriate litigation.

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# KUDOSKORNER

Fasten your seatbelts folks - as congratulations is due to **AFD Lee Titterington, District of Arizona, Phoenix** for a "not guilty" verdict in an interference-

with-a-flight-crew case. The client went to trial after rejecting an offer for a deferred sentence even though a conviction for this class B felony would have landed the client in prison as it is not a probation eligible offense. Lee pieced together a very persuasive set of facts demonstrating how the stewardess exaggerated a slightly unpleasant exchange between her and the client. By the time the pilot heard the story, it had flown to new heights.

Big win for **AFD Marcy Janes, District of Arizona, Tucson** and **AFD Heather Williams (Co-Supervisor of Immigration Unit), District of Arizona, Tucson** who assisted! After three days of a jury trial, the judge dismissed the case because of prosecutorial misconduct. Marcy's client, a lawful permanent resident with a variety of mental health problems, was charged with possession with intent to deliver 55 pounds of marijuana. Her client was a battered woman with no prior record and three citizen children. A conviction would have meant removal from the United States with a permanent bar to re-entering, and the children would have had to be sent to live with their abusive father. Prior to trial, the prosecutor, in violation of the rules, subpoenaed privileged mental health records anticipating a duress defense. The court agreed that the actions of the prosecutor were inappropriate, however the court refused to dismiss the case. At trial, an insanity defense was presented. On the third day of trial, it became clear that the prosecutor had again violated the counselor-patient privilege by sending the case agent to interview the domestic violence counselor under the pretense that he was an agent for the defense. The judge

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dismissed the case stating, "to preserve the integrity of this court, there is no remedy other than dismissal." Congratulations!!!

**AFD Miriam Conrad, District of Massachusetts**, had a well deserved victory on February 28, 2004 when her client, a Saudi national charged with having "incendiary devices" on an airplane and making false statements, was acquitted of all charges. The client was arrested at Boston's Logan Airport on January 3 after customs inspectors found three tiny firecrackers in the outer pocket of his backpack. The client, a biomedical engineer at a Riyadh hospital who had traveled to Boston for training on a DNA sequencing machine, first told inspectors that the items were crayons. After the tip broke off one to reveal black powder, he said he didn't know what they were. He testified at trial that he did not know how the firecrackers came to be in his bag, and that he thought they were crayons because they looked like crayons. Defense witnesses, who were flown in from Saudi Arabia, testified that a number of children were among the visitors who had come to his home the night before he left to see his newborn baby. Children in Saudi Arabia frequently play with firecrackers. The client's wife - appearing unveiled in public for the first time in her adult life - testified that she is an amateur artist and uses crayons that looked remarkably like the firecrackers. A defense expert testified that the firecrackers were less "incendiary" than a kitchen match. The government's "expert" gave a description of incendiary devices that, he acknowledged, included two sticks or rocks.

The client was freed on \$50,000 bail pending trial, but required to remain under house arrest in the U.S. (Originally, a magistrate ruled that he could go back to Saudi Arabia while awaiting trial, but the district court judge modified the conditions after the government appealed.) After his acquittal, five customs agents staged a midnight arrest of him (because his visa had been revoked at the airport and he was paroled in only for the prosecution). They would not let him call his lawyer, take his wallet or coat, or explain to his non-English speaking wife what was happening.

Unbelievably, one of the two prosecutors in the case (whom the defendant had hugged after the verdict!) went to the jail at 2 a.m. after this post-verdict arrest and apologized for the customs agents' actions. He even retrieved his wallet and coat and brought it to him at the airport.

The Federal Public Defender's Office in the **Middle District of Tennessee** has exceeded all expectations this past year. **AFD Hugh Mundy**, has been featured in Nashville Lifestyles Magazine as one of the top 25 best looking Nashvillians, and **AFD Ron Small**, has been featured in the same magazine as one of Nashville's Hot Singles. When **AFD Jude**

Lenahan,, found out about the honors, he when into the archives and retrieved a 25 year old Nashville Magazine where he was featured as one of five famous Nashvillians. Step aside American Idol, it's time for the Federal Public Defender Idol.

