



THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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NAFD NEWSLETTER

National Association of Federal Defenders

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THOUGHTS FROM THE PRESIDENT

When we began discussing this issue of *The Liberty Legend*, I realized we could fill an entire issue just with articles about the extraordinary work defenders have been doing this year. That is an amazing fact. So amazing, I almost requested we do just that.

Then along came *Booker* and *Fanfan*.

Now this publication contains more. Articles on important topics other than *Blakely/Booker/Fanfan*, of course (there are other issues, aren't there?). But also lots of information on NAFD's work in the *Booker/Fanfan* cases to further the fight for justice as best we can. And it is that phrase, "as best we can," I want to focus on here.

The decision to write our own Amicus brief in *Booker* was not an easy one. The time was short and the questions were many and complicated. Although it was impossible to reach every lawyer in the federal defender system, we knew going into the process we could not craft a position with which every defender would agree. Indeed,

even among ourselves there was wide disagreement. I was passionately in the "guidelines should be declared unconstitutional" camp. This position turned out to be contrary to that of many defenders with whom we spoke. It also turned out to be contrary to the position of the parties, who requested that all amici file briefs be consistent with their position that *Blakely* both applies to the guidelines and allows the guidelines to continue to function. As an organization composed of people whose jobs are first and foremost to represent their clients to the best of their ability, we felt it was important to respect that request.

So we were stumped. Should we sign on to another organization's brief? Should we remain silent because our diversity made it impossible to reach unanimous agreement on any position? Or could we find a way to make our diversity work for us, not paralyze us? Despite the risks, we decided it was most important to take a position and let our voices be heard; to celebrate our diversity and test our belief in democracy in a most personal way.

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The Amicus Committee chairs drafted a variety of positions and, after submitting them to the entire Amicus Committee for approval and ranking, submitted them to our entire Board of Directors, again for approval, or not, and ranking. Every single Board member responded. We went with the position that was overwhelmingly supported by the Board.

Our amicus brief is the result of that decision. It is available on our website, www.federaldefenders.org and on Prof. Berman's Blakely Blog, <http://sentencing.typepad.com>. It was put together by the ace team of Henry Bemporad, Fran Pratt and Paul Rashkind, with Paul volunteering to do the actual writing. You can read more about their incredible work later in this issue.

But it was not just the three-person dynamo that made the process work. It was the willingness of every person to participate in the process and to accept the results. I know there are defenders who disagree with, and some who violently disagree with, the idea that any part of the guidelines may be workable after *Blakely*. Yet, no one understands the importance of the democratic process or the importance of speaking out better than the defender community. In the end, that is the stand our organization chose to take.

Our decision to take a stand has already increased our prominence and will undoubtedly provide more opportunities for us to make our voices heard in the future. Just recently, our brief was quoted in *The Washington Post*, in an article entitled, "Supreme Court to Consider Federal Sentencing Guidelines," Oct. 3, 2004, p. A10. And Professor Berman made the following comments about our brief in his *Blakely* Blog:

I have decided to focus first on the [*Booker*] amicus briefs, in part because it is fun and interesting to see the different ways that different folks talk through similar issues. **In this vein, the NAFD brief earns significant bonus point for (quite effectively) seeking to discuss distinct issues in distinct ways . . .**
[Emphasis added.]

Even more importantly, we should be proud of the contribution we have made toward creating a fairer system of justice for our clients. In this regard, I include the response we received from Dean Strang, Director of the Federal Defender Services of Wisconsin and co-counsel for Mr. Booker. After reading our final brief, Dean wrote to Fran, Henry and Paul:

In recent weeks, I have listened more or less patiently to much talking about amicus briefs. As I recall, very little of that talking came from your mouths collectively. Last night, I read your amicus brief in *Booker* and *Fanfan*. Your brief was an unrivaled pleasure. The work of lawyers, rather than marketers or mountebanks. Thank you.

Whether or not you agree with the argument made in our brief, the brief is well worth reading. I urge you not just to read it, but to give us the benefit of your thoughts so we can print a variety of viewpoints in our next Newsletter. Please e-mail me or our extraordinary editors, Lori Ulrich and Tony Lacy, whose commitment of time and talent is what makes it possible for us to obtain and communicate this information to you.

Carol

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SUMMARY OF ORAL ARGUMENT
BEFORE THE U.S. SUPREME COURT IN BOOKER/FANFAN
OCTOBER 4, 2004

by Jane McClellan, Assistant Federal Public Defender, District of Arizona, Phoenix Office

On the first day of its term, the Supreme Court heard two hours of argument in the consolidated cases of Booker and Fanfan. You can begin mourning the loss of the guidelines as we know them. What is unclear is what will replace them or how they will be revised. Paul Clement, Acting Solicitor General, argued on behalf the government. On behalf of the defendants, the attorneys who represented the defendants in the lower courts argued – Rosemary Scapicchio on behalf of Ducan Fanfan, and Christopher Kelly on behalf of Freddie Booker. I have summarized as verbatim as possible the

argument, with no editorial remarks. Make of it what you will.

The Government:

The government began by arguing that if the Court finds that the “outer bounds of the Sentencing Guidelines” are the equivalent of the Blakely presumptive statutory maximum, then the sentences in the majority of federal cases are “dubious.” He argued that the code sets the relevant statutory maximum, not the Guidelines. He then reviewed

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prior cases that admittedly did not involve Sixth Amendment claims but nevertheless upheld the Guidelines, namely Witte, Edwards, and Watts. Justice Scalia, with the first question, noted that he did not recall a jury question being raised in Edwards.

Justice Scalia then said that, “assuming we apply Blakely,” recognizing that the government also believes that Blakely should be overruled, the “cure does not correspond to the disease.” The maximum sentence under the guidelines is not prescribed by the legislature, and it does not matter about that. The right to a jury trial emanates from the distrust of judges. Justice Ginsberg chimed in that it is different when the judge has discretion; but when the judge’s fact-finding is quantified, as it is under the Guidelines, (then Blakely applies).

The government responded that the jury trial right is not just about protecting the defendant from judges. Justice Scalia said that under an indeterminate sentencing scheme, if the defendant got a merciful judge he might get a low sentence, and if he got a hanging judge he might get a high sentence. That was okay. However, here, the finding of a specific fact entitles the defendant to a specific sentence. The government responded that you look to the U.S. Code for the maximum sentence. Justice Scalia said that the code does not set the maximum exposure – it is the finding of facts such as whether the defendant used a firearm. The defendant is facing less time, for example, if he did not use a firearm. Justice Stevens noted that the defendant can appeal a mistaken finding of fact.

Justice Ginsberg asked, what if Congress sets the facts to be determined — then they have set the maximum. Would the jury then have to make these findings? The government answered that that is not at issue here. The government argued that one amendment (or a few amendments) to the Guidelines do not change the general character of the Guidelines. For example, the Sentencing Reform Act amended the Federal Rules of Criminal Procedure. That did not turn the federal rules into statutes. Justice Souter said that there is a difference in process, but not in effect to

the defendant.

Justice Souter continued that because you can’t get the increased sentence without factfinding, therefore it is a Sixth Amendment right. Justice Scalia said that each finding is appealable. Under a discretionary system, you can’t appeal. Justice Souter noted that the fact that the Guidelines are complicated can’t really be an argument why they are constitutional and Blakely does not apply. Why isn’t each fact subject to the Sixth Amendment? The government responded that “the focus of the Guidelines is different.” Justice Scalia said he finds little difference between elements versus sentencing facts. The judge is doing the same thing. There is no difference regarding what you call it – the effect is the same. The government non-responded that the Guidelines have a widely variant focus.

Justice Ginsberg asked, what if the Guidelines were legislation? The government answered that the government would then have to ask the Supreme Court to overturn Blakely. The Commission versus legislature issue makes a difference.

Justice Ginsberg said that it is not clear than any judges have to be on the Commission anymore (PROTECT Act). Justice Scalia quipped, “Is the Commission still in the judicial branch?” The government responded that yes, it is, and it still has judges. That fact is not dispositive of the issue. He cited Mistretta. Chief Justice Rehnquist stated that Mistretta might have come out different if the Commission were not in the judicial branch.

Justice Kennedy, on a different tack, stated that the paradigm (of Blakely?) is that facts such as drug type and amount, guns, use of violence, etc., are factual findings for the jury to make. Are there other factual findings outside that paradigm for the judge still to determine, such as remorse, whether the defendant was a ringleader, whether the defendant cooperated in the preparation of the presentence report? Is it “in for a penny, in for a pound?” Are there some facts like elements, and others that are not? He supposed that it would take a lot of cases to

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decide those issues. The government answered that the defendants' position is all or nothing. Some facts, though, do not look like traditional elements. Justice Kennedy asked, what is the test for distinguishing element-like sentencing facts from pure sentencing facts (that the jury does not have to find)? The government responded by citing Patterson and stating that there is no bright line.