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# LITIGATING IN THE PENAL COLONY

## Protecting Your Health & Safety: A Litigation Guide for Inmates

By Robert E. Toone

The Southern Poverty Law Center, 2002 \$10, 328 pages, Glossary & Listings

*A Book Review by Jon M. Sands, Federal Public Defender, District of Arizona*

Medieval penal philosophy included torture, whipping, hanging, quartering and being burnt at the stake. Modern American punishment, in an enlightened age, includes forms of torture, referred to as interrogation, striking, whipping, capital punishment in all its forms, including hanging, gassing, burning by electricity and the so-called painless lethal injection. Even the practice of being placed in the stocks is still prevalent, although somewhat curtailed by the Supreme Court's decision in *Hope v. Pelzer*, 122 S.Ct. 2508 (2002), where the Court held that hitching a prisoner to a post for seven hours without water or bathroom breaks as punishment for disruptive behavior, violated the constitutional prohibition against cruel and unusual punishment. Chillingly, there was a dissent.

Thousands and thousands of prisoners are daily subjected to this harsh and brutal treatment. In prisons, and Big Houses, stretching from coast to coast, prisoners are regularly mistreated, maimed and killed. Stripped of most rights, the few remaining are hard to enforce. Legislatures and courts have erected a picket of procedural hurdles to clear while narrowing the relief available. The prisoners seeking redress lack counsel to represent them, lack legal resources and materials, and must litigate generally prose in a hostile legal environment where the Prison Litigation Reform Act of 1996 (PLRA) reads like the handbook for Kafka's nightmarish *In the Penal Colony*.

It is therefore somewhat encouraging that there is now a map to this maze, a primer for clearing

the procedural gauntlet, in the form of a handbook for the pro se prisoner litigant. *Protecting Your Health & Safety* is a guide for protecting prisoner rights. Written by Robert E. Toone, and a project of the Southern Poverty Law Center, the guide seeks to explain basic prisoner rights and present an overview of the administrative and legal court systems. Its goal is to make inmates aware of what rights they have, and how to state a claim, preserve it, gain discovery, conduct a trial, and argue his case. It is a much needed resource, and one that should be widely disbursed.

*Protecting Your Health & Safety* is divided into two parts. The first part overviews prisoners' rights. This is an important principle, and the guide does a nice job of explaining a right as a protection or certain freedom, and the flip side of the right is a duty to protect. This pairing, of a right and duty, makes sense as the guide then discusses the jurisprudence of excessive force, deliberate indifference, protection, medical care, and confinement conditions. The guide does not assume perfection as a right, but is realistic that prisons are harsh places, designed to punish, and where mean and dangerous conditions can legally exist. Yet there are limits. A good example is seen in the discussion of "deliberate indifference," where the distinction is made between one being assaulted unexpectedly by an inmate, and the guards knowing that inmate has a history of assault, especially against inmates of a difference race, or certain physical stature. The differences are illustrated by examples, with helpful case citations in footnotes. In this manner, the careful and clear discussion will not

foster frivolous litigation, but rather, if studied, will help establish legitimate claims to health and safety.

One concern, which is present in any guide on any legal subject, is the updating of the case citations. Published in 2002, this reviewer noted at least one citation that has already been superseded. It is of special note as it deals with the right of inmates to procreate. While there was a circuit split at the time of publication, the right, recognized by a panel in the Ninth Circuit, was subsequently vacated by en banc review. The inmate user, and lawyer, must take care with the authorities. This is especially true with citations from the Ninth Circuit, which this reviewer understands not to be recognized as any sort of authority by most other circuits.