Justice Stevens asked what percentage of cases would violate the Blakely rule? He believes that for the small number of cases that go to trial, a small number would have Apprendi violations? The government answered that 65% of the 2002 cases raised an Apprendi issue. Justice Stevens asked if they raise an issue where a fact increased the sentence? The government answered that yes – in virtually all drug cases, for example. Justice Stevens continued this line of questioning and asked whether in all of these cases were the sentences actually greater than what the jury verdict called for? The government responded that 97% of the cases settle. Justice Stevens said he does not believe that 65% of the cases actually raise an issue of an increase above the jury verdict. The government responded that yes, 65% of the cases do have a Blakely problem. Through pleas they may be able to waive these issues. But application of Blakely to the Guidelines will have a tremendous impact. Justice Scalia responded that there will be a tremendous “one shot impact,” but not in the future. He thinks that the charges could provide for jury findings. Justice Scalia said, “What’s the problem with that?”

The government said that it did not want all increases to go to the jury, to be found beyond a reasonable doubt, and decreases to be found by a preponderance of the evidence. The defendant wants sentencing factors in the indictment – a Blakely-ization of the Guidelines. This creates a separation of powers problem.

In regard to severance, Justice Scalia asked “what has to come out?” Where the statutes or guidelines say that the “court finds” it could be the jury. The government said that 18 U.S.C. § 3742 has

to be changed or deleted. Justice Scalia responded that if there are two possible interpretations of a statute – one finding the statute constitutional and the other finding it unconstitutional – then it’s an easy call – you find it constitutional (referring to § 3742).

Justice Stevens commented that there is a different process, but the same sentence. Do you think that juries find facts differently from judges? It’s usually simple. Would it make a difference who was doing the fact-finding? On issues like drug amount and guns? The government tried to respond with an example regarding fraud, but Justice Stevens kept asking the same question about whether a jury would make different findings regarding drugs and guns. The government conceded no, but continued on with its fraud example. If there was one victim and a small loss amount, then these facts would not be hard to prove to a jury. However, where there were multiple victims and large loss amounts, it would be difficult. You would have to call in 2,000 victims. Justice Stevens commented, don’t you think you could prove it with two to three witnesses?

Justice Scalia said, shouldn’t judges not be guessing about such findings with evidence that would not be admitted to trial? If the defendant gets 10 years, do you say “Don’t worry about it, it wasn’t an element of the crime.”

Justice Ginsberg asked how it has worked with alleging the facts in the indictment and proving it to the jury? The government said that it has not had enough experience. It is not hard to put the factors in the indictment, except for relevant conduct. Chief Justice Rehnquist said that you couldn’t allege perjury in the indictment. Justice Souter said you would need a separate prosecution. He said you ought to have an obstruction of justice law that can be prosecuted. The government commented that this Court upheld Dunnigan.

Justice Breyer said that he had listed four categories of things the government alleges are hard to prove: (1) where there is a vast amount of information; (2) matters that happen at trial, like

perjury; (3) too complicated of facts; (4) facts too difficult to explain, such as brandishing or multiple count rules. The government said look at the Medas cases. Justice Breyer said, what about a simpler approach. In 18 U.S.C. § 3553(b), change “shall” to “may,” and make them advisory guidelines. If Blakely applies, what would be wrong with that? This leaves the appellate section in place. A defendant could appeal a sentence where the judge did not apply the Guidelines (or sentenced outside the Guidelines) and the Court would decide what is or is not reasonable. “We (the Supreme Court) would become the Sentencing Commission. I thought I had escaped.” The government agreed with the idea of advisory guidelines.

Justice Kennedy asked, why wouldn’t (advisory guidelines) create an entitlement to a sentence? Justice Scalia said that if the Guidelines are still binding, then you need a jury. Justice Scalia commented that in the past, judges used to define elements, and then the juries would find them.

The government responded that there would be a separation of powers problem. It believes that, with an advisory system, the appeal process and the Commission would not violate Blakely.

Justice Scalia said that discretionary sentencing does not allow the appellate court to increase a sentence. Justice Breyer disagreed and said that there are instances where such is the case – in England sentences were appealable (and could be increased by the appeals court) – is it unconstitutional to have appeals courts setting limits? The government said yes. It said that that reading of § 3742 is not pre-ordained. Justice O’Connor said that that seems so contrary to what Congress wanted. She said it is a “real stretch” to say that the Guidelines are advisory or to see how an appellate scheme would apply to it. Chief Justice Rehnquist asked, what if judges look to the Guidelines for guidance? Justice Ginsberg asked why only under § 3553(b) is “shall” changed to “may.” What about § 3553(a)? The Guidelines are one of the sentencing factors to be considered. Justice Scalia stated that making the guidelines advisory

deprives the statute of its purpose – to constrain judicial discretion. If “court” can mean “jury,” Justice Scalia asked, how many sections of the Guidelines do not allow “court” to mean “jury”? The government responded that one thing was the section directing the judge to look at the PSR; § 994(a) – sentencing guidelines for sentencing court; role of the district court; and the statement that the judge is to make findings by a preponderance of the evidence.

Justice Kennedy asked how many sentencing factors would be “radical departures” from traditional jury factors? The government responded “many.” See Medas – containing a 20 page special verdict. Justice Scalia commented that you should get rid of the prosecutor in that case. The government responded that there was no other way to do it. Relevant conduct would be a “wilder” jury instruction. It transforms cases against individual defendants into cases about schemes, conspiracies, multiple actors.

Justice Stevens asked, in regard to severability, is there a particular provision that can be severed? The government said § 3553(b) – the reference to “shall.”

The government saved four minutes for rebuttal.

The Defense:

Christopher Kelly argued first for the defendants. Justice Breyer asked, what if there were no guidelines, and the sentence generally was 10 years, but the judge said it was his practice to give 15 years? The defense answered that this would be constitutional, in an indeterminate scheme. Justice Breyer asked, what if the appellate court thinks that it is reasonable to give five years if there is no gun used, and seven years if there is a gun, is this unconstitutional? The defense said yes. (However, I think this was clarified later to mean that if there is an indeterminate sentencing scheme, then appeals’ courts’ findings are constitutional.) Justice Breyer asked, what if the parole commission made the

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finding in an indeterminate sentencing scheme that you get seven years if you use a gun and five years if you do not? The defense answered that is constitutional. Justice Scalia chimed in that the defendant, in the indeterminate system, is not entitled to any certain sentence. Justice Breyer continued with his hypotheticals regarding sentencing guidelines run by parole boards or appellate courts making “reasonableness” findings. The defense responded that the relevant issue is not executive versus judicial. The Commission is increasing sentences, whereas in the other hypotheticals the sentences are being decreased.

Justice Kennedy asked, what if judges had complete discretion? The answer was this would not be a Sixth Amendment problem. Justice Kennedy continued, what are the policy arguments for giving judges complete discretion, with no explanation for their sentences, and holding this scheme “constitutional,” whereas with the Guidelines the judges must give reasons for their sentences (and isn’t this better). Isn’t this overly “formalistic?” What if there are two defendants who committed the same crime before a parole board, in an indeterminate system, and one defendant gets a long sentence and the other does not? The answer from the defense – it is constitutional. The parole commission does not increase sentences. If the parole commission or appeals court increases the sentence, then it violates Apprendi.

Justice Kennedy raised the example of California’s indeterminate sentencing scheme where the defendant was sentenced to prison for up to life. Chief Justice Rehnquist said what if the statutory range was one year to life imprisonment. The defense responded that this does not raise a Sixth Amendment problem.

Justice Ginsberg asked why it would be terrible to have a half-advisory and half-binding guidelines system? The defense responded that this is not what Congress intended – a dual sentencing scheme. There would be no uniformity; it would be easily manipulable; the government could choose to

allege guidelines facts or not. Justice Stevens said how is the defendants’ solution any less manipulable? Justice Souter said there is manipulation of charge bargaining. Justice Breyer asked, how does charge manipulation occur under the Guidelines? The goal of the guidelines was to decrease charge bargaining. Justice Scalia said it has been replaced with fact bargaining. Justice Stevens said, why not a two-track system – under your system the judge finds downwards and the jury finds upwards? Justice Stevens said he would leave in place something closer to what Congress wanted.

Justice Ginsberg asked, what about the four factors outlined by Justice Breyer? What about relevant conduct? The defense answered that perjury at trial would be out. Justice Scalia wondered aloud, could you have a sentencing phase where perjury at trial was proved? Justice Stevens asked whether the judge could find that the jury must have disbelieved what the defendant testified to by finding him guilty? The defense responded that you can’t say, just based on the guilty verdict, that the jury disbelieved the defendant.

Justice Breyer commented about 100 years of sentencing, and the consideration of the manner of the crime, the multiple count rules, and such things. Justice Kennedy said that the jury finds the crime, the judge finds “the context.” The defense responded that within the sentencing range, within the presentence report (the judge finds the sentence). Although the Guidelines are long, only a few apply to each case. We give complex jury instructions in other cases. It can be done.

Justice Breyer said, so the Constitution prohibits uniformity? We will be back to the old disparate system.