The second part of the guide deals with litigation. In straightforward “how to” language, the guide does an excellent job of taking a claim through administrative remedies and then through a federal

court action. Each stage of litigation is named, explained, and the controlling procedural rule are cited. Examples of pleadings are provided, from the basic explanation of what a caption is, and to proof of service, to the request for discovery, or response to summary judgment. In this manner, the guide is every bit as useful to the lawyer practicing in this area, few though they are, as to the pro se inmate. Given that, in 1999, over 70% of all federal pro se filings were prisoner claims, this manual acts as a legal writing/civil procedure course all in one. Indeed, it could be used as a text in those courses. Magistrate judges, usually charged by district courts to hear prisoner complaints, would be well served to direct prisoner litigants to this resource. It will help focus the issues and secure redress where it is warranted.

*Protecting Your Health & Safety* is available for \$10 from The Southern Poverty Law Center, P.O. Box 548, Montgomery, Alabama, 36101-0548. It is well worth the cost.

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## FEDERAL SENTENCING LAW AND PRACTICE 2004 ED.

By Thomas W. Hutchison, Peter B. Hoffman, Deborah Young, & Sigmund G. Popko  
Thomson West (2004) 2023 pages

*A Book Review by Jon M. Sands, Federal Public Defender, District of Arizona*  
This review appeared in THE CHAMPION

Of the making of treatises there is no end. Each year hornbooks, multi-volume series, and definitive guides appear, dutifully followed by the supplements. The books all too often are put in bookshelves, and remain unused. After all, a criminal defense lawyer wants to know the latest law, from his or her jurisdiction, and not especially what an intermediate southern appellate court a hundred years ago opined about horse theft or larceny of a buggy. There are exceptions, and this book is one.

*Federal Sentencing Law and Practice* (“FSL&P”) is an annual publication that is actually useful. It covers that area of law that every federal criminal defense lawyer, or any lawyer who has clients facing federal charges, must know: the Federal Sentencing Guidelines. Given that the vast majority

of charged federal defendants are convicted of something, and that every defendant always asks, “what am I facing?”, this book will soon prove indispensable.

The authors know what they are talking about. They were practitioners in the field: they either worked at the Sentencing Commission, were federal defenders or federal prosecutors. Their expertise is of a practical bent: what does the lawyer need to know, and why. The treatise follows the Guidelines, so it is easy to use. It charts the different interpretations, and conflicts among the circuits. For example, in terms of calculating loss under 2B1.1, it cites the guideline, explicates the meaning, and annotates with cases. The commentary offers interpretation; and compares and contrast different ways of determining loss, that is

comprehensive. As such, the treatise serves as a handy introduction to the subject.

It is also more. The treatise discusses looming issues, and marks areas that are unclear. Take the term “pattern of activity” that appears in 2G2.2. *FSL&P* explains the historical development of the term, the legislative history as it were, and the way it is at odds with other drafting approaches in specific offense characteristics. At the very best, the treatise will help criminal defense lawyers wind their way through the relevant conduct maze of 1B1.3, avoiding pitfalls and emerging with an understanding of the concept, why the traps are set the way they are and how certain interpretations can help.

*FSL&P* is all the more needed in the wake of the recently enacted Protect Act, which can be characterized as the most radical change in the guidelines since enactment. The treatise takes us through the Act, and points out the changes, the purported reasons, and the implications. In acceptance of responsibility, for example, the “third point” is now dependent upon a government motion.

The treatise compares and contrasts this requirement with other required government motions (substantial assistance), while delineating the practical effect (in most cases, not much since the government is as eager to strike a deal to avoid trial as the defendant, if not more so). In addition to the usual federal crimes, such as drugs and fraud, *FSL&P* also ventures into some of the more obscure areas of federal criminal jurisdiction, such as Indian law, with its overlay of special jurisdiction, congressional definitions, and the rights of the tribes as sovereigns. The treatise points out that certain constitutional rights implicit in federal criminal law (such as *Miranda*) are not required in the tribal context, and that this is an area of a possible challenge.

*FSL&P* is a book that doesn't just complement the guidelines (in all senses of the word), but rather transcends the sentencing text by its commentary and approach. It is a volume worth having, and worth having open, when any guideline question comes up. Dog-eared and highlighted, *FSL&P* will save a lawyer's time, and most important, save the client's time.