Chief Justice Rehnquist asked, what about the form of verdict? Separate lines for each finding? A special verdict? The defense answered yes. Justice Ginsberg said that a special verdict wouldn’t do from the defendant’s viewpoint. The defendant wouldn’t want all of it to be tried to the jury. The defense

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answered that the trial could be bifurcated. Justice Ginsberg asked, “have two trials?” The defense answered that in some cases there would be two. Justice Souter asked, “isn’t that true of all relevant conduct”? (The need for bifurcated trials.) The defense responded that some additional facts would come in, for example under 404(b). Justice Souter said that by requiring additional findings, it skews the case. The defendants will demand a separate procedure?

Justice Ginsberg asked, “Do you know the Kansas system?” Are all of their trials bifurcated? The defense responded that it did not know if all of their trials were bifurcated. It would work the same as the proposal here.

Justice Breyer said, isn’t there a little bit of a leg up for the defendants for cases not plea bargained? The defense responded that now prosecutors charge the crimes it can most easily prove, and the defendant must plead. The government saves the harder-to-prove facts for sentencing.

Rosemary Scapicchio argued the remainder of defendants’ allotted time. She began by noting that the government has changed its position from what it argued in Blakely. The source of the law does not matter.

Justice Breyer asked his same hypotheticals about indeterminate sentencing schemes where a parole commission or panel of the court of appeals effectively “determines” the sentence. Defense counsel responded by stating that if the fact increases the sentence, then the system is unconstitutional (where the jury does not make the finding).

Justice Ginsberg asked some specific questions about what happened in Fanfan’s case. Defense counsel clarified that the district court judge made findings under the Guidelines, and that the guideline-sentence would be 188 to 235 months. The district court judge sentenced defendant to a much lower term of imprisonment based on the jury verdict. Justice Ginsberg asked, was this a windfall for this

defendant? The defense answered no. The government could have indicted and proven the additional facts. The government knew or should have known after Apprendi and Ring that it should have done so. Justice Stevens asked if the judge in this case said what he would have sentenced the defendant to if there were no guidelines? The defense answered no he did not.

Chief Justice Rehnquist asked whether only provisions that increase sentences would be severed? The defense answered yes. Justice Stevens said that he did not understand why only those provisions would be severed. It is not necessary to sever the statute – just applications that increase the sentence. Chief Justice Rehnquist asked whether it would really save the guidelines to delete the upwards? Justice O’Connor said maybe we should just leave it to Congress. The defense responded that Congress intended a mandatory system (not an advisory guidelines system). Justice O’Connor said that Congress intended fact-finding by a preponderance of the evidence. The defense responded no. Chief Justice Rehnquist asked whether it would be proportional if the jury verdict decides upwards but not downwards. The defense responded that proportionality will not change.

Chief Justice Rehnquist said that Congress can put in a new system. The defense responded that is true. The government has the burden of proving severability. You do not have to throw out the bulk of the Guidelines.

Justice Scalia said, why not just say that they are unconstitutional as applied? Not a severance issue. Hold that application of the Guidelines in these cases produces an unconstitutional sentence. Justice Scalia continued that he is not sure that this is properly described as “un-severability.”

Justice Stevens asked if it is a small percentage of cases that would be unconstitutional? He said it seems a weak case to find all of the statute unconstitutional. Instead, he opined, that the Guidelines are applied in all cases, and you bring in

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the jury for other factors that need to be decided by a jury. Justice Scalia said you do not call it severance. Whatever they do will be an interim solution.

Justice Breyer said that this works because most cases are pled. In those few cases where facts are contested – it goes to a jury. This is not what Congress intended; (Congress has enacted many mandatory minimums. Everything depends on plea bargaining. The defense responded that this is how the Guidelines work now. They fact bargain now.

Justice Breyer asked if there was any prior commentary saying that the Guidelines were unconstitutional based on the Sixth Amendment? (Prior to Apprendi and/or Blakely.) The defense said that she was not aware of any. Justice Stevens said, see Justice Thomas’s dissent in Apprendi for some authority. Justice Stevens asked if the judge has discretion within the guidelines range? The defense answered yes.

The Government’s Rebuttal:

The government had a four-minute rebuttal during which no questions were asked. The government argued that the legislative/judicial distinction at least matters for severability. If a non-legislative body, the Commission, is creating crimes, “creates thousands of new crimes,” by applying Blakely. (Separation of powers problem.) If there is no enhancement factor, then there is no problem, and the Guidelines apply. If there is a Sixth Amendment problem, then it is severable – in that § 3553(b) severs – and the guidelines are not mandatory, but the judge sentences within the (statutory?) range. The government concedes that it may be an interim decision anyway. Look at the cases in the pipelines. The defendants here are getting a windfall. If Blakely applies, more power goes to the prosecution. They choose the enhancement factors. Bifurcation is not a panacea.

AWARDS PRESENTED TO OUTSTANDING DEFENDERS, INVESTIGATORS AND PARALEGAL

ANNE BERTON AND ROBERT CASTANEDA

2004 Outstanding Assistant Federal Defenders

Western District of Texas

Anne Berton and Robert Castaneda, who received the Outstanding Assistant Federal Defender Award as a team (and they just happen to be husband and wife), have been with the Federal Public Defender’s Office for six years and fifteen years respectively. They both work in the El Paso branch and together have had six jury trials in 1999 and four in 2000. Of those ten cases, eight resulted in outright acquittals; one was a split verdict after an Allen charge; and one was a hung jury and the client pleaded to a reduced charge. Robert tried an additional case with another assistant in 1999 which resulted in a judgement of acquittal. Their trials have

receded since those two great years, but it is apparent that the U.S. Attorney’s office knows of their formidable talent.

They work beautifully together. They train panel lawyers around the country. They are revered by staff, their colleagues, and of course, enjoy an excellent reputation in the criminal defense community of West Texas. Robert was honored this year with the El Paso Criminal Defense Lawyers Association Outstanding Lawyer Award. He is a former assistant District Attorney and Justice of the Peace in El Paso. Anne graduated from the U.S.

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Military Academy at West Point where she went through jungle school and achieved her parachute badge. She worked in the County Public Defender's

Office before she joined the Federal Public Defender's Office. They are delightful to work with and both equally deserving of the award.

SHANNON P. O'CONNOR

2004 Outstanding Assistant Federal Defender
District of Nebraska

Shannon P. O'Connor is the First Assistant Federal Public Defender for the District of Nebraska. Previously, he was a Deputy Douglas County Public Defender for eight years. He has easily tried over fifty jury trials, but his peers long ago quit counting. Perhaps no criminal defense attorney in the State of Nebraska, and few in the United States, have a better winning record in jury trials than Shannon O'Connor. He has beaten every Assistant U.S. Attorney he has come up against. He has won drug cases, Armed Career Criminal charges, forgery, assault, murder, and sexual assault cases. In short, if the case can be won, Shannon will win it. If it can't be won, he will still probably win it. Recently he tried an Armed Career Criminal case where his client was looking at thirty years under the guidelines. The facts were bad. Several witnesses saw the client with the gun and a police officer heard it clank when it dropped near the client with no one else around. The result was a not guilty verdict.

Shannon is the first attorney to pitch in and help any other attorney in the office, and the panel attorneys, with their cases. He is usually the last to leave at night and always stays late when someone is in trial. If a hearing needs to be covered, he will always volunteer. Shannon takes the most difficult cases in the office and will not assign a case to someone else just because it does not appear to be triable.

Shannon is well-respected by everyone who knows him. Federal judges refer to him as one of the best criminal defense attorneys in Nebraska. State judges know and like Shannon. They wish he still practiced in state court. Shannon has a great personality and sense of humor which lends itself to

friendships across all offices within the system. Opposing counsel and probation officers like him as a person, but they don't like to see him on their cases! Shannon respects his clients. He has a practice that when he first meets a client, he always stands up. He shows in his words and deeds that his clients are important to him as people. He will spend whatever time is necessary with a client to explain procedures or the law. He frequently meets with clients at night and over the weekend.

Shannon is a favorite speaker at CJA panel seminars. His knowledge of trial techniques, evidence and defenses is vast. Both new and experienced attorneys seek out his ideas. He is always willing to share. Of course, Shannon keeps up on the law and is an excellent writer. He writes his own trial and appellate level briefs. His contributions during weekly case meetings are valued by all the attorneys for his creativity and insight.

Shannon is a Board member of the Nebraska Criminal Defense Attorney's Association. He is a member of the National Association of Federal Defenders and the National Association of Criminal Defense Lawyers. He is active in the local community as well. He is the most generous contributor in the office to the needy, and he is always at charitable functions in Omaha.

Shannon has devoted almost all of his professional life as a public defender. He is the epitome of committed, passionate, quality representation. The Association is enhanced by awarding its Outstanding Assistant Federal Public Defender awards to attorneys of the caliber of Shannon O'Connor.

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FELICIA SARNER

2004 Outstanding Assistant Federal Defender
Eastern District of Pennsylvania

Felicia Sarner, Supervisory Assistant Federal Defender for the Eastern District of Pennsylvania, has so many talents and has touched so many of us in the Federal Defender System that she truly is an inspiration to all. As a supervisor, Felicia's obvious priority is to make all attorneys and staff become better at their jobs with an eye on improving the plight of our clients. She assists the attorneys in reaching new levels and accomplishes this goal by both critique and example. Moreover, with Felicia's outstanding skills and knowledge, her critique is never less than (painfully) comprehensive. Yet, under Felicia's supervision, this critique is always constructive and her obvious goal is to simply make you a better attorney and to improve client representation. Simply put, she is an extremely gifted teacher always raising the bar for those under her supervision.

Her expertise in a host of areas serves as an excellent example of the heights we can achieve. To read Felicia's memos or to see her litigate is always an eye opening experience. Moreover, to sit and watch Felicia work directly with her clients is an education in empathy, care and excellence. It would be difficult for any client to not feel 100% cared for and appreciated while being represented by Felicia.

Nor is Felicia an attorney who leaves any

stone unturned. All areas are explored and all issues are pursued in great detail. To see the completeness of Felicia's representation serves as an education not only in the law, but in the exhaustive lengths an attorney should take when dealing with federal defense representation.

Felicia has brought great respect and thus the pride of the defender office when dealing with adversaries and the bench. Felicia is so well respected by the bench that she is a constant lecturer during their annual judicial retreat. All too often, when Felicia enters the courtroom, the presiding judge will pause his/her proceeding and recognize her entrance. When dealing with the United States Attorney's Office, all a line attorney has to say is "well, I have to take this back to the office and discuss it with Felicia" and things which couldn't be done seem possible.

In addition to her attributes named above, Felicia is a current Board Member of NAFD, former co-editor of NAFD's national newsletter, The Liberty Legend, (we still miss her), and regular contributor of articles to the newsletter (for which we are extremely grateful). Felicia frequently publishes articles on federal sentencing issues for the Federal Sentencing Reporter and The Champion.

BETSY ANDERSON

2004 Outstanding Investigator
District of Montana

Betsy Anderson has been with the District of Montana, Helena and Missoula offices, for twelve years. She has extensive investigative experience most of which came from her years with the Wisconsin State Public Defender Office where she was the sole investigator for the Northern Wisconsin area. She has become an expert on the guidelines and has saved clients countless years because of her

thorough interviews, record collection, and data analysis. She is well respected by her colleagues in Montana and in surrounding states. Betsy has acted as a speaker/presenter at CJA Panel Seminars on investigative issues. Not only does she regularly volunteer to assist her fellow investigators, but she will often drive long hours far from her home in Helena to meet with a difficult client if an investigator

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or attorney is experiencing communication problems. She has a knack for quickly establishing rapport with clients, witnesses, and other players in the system. In fact, her ability to interact with the law enforcement community has netted some valuable gems that eventually led to suppression of evidence. In the past two years, Betsy's investigative work has led directly to at least three dismissals after suppression motions were filed based on her investigations. She has helped her office win several trials and to "beat some counts" in others. Clients love her, attorneys need her, and the court, government, and law enforcement officials respect her. Her integrity is beyond reproach.

Betsy regularly works with different attorneys and has adjusted to their individual quirks and eccentricities with alacrity and grace and has responded to the demands of each promptly, professionally, and completely, even if she disagrees with the investigative avenue suggested by the AFPD. Often, the avenue suggested by the Assistant leads nowhere, but Betsy, through humility, hard work and effort, is able to get the investigation on the right track, directing the attorney to a more profitable focus, without ruffling feathers or damaging egos. That – if nothing else – is deserving of the Outstanding Investigator Award.

GERALD POWELL

2004 Outstanding Investigator
Western District of Tennessee

"The office needs a witness. The client doesn't know the witness's name or where he lives, but knows that he may be found in a public housing unit where he is known as 'Top Cat.' 'Top Cat' hangs out on a particular corner and sells stuff. 'Top Cat' needs to be interviewed and subpoenaed for trial." Gerald Powell, an investigator in the Federal Public Defender's Office in Memphis, Tennessee found 'Top Cat,' interviewed him, prepared a report, and produced the gentleman for use as a trial witness. This is typical for Gerald who is an invaluable asset to the office. It is not unusual to have three or four trials going on simultaneously. Gerald works with the other investigators in the office to assist the trial lawyer when everything else is dissolving into chaos. If there is nothing else the attorney can cling to, it is Gerald

that is carrying out the most absurd demands.

Gerald, when acquainted with a case and its requirements by an attorney, follows the purpose, often devising his own way of finding and nailing down good information. He periodically reports progress, and works early morning, late evenings, and on weekends, often driving long distances, in pursuit of his assignments. He has always demonstrated a mild temperament, good humor, and strong organization. Besides having the required courage, integrity, and fortitude required of an investigator for the public defender, Gerald has always demonstrated a clear understanding of the law and its interpretations. He is an outstanding investigator and very deserving of the award.

ANNETTE METCALF

2004 Outstanding Paralegal
District of Hawaii

Annette Metcalf has been with the District of Hawaii for twelve years and prior to that she worked in another public defender office. Annette is the person the office turns to for help for virtually all of the mentally ill, homeless, drug user, juvenile, and

pregnant clients. She does it all. She treats each of them with the respect that each human being deserves. She arranges interviews for defendants to get into drug treatment programs, takes them to the interview or arranges for an investigator to do so; follows up,

writes reports, and goes to court to answer questions when attorneys try to get defendants out on pre-trial release. When they screw up on pre-trial release, probation, or supervised release, attorneys turn to Annette again for other alternatives. Annette buys clothes for defendants who need them and provides lunch for clients that she works with through the lunch hour. If a client needs a ride to the airport at 5:00 p.m. (a miserable and long drive during rush hour), Annette will take them. Annette has an incredible amount of compassion, not to mention

patience, for mentally ill clients who call her continuously. Annette has been known to work too hard, to her own detriment. This is how much she cares for the clients.

The office has eight attorneys, and each attorney of course, has clients with special needs. Annette handles them all. Her work is very emotionally taxing. If she is out of the office for even one day, the office suffers. Annette is truly a dedicated career public defender paralegal.

REPORT OF THE AMICUS COMMITTEE

By Fran Pratt, Co-Chair of Amicus Committee, Research & Writing Attorney, Eastern District of Virginia, Alexandria

Since the last report in the Spring 2004 issue of the Liberty Legend, the NAFD has been involved as an amicus in three cases. The first is *William Thurston v. United States*, U.S. No. 03-1670, which challenges the application of the PROTECT Act's appellate review provisions to cases that were already pending on appeal when Congress passed the Act in April 2004. The original decision was *United States v. Thurston*, Nos. 02-1966, 02-1967, 2003 U.S. App. LEXIS 15516 (1st Cir. Aug. 4, 2003). The First Circuit withdrew it and issued a superseding opinion that is published at 358 F.3d 51 (1st Cir. 2004). The NAFD joined in the amicus brief filed by the FPD office in Boston on behalf of the petitioner at the cert. stage. The case was scheduled for conference on September 27.

The second and third cases are *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. These cases are, of course, the two in which the United States sought certiorari to determine whether *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applies to the U.S. Sentencing Guidelines. The NAFD joined with the NACDL in urging at the cert. stage that the Supreme Court reframe the questions as presented by the Solicitor General in its petitions, as well as urging the Court to grant cert. in another case in place of *Fanfan*.

At the merits stage, the NAFD submitted a brief on its own instead of joining with another organization. This is the first time that the NAFD has done so, and it took a certain degree of organizational soul-searching and a stroke of luck before it happened.

At the start of a much more extensive amicus decision-making process than normally occurs, Carol Brook (as NAFD President), and Henry Bemporad, and I (as two of the three chairs of the Amicus Committee) participated in the first of several lengthy conference calls among counsel for *Booker* and *Fanfan* and a number of potential amici, including the NACDL and FAMM. During that call, at least one potential amicus indicated its desire to take a position that, if accepted, would result in lengthier sentences for both Mr. Booker and Mr. Fanfan. The NAFD did not believe this was appropriate and, therefore, Carol made very clear that the NAFD would not take a position that would hurt the two men. As a result, this meant that the NAFD could not argue that the Guidelines were unconstitutional or should become advisory, even though we recognized that some NAFD members strongly believe in those positions.

Keeping that overarching principle in mind, Henry and I spent time with Carol, Jon Sands, and

Penny Marshall discussing whether the NAFD should take any position at all and, if so, what the possible positions were and the pros and cons of each of them. Henry and I then prepared a memo to go to the NAFD Board outlining four possible positions and asking for approval of all of them so that NAFD could remain flexible vis-a-vis the positions being taken by Booker and Fanfan and by the other amici. Those positions were: (I) argue that *Blakely* applies to the Sentencing Guidelines; (II) argue that the Supreme Court could avoid having to decide whether *Blakely* applies by interpreting the term “statutory maximum” as used in U.S.S.G. § 5G1.1 in the way that *Blakely* defines it; (III) respond to the fear that “the sky will fall” if *Blakely* is applied to the Guidelines; and (IV) address the unfairness of the current Guidelines to defendants.

The NAFD Amicus Committee members reviewed a draft of the memo before it went to the full board, as did Carol. Both the Amicus Committee and the Board expressed strong preferences for the positions that were more policy- and/or practice-oriented, i.e., options III and IV.