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## “DON'T KNOW WHAT YOU'VE GOT 'TIL IT'S GONE”<sup>1</sup>:

### Primer on Social Security Benefits and What Happens to Them After a Conviction for Social Security Fraud

by Tracy Friddle, District of Arizona, Phoenix

*With Supplemental Security Income (SSI) disability benefits as her sole source of income, Ms. Scott found it very difficult to make ends meet. She received the SSI benefits because of her various mental illnesses, which normally made it difficult for her to find and keep a job. Even with her illnesses, however, Ms. Scott experienced periods of stability. During one of those periods, she decided to try working again. A friend helped her get a telemarketing job that had flexible hours and was not too stressful. Afraid of losing her benefits, she used her daughter's Social Security number at the telemarketing job. Several months later, the Social Security Administration (SSA) found out about Ms.*

*Scott's job and forwarded her case to its Office of the Inspector General (OIG), who after conducting some investigation, referred the case to the Department of Justice.*

This is right about the time that Ms. Scott is likely to walk into one of our offices. And, unfortunately, at this point, there is not much that we can do to prevent a conviction. The SSA and OIG have already obtained incriminating statements from Ms. Scott. They have also developed a paper trail that tracks the many false representations Ms. Scott made to it to continue receiving SSI benefits. So, we enter sentencing mode, explaining to Ms. Scott the potential

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consequences of a Social Security fraud conviction. Ms. Scott is, of course, concerned about the direct consequences of conviction, but another question weighs heavily on her mind: “What will happen to my benefits?”

Unfortunately, because a number of factors influence what will happen to Ms. Scott’s benefits after a conviction for Social Security fraud, we cannot give her a clear-cut answer to her question. Still, we can warn her and clients like her of the potential benefits-related consequences of a Social Security fraud conviction. This warning carries with it some good, bad, and even worse news. The good news is that clients generally will not have to automatically and permanently forfeit their benefits as a result of the conviction. The bad news is that the SSA could nonetheless reduce, suspend, or terminate clients’ benefits based on the conduct underlying the conviction. Worse yet, because the burden of proof is lower in Social Security proceedings than in criminal proceedings, the SSA could, in many cases, take these actions even in the absence of a conviction.

The following questions and answers provide an overview of the potential consequences of Social Security fraud convictions as well as some basic principles about Social Security that help explain when, why, and how those consequences may come about.

#### **IV. Are all Social Security benefits created equal?**

No, Social Security practitioners often speak of two classes of Social Security benefits: Title II and Title XVI benefits. The Social Security Administration oversees both classes of benefits. Within these classes, there are several different types of benefits. “Title II benefits” include Social Security Disability Insurance (SSDI or DIB for “Disability Insurance Benefits”), Social Security Retirement (SSR), and Social Security survivor’s, child’s, and spouse’s benefits (derivative benefits). Commentators may also refer to Title II benefits as “OASDI” – or “Old-Age, Survivors and Disability Insurance” – programs. “Title XVI benefits” consist of

Supplemental Security Income (SSI) for the blind, disabled, and aged. Title II and Title XVI benefits have distinct eligibility requirements and are impacted differently by a beneficiary’s involvement in Social Security fraud.

#### **2. What is the difference between Title II and Title XVI benefits?**

The primary difference between Title II and Title XVI programs is that Title II programs are essentially “insurance” or “retirement” programs, whereas Title XVI is a “supplemental income”, or welfare, program. That is, to be eligible for Title II programs, an individual must have worked and paid Social Security taxes for a minimum period of time. Title XVI, by contrast, imposes no work-history requirement. Instead, it has much more restrictive financial eligibility criteria than Title II. Further, as with insurance and retirement programs, the amount of Title II benefits a claimant receives is generally based on what she has paid into the program. SSI beneficiaries, on the other hand, receive a fixed sum designed to help them meet their basic needs. Additionally, Title II benefits are funded by Social Security taxes, while Title XVI benefits come out of general tax revenues.