The stroke of luck occurred when Paul Rashkind, head of the Miami FPD office’s appellate unit, agreed to write the amicus brief. As Carol has

written elsewhere in this newsletter, the NAFD brief would not have happened without his incredible efforts. Paul, with substantive and editorial assistance from Henry, eloquently and persuasively made the case that “the sky will NOT fall” if *Blakely* applies to the Guidelines. (We had hoped to also address the harshness of the current system, but were not able to due to space constraints.) In the end, the NAFD was able to present to the Supreme Court a position that supported the respondents, that countered the government’s arguments, and that provided a perspective not presented by any other amicus in the case.

Looking ahead, the Supreme Court has just granted cert. in some criminal cases and likely will grant cert in additional cases in the upcoming weeks. Accordingly, it looks to be another active term, and the NAFD will almost certainly continue to maintain the presence that it has developed as an amicus in the Supreme Court over the last several Terms. If you are interested in being involved in the Amicus Committee’s work, please contact any of the three co-chairs: Henry Bemporad in San Antonio, Texas, David McColgin in Philadelphia, Pennsylvania, or me, Fran Pratt, in Alexandria, Virginia.

PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA

By George Fisher

Stanford University Press, Stanford, CA, 2003. 397 pages, \$65.00.

A Book Review by Jon M. Sands, Federal Public Defender, District of Arizona
Originally Printed in THE FEDERAL LAWYER

Substance abuse and violence were rising. There was a public outcry for tougher penalties. The politicians responded with mandatory sentencing. Prosecutors in the meantime saw their caseloads increase sharply. I refer, of course, to Massachusetts in the early 1800s. Mandatory sentences were imposed for violations of the liquor laws and for murder; they were designed to ensure harsh

punishment for drunkenness and violence, especially among new immigrants and the lower classes (sound familiar?). This, paradoxically, gave prosecutors the opportunity to plea bargain more effectively. The rise of modern plea bargaining, and its consequences, is the subject of George Fisher’s enlightening and engaging study, *Plea Bargaining’s Triumph*.

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Legal historians have sought to explain why plea bargaining developed. Some have suggested that the reasons are principally caseload-driven. Others have suggested that the rise of effective police investigation and forensic science, such as fingerprinting, increased the willingness of defendants to plead guilty. Fisher sees merit in multiple explanations but argues, quite convincingly from his historical examination of 19th-century Massachusetts court records, where plea bargaining seems first to have been recorded, that prosecutors were and are the prime movers behind plea bargaining. Prosecutors' triumphed in pushing plea bargaining because of judicial acquiescence, mandatory sentencing that ensured that pleading to a lesser crime would reduce the sentence, and defendants' compliance.

Fisher's examination is instructively divided into three main areas. First, he canvases the history of plea bargaining – what we know of the practice, and explanations for its rise. Next, he does a micro-examination of how plea bargaining developed and came to be dominant in particular county courts in Massachusetts. Finally, from this study he draws macro-implications as to why plea bargaining now predominates. He moves from history to current practice, including plea bargaining under the federal sentencing guidelines.

In Massachusetts, plea bargains were not used prior to the 19th century because sentencing for most crimes was indeterminate, so prosecutors could not guarantee that pleading to a reduced charge would ensure a lighter sentence. But then mandatory sentencing began, and the early-19th century county courts in rural Massachusetts provide a treasure trove of charges, pleas, and sentences from colonial times to the present.

The first plea bargain Fisher covers took place in 1808, just a year after the new county attorney took office. It was a plea deal that any modern prosecutor or defense counsel would recognize: the defendant was overcharged on an indictment to build leverage and then charges were eliminated to win his guilty plea. Fisher makes the point that plea bargaining

developed at the same time as the election of public prosecutors, which replaced the ad hoc appointment of private attorneys as prosecutors. When prosecutors became elected officials and faced reelection challenges, they felt pressure to bring more prosecutions, but funding was limited. This led to pleas, as prosecutors sought ready convictions instead of risky trials, so that they could trumpet their high conviction rates. Modern practice has only reinforced this.

Fisher believes, and supports his contention with his data, that plea bargaining went hand-in-hand with the imposition of mandatory sentencing, which is another way of saying that prosecutors will deal when judicial discretion is heeled. The legislative desire to “get tough,” present in the 1800s as today, spurred prosecutorial dealings; it gave prosecutors cards to deal, and gave defendants a benefit to bargain for.

Paradoxically, the rise of plea bargaining was soon the subject of legislative inquiry. In 1844, a Massachusetts newspaper ran a report of a supposed “grave charge of official misconduct against the able and distinguished district attorney.” The grave charge was that the prosecutor had taken “less than might have been required on the discharge of indictment bound and not tried.” In other words, the prosecutor had let the public down by pleading cases.

The prosecutor appeared in front of the committee and mounted his defense. The arguments he put forward – that pleas assured swift punishment, effective management of caseloads and scarce prosecutorial resources, and greater public safety – swayed the committee. The committee, in its report, concluded that plea bargaining, more than trials, did in fact attain “the just end of all punishment.”

Of course legislative minds can change. By the 1850s, criticisms of plea bargaining (the same ones you hear today), such as that justice is dealt behind closed doors and that punishment is too lenient, prompted the legislature to try to ban it. But it was too prevalent to stop. Prosecutors merely figured out new ways to get the courts to approve pleas.

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Prosecutors could not enforce plea bargains unless judges went along. Fisher writes that it was not until the increase in personal injury cases in the 19th century that the courts welcomed the case relief afforded by the struck deal. This pleading of Peter to allow Paul to bring a personal injury suit was a consequence of industrialization. The practice is so ingrained at this point that plea bargaining has become necessary to the functioning of the criminal justice system. The constitutionality of plea bargaining has been upheld time and again, and, with over 90 percent of cases being pled, and the figure close to 99 percent in the federal system, plea bargaining has indeed triumphed.

Just because plea bargaining is unavoidable does not mean that it is bad. It provides defendants with some control over their fate, it allows prosecutors to prosecute more cases, and it reduces judges' trial caseloads. Plea bargaining became the predominant means of resolving criminal matters because all three players could gain. It can be argued, as Fisher does, that plea bargaining is now solely controlled by the prosecutors. The critical check of a judicial role in sentencing has been supplanted. This skewing of power was one reason that Justice Kennedy recently called upon the ABA to strive for sentencing reform and that Chief Justice Rehnquist criticized the PROTECT Act.

The modern problem with plea bargaining, Fisher contends, arises from prosecutors' domination of the system. This development, arising mainly from rigid mandatory minimum sentences and inflexible federal sentencing guidelines, put sentencing in the sole discretion of the prosecutor, as the prosecutor's decision as to what crime to allow a defendant to plead to determines the sentence.

This overwhelming power of the prosecutor to set sentences is something that I, as an assistant federal public defender, know too well. The government can choose, in a drug case, for example, to select the charges so that a defendant can face five years, 10 years, 40 years, or life. Counts charging use of a firearm can be stacked, so that a defendant who

was unlucky enough to have a co-defendant in a conspiracy case who had a weapon can face life. The plea possibility is that the gun counts can be dismissed, leaving "only" a mandatory-minimum charge of at least a decade for what could have been a very small amount of drugs that the defendant handled only because her boyfriend forced her to. Ten years or life – that is the choice under a plea, when what is really needed is a drug treatment program, or at worst a short term of confinement. The court have no real say in this process, and the defendant has no choice but to accept its outcome. What should worry us all is that, under the federal sentencing and plea regime, the prosecutor, with the power to charge and therefore effectively to set sentences, becomes the judge and jury for defendants who plead. Sometimes punishment is set so high that any plea looks good, and an innocent defendant, or more often a "not as culpable" defendant, will accept a plea, and must rely solely upon the kindness of prosecutors to determine his punishment. What then can be said for the doctrine of just desserts or fairness? This is what our federal criminal justice system has become with mandatory minimums and plea bargaining.

Though plea bargains may benefit individual defendants, they may actually be a detriment to the class of defendants, because they result in more defendants being convicted. How does this work? Well, district attorneys have limited budgets. If every defendant decided to go to trial, there is a good chance that the acquittal rate would be quite high. But if the district attorney can get most defendants to plead, then he can concentrate office resources on the few who do not plead, and thereby get a high conviction rate on those. If every defendant rejected the plea offer and went to trial, the conviction rate would drop, but no one knows who would be acquitted. Faced with the choice, where a plea would get him less than if he is convicted at trial, most defendants will accept the plea.

The necessity for plea bargaining in modern criminal practice is a truth that prosecutors dare not speak. As such, it was political grandstanding when Attorney General John Ashcroft recently announced

his so-called new policy against plea bargaining. His instructing U.S. Attorneys to severely limit plea bargains appears tough, but maintains numerous exceptions to allow the practice to continue. For example, prosecutors have to prosecute readily provable charges. But what are they? There are also exceptions for defendants who provide “substantial assistance” and exceptions for so-called “fast-track” pleas aimed at sparing overburdened local U.S. Attorney Offices. Speak of exceptions that swallow the rule! In the District of Arizona, with upwards of 4,000 cases a year, most of which are immigration offenses, the government, with the blessing of the Department of Justice, has a “fast-track” policy that substantially reduces sentences in order to move the cases. Defendants take the plea offer, and do so overwhelmingly, giving the government close to a 100-percent conviction rate. Plea bargaining is business as usual in federal criminal justice, and good

business at that.

A practice like plea bargaining is so pervasive that no one gives it a second thought. It is good to look back to its origins, and *Plea Bargaining’s Triumph* is to be praised, and read, for doing so. The arguments for, and much more frequently, against, plea bargaining are made by politicians with the fervor of the newly converted. Fisher shows that the reasons for pleas are as prevalent now as they were two centuries ago. The only differences have been the increase in the prosecutor’s power to strike the deal, and the decrease in the court’s power over sentencing. It is to be hoped, in the aftermath of the PROTECT Act power grab, that, in the next wave of sentencing reform, judges will reclaim their vital role and replace overly harsh punishments with just ones, and cruel retribution with fairness. We have a ways to go.

KUDOSKORNER

Frank Dunham, FPD, and Jeremy Kamens, AFD, Eastern District of Virginia, take major kudos for their efforts to free Yaser Hamdi, the American

citizen picked up in Afghanistan and held in U.S. military custody after September 11, 2001. After countless hours of brainstorming, researching, writing, and preparing for arguments in the district court, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court, which culminated in a stunning victory in the highest court and a strongly-worded reversal of the Fourth Circuit, the government finally agreed to release Mr. Hamdi in September 2004, nearly three years after his capture. Frank's and Jeremy's unflagging persistence and dedication were remarkable, particularly when they were not even able to meet the client until after the case had wended its way to the Supreme Court over two years into Mr. Hamdi's incommunicado imprisonment. They were ably assisted in their efforts by many people in the Eastern District of Virginia office, including attorneys Larry Shelton, Ken Troccoli, Fran Pratt, and Nia Vidal, and staff members Pam Bishop, Martha Day, Joyce

Rubens, Pat Savieo, Sandra Schidlo, Pamela Scott, and Janet Thornhill (apologies to anyone who was inadvertently omitted). A large group of law professors and attorneys from various civil rights organizations also provided invaluable perspective and feedback as the case progressed. While this was truly a team effort, the bulk of the credit clearly go to Frank and Geremy for never giving up. Congratulations on a job well done!

The Federal Defenders in the **District of Arizona** have been very busy winning cases. **AFPDs Donna Elm and Milagros Cisneros (Phoenix)** got an acquittal on a first degree murder case. The victim died in a gang shoot out; Donna's defense was that someone else, and she had a few candidates to nominate, did it, and that her gang member was unjustly fingered. The jury saw it her way. **AFPD Joel Parris (Tucson)** got an acquittal in a civil rights violation case. He represented a border agent accused of assaulting an alien. Joel argued self defense and won. **AFPD Craig Orent (Phoenix)** went to trial on a felon in possession charge. He argued that there was no tie between the gun and the defendant, although it was found on the path that the defendant was supposedly fleeing. The court gave him a judgment of acquittal.

The NAFD gratefully acknowledges the diligence and dedication of **Jan Kullberg, Investigator/Paralegal** in the **Phoenix Office** of the **District of Arizona**, for putting together the Directory of Federal Public Defender and Community Defender Offices that has been sent systemwide. Jan's undertaking of this task went beyond the usual call of duty, and demonstrates the commitment so many of our members have to the association, and to the defender system. Jan completed the directory in addition to gearing up for trial on several large white collar cases and other matters. This directory is one that keeps everyone in touch, and is invaluable. We all owe Jan our thanks.

While we say a sad goodbye to Fred Kay, from out of the West comes an Assistant Federal Defender who, through selfless and tireless effort, is now **Federal Public Defender** for the **District of Arizona** - **Jon M. Sands**. You see Jon everywhere - all the seminars and committee meetings. You can't open The Champion,

Liberty Legend, or Arizona Lawyer magazines without seeing some contribution he's made. You think you know him, but do we really know Jon Sands? Jon is tireless. Take a deep breath and read. Jon graduated in 1979 from Yale University and in 1984 from the University of California at Davis School of Law where he graduated with honors and was Editor-in-Chief of the Law Review. Following law school, he held a judicial clerkship with the Honorable Mary M. Schroeder, U.S. Court of Appeals for the Ninth Circuit. In 1985 he became an associate with Meyer, Hendricks, Victor, Osborn & Maledon, and in 1987, he became an Assistant Federal Public Defender.

Since 1984, almost 80 articles, treatises, book chapters, and book reviews have Jon's byline, solo or jointly (and he likely actually read all the 50 books he reviewed and so many more). Jon has served and serves on committees with the ABA, NACDL, Arizona Attorneys for Criminal Justice, Arizona State Bar, National Association of Federal Defenders, Federal Bar Association, and the Federal Sentencing Reporter. He has testified several times before the U.S. Sentencing Commission.

Speaker, you ask? Why, yes, he is. Besides teaching as an adjunct professor at Arizona State University Law School, Jon has been on the NCDC faculty since 1996 as well as teaching at other trial advocacy seminars. He has spoken at over 100 local, state and national seminars in over 151 separate lectures on any and every subject imaginable. And, as we who have heard him speak know, each is with humor, intelligence, and conviction (for which he gets full acceptance points).

For those of us lucky enough to call Jon "friend," we know he is selfless, promoting the talents and achievement of colleagues without his ego interfering. And for those of us in the Federal Defender community who barely know him, he is a constant friend championing the defense role and our clients' cause. And what you may not know, but will come as no surprise, Jon somehow carves out times for his other loves: wife Joyce, children Maddy and Henry, golden retriever Amy, roses, baseball, the 49er's and the Raiders, and reading. Good luck, Jon, in your new role and we hope you get your wish: to see yourself in The New York Times.

Nice win for **Christopher O'Malley, AFPD, District of New Jersey, Camden.** Client, an inmate at FCI Fairton, was charged with forcibly assaulting a federal corrections officer, in violation of 18 U.S.C. § 111(a). The defendant was attending a class at Fairton when he was summoned into the hallway by the victim guard. An

altercation ensued. Four prison guards, including the victim guard, testified that the defendant punched the victim guard in the nose and made stabbing motions at the victim with a pen after the victim guard confronted the defendant about an earlier infraction. The defendant testified on his own behalf. He stated that the victim guard called him out of class and then attacked him in the hallway without provocation. The defendant swatted at the guard in self-defense, but did not intentionally punch the guard in the face. The defendant's story was corroborated by his teacher. Defense counsel was prohibited from introducing testimony regarding the victim guard's reputation for bullying inmates. Counsel did, however, ask for and receive a jury instruction on the lesser included offense of simple assault. The jury acquitted the defendant of aggravated assault of a federal officer and convicted him of simple assault.

On March 11, 2004, terrorists detonated bombs on a number of trains in Madrid, Spain, killing approximately 191 people, and injuring thousands more, including a number of United States citizens. On May 6, 2004, Brandon Bieri Mayfield, a 37-year-old civil and immigration lawyer, practicing in Portland, Oregon, was arrested as a material witness with respect to a federal grand jury's investigation into that bombing. An affidavit signed by FBI Special Agent Richard K. Werder, submitted in support of the government's application for the material witness arrest warrant, averred that Mayfield's fingerprint had been found on a bag in Spain containing detonation devices similar to those used in the bombings. For some two weeks, the government claimed it was necessary to detain Mayfield in order to secure his possible testimony with respect to the commission of potentially capital crimes and the provision of assistance to international terrorists. However, on May 24, 2004, in anticipation of a news release from the Spanish National Police, the government announced that the FBI had erred in its identification of Mayfield and moved to dismiss the material witness proceeding.

FPD Steven T. Wax and AFPD Christopher J. Schatz, District of Oregon, represented Mayfield during the course of his harrowing 18 day ordeal and in proceedings that occurred following the granting of the government's motion to dismiss. Their activities, and the lessons to be learned from the Mayfield case, are described in the September/October issue of The Champion. Several investigations

have been launched into the activities of the FBI's Fingerprint Identification Unit, and as well the government's overall conduct (which appears to have included surreptitious Patriot Act entries of Mayfield's home and law office). Civil litigation has also commenced with the filing of a complaint for violation of civil rights by a team of lawyers headed by Wyoming attorney, Gerry Spence.

If you read the last newsletter, you may recall reading that several attorneys in the Middle District of Tennessee had been featured in the Nashville Lifestyles Magazine as some of the top 25 best looking Nashvillians, or some of the hottest singles, or some of the most famous Nashvillians. Well, we have since learned that **Henry Martin, FPD, Middle District of Tennessee**, was featured in the magazine in the 1970's as one of Nashville's "promising young attorneys." He apparently was too modest to reveal this earlier. Apparently, the Nashville Lifestyles Magazine is never wrong!