#### **3. What is Social Security Disability Insurance (SSDI)?<sup>2</sup>**

SSDI is a Title II program for people who are “disabled”, as defined by the Social Security Act. The Act defines as “disabled” claimants who are blind or unable “to engage in any substantial gainful activity by reason of any [lasting or terminal] medically determinable physical or mental impairment.”<sup>3</sup> Even after they show that they fit the SSA’s disability definition and begin receiving benefits, claimants must, among other things, keep their earnings within limits. If they do not, the SSA could deem the work activity that gave rise to the “excessive” income “substantial gainful activity” and reduce, suspend, or terminate benefits.<sup>4</sup>

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### 4. What is Social Security Retirement (SSR)?<sup>5</sup>

SSR is a Title II program for the “aged”, by which the Social Security Act means people who are at least 62 years old. SSR is designed to make up for lost earnings due to retirement; thus, claimants who continue to work after they begin receiving SSR are subject to earnings limits. If they exceed those limits, their benefits will be reduced.<sup>6</sup>

### 5. What are Social Security survivor’s, child’s, and spouse’s benefits (derivative benefits)?<sup>7</sup>

Under certain circumstances, spouses (even divorced ones), widows or widowers, and children of SSDI and SSR beneficiaries may receive benefits based on the SSDI or SSR beneficiary’s earning record. Although spouses, widows or widowers, and children receive these benefits derivatively, a number of factors concerning their own lives can affect their eligibility. For example, their earnings, eligibility for benefits on their own earning record, and decision to marry or remarry can impact their right to benefits.<sup>8</sup>

### 6. What is Supplemental Security Income (SSI)?<sup>9</sup>

SSI is a Title XVI program for people, like Ms. Scott, who have very little assets and income and are blind, aged or disabled. The SSI definition for disabled is the same as the one used for SSDI,<sup>10</sup> but individuals applying based on old age must be a little more “aged” than SSR applicants (at least 65). SSI beneficiaries may receive benefits at an individual or couple rate.<sup>11</sup> Because income and resources are “major factors” in determining eligibility for SSI,<sup>12</sup> claimants’ earnings and resources, if too high, will result in a reduction, suspension, or termination of SSI benefits.<sup>13</sup>

### 7. Do clients automatically forfeit their right to receive Social Security benefits if they are convicted of Social Security fraud?

Generally, no. As of yet, there is no statute calling for automatic and permanent forfeiture of a recipient’s right to benefits upon conviction for Social Security fraud. However, there are several statutory and regulatory provisions that prohibit payment of benefits to individuals based on certain types of criminal status or activities. For example, “fleeing felons”, i.e., people fleeing to avoid prosecution or confinement after conviction, are ineligible for SSI benefits.<sup>14</sup> People who are incarcerated for at least a month are generally barred from receiving SSDI, SSR, and SSI benefits (see Question 9),<sup>15</sup> and parole violators are ineligible for SSI.<sup>16</sup> In addition, individuals cannot claim benefits as survivors of someone whose death they intentionally caused.<sup>17</sup> And, no matter how disabled an individual may be, she cannot receive SSDI benefits, if she incurred the injuries giving rise to her disability during the commission of a felony.<sup>18</sup>

### 8. Even in the absence of a forfeiture statute, can client’s benefits be terminated administratively?

Yes. After a fraud conviction, Social Security may re-adjudicate (or “review”) an individual’s claim for benefits under Title II or Title XVI and find her ineligible.<sup>19</sup> This could happen if evidence from the client’s case suggests that she is not currently or never was eligible for benefits. You can determine whether this kind of termination through re-adjudication is likely by comparing your client’s situation to the eligibility requirements for the type of benefits she receives. For example, since a claimant must be “disabled” to receive SSDI or SSI disability, her claim will likely be re-adjudicated if her conviction stems from feigning a disability. Unless the claimant has developed a real disability by the time of the re-adjudication, her benefits will likely be terminated. Similarly, since SSI has strict income limits, if a client concealed “excess income”, and

she still earns that income, she will probably be found ineligible in a re-adjudication.