2004 DEFENDER EMERITUS RECOGNITION

ROLAND E. DAHLIN II

Roland E. Dahlin II, recently retired as the Federal Public Defender for the Southern District of Texas, after 30 years, earned his B.A. in Economics in 1956 from the University of Texas. He pursued post-graduate studies in Economics at the University of Michigan from 1956 to 1957 and then worked at J.P. Morgan Bank in New York City. Roland served in the United States Army Reserve, achieved the rank of Lieutenant Colonel, and was called to active duty for one year during the Berlin Wall Crisis of 1961. Roland earned his J.D. from the University of Texas School of Law in 1967 and then served as an Assistant District Attorney for Harris County, Texas, from 1967 to 1974.

On July 14, 1974, Roland was appointed for a four-year term as the first Federal Public Defender for the Southern District of Texas by the United States Court of Appeals for the Fifth Circuit. Roland has

been reappointed as the Federal Public Defender for the Southern District of Texas by the United States Court of Appeal for the Fifth Circuit for consecutive four-year terms from 1974 through the present. He also served for over three years as Chair of the Defender Services Advisory Group, which is the national committee for Federal Public Defenders that operates under the auspices of the Defender Services Division of the Administrative Office of the United States Courts.

Having started the office of the Federal Public Defender for the Southern District of Texas in 1974 with one other lawyer, over the years he has established five offices, which are located in the Houston, Laredo, McAllen, Brownsville, and Corpus Christi Divisions of the Southern District of Texas and which now employ over forty federal criminal defense lawyers and over ten investigators. Together

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his offices presently handle over 600 pending federal criminal appeals and over 2,000 federal district court cases. Under Roland's auspices, his office has had certiorari granted in two cases and has briefed and argued those cases on the merits in the United States Supreme Court. In addition, Roland and his attorneys conduct continuing legal education seminars throughout the Southern District of Texas to train criminal defense lawyers in defending federal criminal

cases.

For twenty-eight years, Roland has served the legal community and the citizenry in zealous defense of the Sixth Amendment right to counsel under the United States Constitution. Roland retired on July 30, 2004. His 30th anniversary as Federal Public Defender was July 15, 2004.

MICHAEL G. KATZ

Michael G. Katz retired as the Federal Public Defender for the Districts of Colorado and Wyoming on January 23, 2004, after approximately 25 years and six terms in office. Michael came to the Office of the Federal Public Defender in July of 1978 from the University of Colorado School of Law, where he had been the director of the law school's Legal Aid and Defender Program.

In June of 1979, he was selected to head the Federal Public Defender's Office in Colorado by the Tenth Circuit Court of Appeals upon the recommendation of the United States District Court for the District of Colorado. He was subsequently appointed to 5 additional four year terms as the Federal Public Defender.

In 1987, Michael was asked by the Tenth Circuit to open an appellate section in his office that would handle appeals from the six western states that comprise the Tenth Circuit--Colorado, Wyoming, Kansas, Utah, New Mexico, and Oklahoma. In 1991 the United States District Court for the District of Wyoming asked him to open a branch of his office in Cheyenne, to provide representation in U.S. District Court in Wyoming as well as Colorado.

During Michael's tenure, the Federal Public Defender's Office has grown from three attorneys in Denver to 16 attorneys in Denver and three more in Cheyenne. Michael's time in the office covers a period in which there have been six separate United State's Attorneys for the District of Colorado.

TERENCE F. MACCARTHY AWARD

FRED KAY

Fred Kay was awarded the Terence F. MacCarthy Award and the Defender Emeritus Recognition by the National Association of Federal Defenders at the annual seminar in Boston. The Terence F. MacCarthy Award was first presented to Terry and has since been awarded to Jack McMahon, Judy Clarke and Stephanie Kearns. It proclaims that it is awarded, "Recognizing Excellence in a Career Devoted to the Representation of the Poor." It is not

an annual award, but has been awarded when appropriate. It is an award reserved for chief defenders whose career has been marked by those attributes for which Terry has always set the standard. In a rather quiet, unassuming way, Fred has gone about the business of providing quality and courageous representation to his clients for decades. He has done this personally and through the people he has brought into the office - so many of whom have

themselves become major contributors to our cause. The outstanding work done by Jon Sands, Heather Williams, Dave Shannon and the others there is testament to Fred's leadership and inspiration - and his ability to create and maintain a nurturing work environment even in days of tight budgets and never-ending administrative entanglements. The

Terence F. MacCarthy Award is not a retirement award. It is however a career achievement award and at the close of Fred's tenure as the federal defender in Arizona, the association is proud to recognize his lifetime of contribution and service by bestowing to him the MacCarthy Award.

DUE PROCESS TRUMPS STANDING:

SUPPRESSION OF INVOLUNTARY WITNESS STATEMENTS

by Donna Lee Elm

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How often has this happened to you? You have a *killer* 4th Amendment suppression motion: in the dead of night, police busted into the wrong house, without a warrant or exigent circumstances, found nothing illegal, so they pried up floor boards in 3 rooms until finding a safe, that displayed a sign warning "Private Property of Homeowner," and then they beat him black and blue until he "volunteered" the combination, until they finally nabbed the bag of meth inside labeled "Joe's stash." And though you represent Joe, it wasn't Joe's house! Foiled by standing! Suddenly the homeowner is feeling a whole lot more optimistic than your client is.

There is virtually no way to get around the standing barrier in 4th Amendment issues. And admittedly, there's virtually no way to get around it when suppressing most witness statements either. *Miranda* violations, the typical 5th Amendment fare of invoking rights to counsel or silence during custodial interrogation, are inexorably subject to standing. But there is a small window of opportunity that you may be able to use to suppress third party statements that were taken involuntarily. Recall that *Miranda* violations are suppressed to control police overreaching, whereas involuntary statements are suppressed because (being coerced), they are inherently "untrustworthy." That distinction makes a difference.

Suppression of a Witness's Statement

Generally, only an accused has the right to suppress statements he made that were involuntary. Spano v. New York, 360 U.S. 315, 320-21, 79 S.Ct. 1202, 1205-06 (1959). However, a defendant is also entitled to suppress the statement of a witness if using it would violate the defendant's Due Process rights. The 10th Circuit explained in Clanton v. Cooper:

There are two types of constitutional protections that invoke exclusionary rules. In the first category, the exclusion of unconstitutionally obtained evidence is designed to protect the enjoyment of constitutional rights themselves. Thus, for example, the Fourth Amendment protects the right to privacy by prohibiting officers from bursting into a home (lacking consent or exigent circumstances) and seizing evidence without a warrant; if the officers do so, the resulting evidence, though accurate, will be suppressed to discourage such unconstitutional actions. [Citation omitted] In this category, only the victims of unconstitutional conduct may challenge the unconstitutional nature of the officer's actions, because their rights have been violated.

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In the second category, a constitutional violation may assist officers in gathering evidence, but the violation has both offended the Constitution and rendered the evidence unreliable. A coerced confession fits into this category. ... Consequently, because the evidence is unreliable and its use offends the Constitution, a person may challenge the Government's use against him or her of a coerced confession given by another person. "Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause." Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994). Further, "It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case. ... Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness." LaFrance v. Bohlinger, 499 F.2d 29, 34 (1st Cir. 1974). See also United States v. Merkt, 764 F.2d 266, 274 (5th Cir. 1985); United States v. Chiavola, 744 F.2d 1271, 1273 (7th Cir. 1984); Bradford v. Johnson, 476 F.2d 66, 66 (6th Cir. 1973).

Clanton v. Cooper, 129 F.3d 1147, 1157-58 (10th Cir. 1997).

Remember that involuntary statements are inherently unreliable. Spano v. New York, 360 U.S. 315, 320 (1959). "A statement is involuntary if it is extracted by any sort of threats of violence [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993)(quoting United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988)); Bram v. United

States, 168 U.S. 532, 542-43 (1897). Voluntariness questions may take into account the circumstances of the interrogation, including express or implied promises or threats. *E.g.*, Bram; Hutto.

In Clanton, the police interrogating the *de facto* co-defendant, Michael Eaves, advised him that he could get a twenty-five year sentence if he did not confess, but that he could "get off lightly" if he confessed to a pattern of events suggested by the interrogator. The 10th Circuit applied Supreme Court law holding that "a promise of leniency is relevant to determining whether a confession was involuntary and, depending on the totality of the circumstances, may render a confession coerced." *Id.* at 1159 (citing Arizona v. Fulminante, 499 U.S. 279, 286-87, 111 S.Ct. 1246, 1252-53 (1991); Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 203-04 (1976); *et al.*). The Court found that promises of leniency had been made. The 10th Circuit concluded that Clanton could contest the voluntariness of Eaves's confession not based on any violation of Eaves's constitutional rights, but rather as a violation of Clanton's Fourteenth Amendment right to due process. *Id.* at 1158.

Note that in evaluating the "totality of the circumstances as to voluntariness," the 10th Circuit also weighed in that the police falsely represented the Government's evidence to Clanton. *Id.* at 1157, 1159. Such deliberate deceit would usually be disregarded; simple police trickery alone is generally insufficient to render a confession involuntary. *Id.* at 1158. Nevertheless, the Court reasoned: "Though the lies themselves are not unconstitutional, a reasonable official should have been aware that adding the lies to the apparent promises would make it more likely that the confession would be considered involuntary." *Id.*

In People v. Underwood, 61 Cal.2d 113, 389 P.2d 937, 37 Cal.Rptr. 313 (1964), a witness (who had been under the influence at the time of his interrogation) was pressured by interrogating police with threats of prosecution, so gave a false statement implicating Underwood. Several times during the custodial interrogation, he was threatened with prosecution on the charges, and advised that he would

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be sentenced to twenty years on each count and get the gas chamber. When he denied the statements on stand, the State used his interrogation statement to impeach him as a prior inconsistent statement. The Supreme Court of California held:

The same policy statements which preclude the use of an involuntary statement of a defendant require that the prosecution be precluded from impeaching any witness by the use of an involuntary statement given as a result of pressures exerted by the police. Such a statement by a witness is no more trustworthy than one by a defendant, its admission into evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crimes.

Id. at 124, 389 P.2d at 943, 37 Cal.Rptr. at 319. The Court was also concerned with the fact that evidence of Underwood's guilt was "sharply conflicting," so the effect of the involuntary statement being admitted likely had a prejudicial impact on the defendant. Id. at 125, 389 P.2d at 944, 37 Cal.Rptr. at 320.

In LaFrance, a witness who was *not* a co-defendant or "target" of the investigation provided a false statement to police. The Court noted that a *de facto* co-defendant's confession could, as a practical matter, prove even more unreliable than that of the defendant: "Their interest in self-preservation may motivate them to avoid or reduce the likelihood of direct involvement by laying the blame elsewhere." But the Court also recognized that persons not suspected of the crime under investigation could still be improperly coerced by police tactics: "he may succumb to undue pressure for no other reason than to be left alone." That was the case in LaFrance. Moreover, the witness had been threatened with prosecution, subjected to lengthy interrogation, was

then under the influence of drugs, and his statement was the result of suggestion by police of what had occurred.

In People v. Newman, 30 Ill.2d 419, 197 N.E.2d 12 (1964), the defendant's wife implicated him during her interrogation. However, she later revealed that her statement arose after she was told she would have to stay in jail and give birth to her baby there (she was pregnant at the time of interrogation) if she did not confess. Id. at 424, 197 N.E.2d at 14. It helped, too, that the case was also entirely circumstantial. Id. at 423, 197 N.E.2d at 14. Illinois reversed the conviction.

When the Defense raises a colorable claim that (a) a witness's statement was coerced (so is unreliable), and (b) that the defendant's due process rights will be threatened by admitting it (*i.e.*, it is so prejudicial that he would be denied a fair trial), he is entitled to a voluntariness hearing pre-trial. The Government bears the burden to prove by a preponderance of the evidence that statements it seeks to admit at trial are both reliable and voluntary. Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 626 (1972). If it fails to carry its burden, the defendant is entitled to suppress the witness's statement.

Dismissal of the Case

Sometimes the police misconduct goes beyond improper interrogation of a single witness, and pervades the entire investigation. There are several cases where the police improperly interrogated a number of witnesses – poisoning the entire prosecution with their misconduct. These cases are very rare – and winning the motions are even rarer – but when the police misconduct is substantiated and egregious, it can result in dismissal based upon the Due Process violations. A series of cases where the Defense alleged broad misconduct in interrogating witnesses shows where the remedy should be dismissal rather than suppression of a single witness's statement.

The legal analysis starts with the maxim that

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prosecutions (and police investigations) must meet the bare minimum requirements of Due Process. Wilcox v. Ford, 813 F.2d 1140, 1147 (8th Cir. 1987). Hence in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973), the Supreme Court recognized that a conviction could be reversed where Government involvement in the investigation was “so outrageous that it violates ‘fundamental fairness, shocking to the universal sense of justice.’” Id. at 431-32, 93 S.Ct. at 1642-43. The trial court examines what is effectively cumulative misconduct, as Due Process is violated when the misconduct so permeates a prosecution as to render it fundamentally unfair. Consequently, the trial judge must look to the “totality of the circumstances” in deciding this claim. United States v. Haimowitz, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

Case law on this point has arisen where there is wide-ranging misconduct during police interrogations (and investigations in general) in securing evidence to use to convict a suspect. In United States v. Brown, 255 F.3d 1273 (11th Cir. 2001), Brown alleged that highly damaging testimony used to secure his conviction “was procured through coercive prosecutorial tactics.” Id. at 1280. What turned out to be the key prosecution witness denied any knowledge during his interrogation. As he continued to deny, the Government insistently confronted him that he knew, pressuring him until he blurted out an accusation against Brown – something that suggested potential accomplice liability on the witness’s part. When the witness asked if he would be prosecuted, he was told probably not – unless for perjury if he lied on the stand. The District Court dismissed the case due to the gross misconduct in “intimidation tactics,” but the Circuit Court reversed: although the misconduct was *not* commendable, this singular infraction did not warrant reversal.

In Wilcox, *supra*, the police also engaged in “intimidation tactics” with multiple witnesses. Witnesses were threatened with long-term incarceration and prosecution for murder, the police deliberately took advantage of the weaknesses or weakened state of witnesses, also invoking eternal

damnation plus threatening the electric chair; eventually these maneuvers secured them statements against Wilcox. As in Brown, the District Court dismissed the charges due to police abuses, but the 11th Circuit (again) reversed that decision, noting that this conduct was not so extreme as to violate Wilcox’s right to a fundamentally fair trial.

However in a recent case from California, Nickerson v. Roe, 260 F.Supp. 875 (N.D.Cal. 2003), police misconduct was both broader and more insidious than the 11th Circuit examples cited above. In Nickerson, the detectives influenced witness testimony substantially. Among others, they tainted one witness’s memory (who had previously given a clear description that was inconsistent with the defendant) to make a misidentification. They interviewed another witness while he was hospitalized and impaired. They engaged in suggestive and leading (even aggressively *demanding*) questioning through their investigation. When a witness did not provide the testimony they sought, they pressured him to implicate the man they had targeted as the perpetrator. They gave witnesses cues and badgered them until the worn-down witnesses capitulated. They also intimidated those who might provide exculpatory/favorable evidence for the Defense. When a witness provided information that did not implicate Nickerson, the police accused him of lying and threatened his arrest. There were additional problems of withholding favorable evidence, and some officers falsely testifying.

The Court also considered how it should treat evidence of witnesses whose testimony was twisted by the harassing and intimidating pressure tactics of overbearing police. “Presentation of eyewitness identifications that result from intentional pressure by police to identify a particular subject [was] more akin to presentation of false evidence or perjured testimony than to the inadvertent use of a suggestive identification technique.” Id. at 911; United States v. Young, 17 F.3d 1201, 1203-04 (9th Cir. 1994)(“A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness.”). Because a conviction

cannot stand on false material evidence, Nickerson's conviction was vacated.

Consequently, when police misconduct is

pervasive, so that excluding one witness's testimony does not cure the impropriety, and where the accused surely was deprived of Due Process throughout his trial, dismissal is the fitting remedy.

2004 OUTSTANDING AMICUS RECOGNITION TO OUR BOOKER AMICUS TEAM

HENRY BEMPORAD, FRAN PRATT & PAUL RASHKIND

Even before *certiorari* was granted in *Booker*, two of our three Amicus Committee Co-Chairs, Henry Bemporad and Fran Pratt, were already collecting their thoughts and drafting legal arguments. They knew where the Association was headed and they were equally certain we would have no time to get there. They did not take it for granted that we would work with another organization, although they never ruled that out either. So when the first 30-person conference call occurred, they were prepared.

They were so prepared, they may not of noticed when the Association President skipped the country to travel with family to Italy. Henry Bemporad willingly (and graciously) took over the entire process of working with the Board of Directors and did a superb job with, of course, no time to do it in. He carefully analyzed the substance and the process, organized it all, listened to everyone and responded immediately to every question and concern. All of this on top of writing his own fascinating and unique legal response to *Blakely*. Not to mention the hours he spent working with our brief writer, Paul Rashkind, helping to substantively edit the brief. We could not have proceeded without Henry's commitment.

Fran Pratt also worked steadily behind the scenes. She took in all the various potential amicus

positions, summarized and wrote them up in time for both the Amicus Committee and our entire Board to review and comment on them. She too spent untold hours in conference and more hours in her office thinking things through. In addition, she took on all the responsibility for seeing to the myriad and sometimes arcane details required to actually file a first class Supreme Court brief -- from editing to obtaining letters of consent to contacting the printer to fronting the money to file the brief to actually getting the brief filed. Her work too has been invaluable.

Finally, PaulRashkind wrote the brief, with all that entails. It is beautifully written, carefully crafted and tightly argued. Paul analyzed, researched, discussed, and researched some more. He listened to the ideas and opinions of others, wrote, researched, analyzed and rewrote until the argument flowed seamlessly. All this despite the fact that much of his work was done under the watchful and frightening eyes of two hurricanes, at his home throughout a number of nights, by candlelight.

The result? The submission of an important, well-written and persuasive brief that has brought our organization increased respect and prominence. Our great congratulations and deepest thanks to Fran, Henry and Paul.