**9. What if a client is incarcerated or must stay in some other public institution?**

Residents of public institutions are not eligible for SSI benefits for any month *throughout* which they reside in the institution.<sup>20</sup> A “public institution” generally means one that is operated by the federal government, a state, or a subdivision of a state,<sup>21</sup> though there are some exceptions.<sup>22</sup> The “throughout which” language means that a client must be incarcerated for at least a month before she will lose her SSI benefits.<sup>23</sup> SSDI and SSR beneficiaries temporarily lose their benefits if, for at least 30 days, they are “confined in a jail, prison, or other penal institution or correctional facility pursuant to his conviction of a criminal offense.”<sup>24</sup> Therefore, clients who will be incarcerated for at least a month (for SSI recipients) or 30 days (for SSDI and SSR recipients) should expect to have their benefits suspended, at least for the duration of their incarceration. Fortunately, derivative beneficiaries can continue to receive their benefits, despite the principal beneficiary’s confinement.<sup>25</sup>

**10. Can the SSA impose administrative sanctions?**

Yes. Both Title II and XVI claimants are subject to administrative sanctions for, among other things, making “false or misleading statements” to the SSA.<sup>26</sup> Specifically, the SSA can suspend claimants’ benefits for 6 months the first time it imposes a penalty for false and misleading statements, 12 months the second time, and 24 months the third or subsequent time.<sup>27</sup> Before penalizing a claimant, the SSA must determine whether the claimant did in fact make “false or misleading statements”.<sup>28</sup> Spouses, children, and widows or widowers receiving derivative Title II benefits can continue to receive their benefits, notwithstanding the suspension of the principal beneficiary’s benefits.<sup>29</sup> In addition, even though a spouse receiving SSI benefits at a

couple rate has her half of the benefits suspended, the other spouse continues to receive his half.<sup>30</sup>

**11. What about all of the money the SSA says the client owes it?**

In most cases, the money that clients have received in excess of amounts they were actually due will be considered an overpayment.<sup>31</sup> One possible exception is where a client unlawfully negotiates someone else’s benefits check.<sup>32</sup> In that case, the debt incurred to the SSA may not be considered an overpayment, at least for the purpose of seeking certain forms of relief from overpayment recovery. (See Question 12 for more on this scenario.) After satisfying certain procedural requirements, the SSA can recover an overpayment by offsetting the beneficiary’s payments.<sup>33</sup> The SSA may also reduce derivative Title II beneficiaries’ benefits to recover amounts owed by a principal beneficiary.<sup>34</sup> In addition, the SSA can offset Title XVI benefits received by both spouses in a couple if one of the spouse owes an overpayment.<sup>35</sup> In cases involving fraud, there is generally no limit on the SSA’s rate of recoupment of overpayments from Title II or Title XVI beneficiaries.<sup>36</sup> However, a few practitioners assured me that the rate of recoupment is negotiable in many cases, and the SSA often lets claimants continue to receive enough benefits to live on.

**12. How will the SSA recover money its owed by clients who negotiated someone else’s check?**

There is case law that suggests that debt incurred in this way is not an overpayment, at least for purposes of obtaining waiver of recovery (see Question 13). However, this probably does not mean that these clients are off the hook as far as the SSA is concerned. In fact, the debt may still be considered an overpayment for recovery purposes, which means that the SSA may still be able to deduct money owed from any benefits to which the client is, or later becomes, entitled. Additionally, the SSA has other methods of

recovering amounts owed to it. For example, the SSA participates in the tax-refund offset program, through which money owed to federal agencies is recovered by offsetting the debtor's tax refund up to the amount owed to the agency.<sup>37</sup>

### **13. Will the SSA waive debt recovery against the client?**

Probably not. Waiver of recovery of an overpayment is granted to Title II and Title XVI recipients under limited circumstances – i.e., where (a) the debtor is without fault for the overpayment and (2) recovery would defeat the purpose of Title XVI or Title II or would be “against equity and good conscience”.<sup>38</sup> Clients convicted of fraud in connection with receipt of benefits will likely be found to be at fault for the overpayment. Therefore, even if they have an “overpayment” for which they can request waiver, they will likely be found ineligible based on their fault in receiving the overpayment.

### **14. If a client's SSDI or SSR benefits are suspended or the entire amount of her check is offset for overpayment recovery, can she receive SSI benefits?**

Probably not. When a client's SSDI or SSR benefits have been suspended as a penalty for making “false or misleading statements”, she cannot claim SSI benefits during the suspension.<sup>39</sup> Nor can she claim SSDI or SSR benefits during a suspension of her SSI benefits based on the same grounds.<sup>40</sup> Further, when the SSA keeps a Title II claimant's entire benefits check to recover an overpayment from the claimant, the claimant probably will not be able to qualify for Title XVI benefits because the SSA considers the recovered amount “income”.<sup>41</sup> Given Title XVI's strict income limits, this deemed “income” would likely render a claimant ineligible for Title XVI benefits.

### **15. Where can I go for more information?**

The SSA website, [www.ssa.gov](http://www.ssa.gov), has a wealth of information and is user friendly. Especially helpful web pages on the site include the following: the Question and Answer pages, which allow site visitors to ask questions about the Social-Security-related topic of their choice; the SSA Handbook, which provides detailed information about the different Social Security programs in straight forward, simple terms; and the Social Security Act and regulations, which are in a much more user-friendly format than you find on some online research programs.

### **16. Where can I refer clients for assistance with their benefits issues?**

Early intervention by a benefits specialist could help prevent the imposition of some of the harsher consequences discussed above. Some organizations funded by the Legal Services Corporation have benefits units with attorneys that specialize in Social Security benefits. Consult the “Map of LSC Programs” webpage, <http://www.lsc.gov/fundprog.htm>, to find one in your area. Also try local legal services organizations that specialize in issues that affect the elderly or disabled.

## **NOTES**

1. Joni Mitchell, “Big Yellow Taxi” (Siquomb Publishing Corp. 1970)
2. The eligibility requirements listed here are not exhaustive. For more on SSDI eligibility requirements, see 42 U.S.C. § 423 (2000), 20 C.F.R. § 404.315 (2003), and the SSA Handbook, [http://www.ssa.gov/OP\\_Home/handbook/handbook.html](http://www.ssa.gov/OP_Home/handbook/handbook.html) (last visited January 24, 2004).
3. 42 U.S.C. § 423(d)(1)(A) (2000); 20 C.F.R. § 404.1505 (2003).
4. See 20 C.F.R. §§ 404.1574 - 404.1575 (2003).
5. For more on SSR eligibility criteria, see 42 U.S.C. § 402(a) (2000), 20 C.F.R. § 404.310 (2003), and the SSA Handbook, n.2, *supra*.
6. See 20 C.F.R. §§ 404.415 - 404.416 (2003).
7. For the sake of simplicity, I have grouped these three types of benefits together, since all of them are Title II derivative benefits. Each type, however, has its own eligibility criteria. For more on that criteria, see 42

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- U.S.C. § 402(b)-(c) (2000) (requirements for spouses), 42 U.S.C. § 402(d) (2000) (children), 42 U.S.C. § 402(e)-(f) (2000) (widow/ers), 20 C.F.R. §§ 404.330 - 404.331 (2003) (spouses), 20 C.F.R. § 404.335 (2003) (widow/ers), 20 C.F.R. § 404.350 (2003) (children), and the SSA Handbook, n.2 *supra*.
8. *See id.*
9. For more on SSI eligibility requirements, see 42 U.S.C. § 1382 (2000), 20 C.F.R. § 416.202 (2003), and the SSA Handbook, *supra*.
10. *See* 42 U.S.C. § 1382c(a)(3) (2000); 20 C.F.R. § 416.905 (2003).
11. *See* 20 C.F.R. § 416.410 (2003) (individual rate); 20 C.F.R. § 416.412 (2003) (couple rate).
12. 20 C.F.R. § 416.1100 (2003).
13. *See* 20 C.F.R. § 416.1100; 20 C.F.R. § 416.1323 (2003).
14. 42 U.S.C. § 1382(e)(4)(A) (2000); 20 C.F.R. § 416.202(f)(1)-(2) (2003).
15. 42 U.S.C. § 402(x)(1) (2000) (SSDI & SSR claimants); 42 U.S.C. § 1382(e)(1)(A) (2000) (SSI claimants); 20 C.F.R. § 404.468 (2003) (SSDI & SSR claimants); 20 C.F.R. § 416.211 (2003) (SSI claimants).
16. 42 U.S.C. § 1382(e)(4)(B) (2000); 20 C.F.R. § 416.202(f)(3) (2003).
17. *See* 20 C.F.R. § 404.305 (2003).
18. 42 U.S.C. § 423(d)(6)(A) (2000); 20 C.F.R. § 404.1506(a) (2003).
19. *See generally* 20 C.F.R. §§ 404.987-404.996 (2003) (SSA has the authority to reopen and revise Title II eligibility determinations); 20 C.F.R. §§ 416.1487-416.1494 (2003) (reopening and revision of Title XVI eligibility determinations).
20. *See* 20 C.F.R. § 416.211(a).
21. 20 C.F.R. § 416.201 (2003).
22. *See id.*; 20 C.F.R. § 416.211(b).
23. 20 C.F.R. § 416.211(a)(2).
24. 42 U.S.C. § 402(x)(1) (2004); *but see* 20 C.F.R. § 404.468 (2003) (no 30-grace period but conviction must be for a felony).
25. 42 U.S.C. § 402(x)(2) (2000); 20 C.F.R. § 404.468(a).
26. 20 C.F.R. § 404.459 (2003) (Title II claimants); 20 C.F.R. § 416.1340 (2003) (Title XVI claimants).
27. 20 C.F.R. § 404.459(b) (sanctions imposed on Title II recipients); 20 C.F.R. § 416.1340(b) (Title XVI recipients).
28. 20 C.F.R. § 404.459(e) (Title II); 20 C.F.R. § 416.1340(e).
29. 20 C.F.R. § 404.459(d)(2).
30. 20 C.F.R. § 416.1340(d)(2).
31. *See* 20 C.F.R. § 404.501(a) (2003); 20 C.F.R. § 416.537(a) (2003).
32. *See Powderly v. Schweiker*, 704 F.2d 1092 (9th Cir. 1983) (upholding as consistent with the Social Security Act an SSA claims manual provision that refused to treat as overpayments funds obtained through unlawful negotiation of someone else's check).
33. 20 C.F.R. § 404.502 (2003) (recovery of Title II overpayments); 20 C.F.R. § 416.570 (2003) (SSI overpayment recovery).
34. 20 C.F.R. 404.502(a)(2).
35. 20 C.F.R. § 416.570.
36. *See* 20 C.F.R. § 404.502(a)(2) (*any* benefits due to the individual should be recovered); 20 C.F.R. 416.571 (2003) (limit on rate of recoupment not applicable in cases involving fraud).
37. *See* 20 C.F.R. § 404.520 (2003); 20 C.F.R. § 416.580 (2003).
38. 42 U.S.C. § 404(b) (Title II); 42 U.S.C. § 1383(b)(1)(B) (Title XVI); 20 C.F.R. § 404.506 (2003) (Title II); 20 C.F.R. § 416.550 (2003) (Title XVI).
39. 20 C.F.R. § 404.459(a).
40. 20 C.F.R. § 416.1340(a).
41. *See* 20 C.F.R. § 416.1123(b)(1)(2003).

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