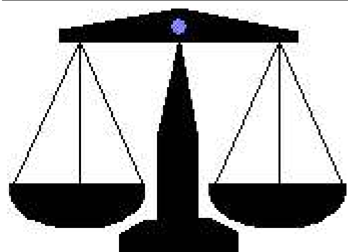


THE LIBERTY LEGEND

Editors: *Tony Lacy*
Lori Ulrich

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Spring Edition 2006
Volume III, Issue 3

NAFD NEWSLETTER

National Association of Federal Defenders
P.O. Box 22223
Nashville, TN 37202
www.federaldefenders.org

NAFD OFFICERS

President
Tim Crooks

Treasurer
Richard Moore

Secretary
Juan Matos

BOARD OF DIRECTORS

Carol Brook*
Judy Clarke
Christine Freeman
William Fry
Skip Gant
Geoffrey Hansen
Tony Lacy
Jude Lenahan
Bernardo Lopez
Terence MacCarthy
Henry Martin*
Penny Marshall*
David Owen
Nancy Price*
Jon Sands*
Felicia Sarner
Leigh Skipper
David Stickman*
Lori Ulrich
Dennis Waks

* Former Presidents

THOUGHTS FROM THE PRESIDENT

Dear NAFD members,

I am sitting here pondering the amazing news that I just received, namely: that the jury trying Zacarias Moussaoui – the first and so far the only person to be tried in connection with the horrific events of 9/11 – rejected the prosecution's call for a death sentence and instead sentenced Mr. Moussaoui to life in prison. Kudos to the Federal Public Defender's Office for the Eastern District of Virginia, including attorneys Gerald Zerkin, Ken Troccoli, and Anne Chapman, Acting Federal Public Defender Michael Nachmanoff, and the other members of their team, for a stellar job representing Mr. Moussaoui, in the face of innumerable obstacles. Special recognition should also go to the recently retired head of that office, Federal Public Defender Emeritus Frank Dunham, who accepted Mr. Moussaoui as the office's very first client and who shepherded the representation until his retirement in January of this year.

Although few of us represent clients as notorious as Mr. Moussaoui, many of us do share the experience – albeit to a much lesser degree – of representing persons who are viewed with opprobrium, and even demonized, by the press and the public. Who among us has not been asked, "How can you represent that person?" or "How can you sleep at night?" The Moussaoui case reminds me of the answers to those questions.

A large part of our role as Federal Public Defenders is to ensure that our clients are judged only for their criminal acts, and not for their personalities, racial or ethnic origins, philosophies, or beliefs. And, we fulfill that role in large part by insisting that our clients, no less than any other person who appears before an American court of law, receive all the procedural rights to which they

Continued on Page 2

are entitled. By securing those rights for even our most demonized clients, we affirm their basic humanity, and we also assure the world that American courts are courts of justice.

So, the next time you represent someone who is accused of horrible acts, or who is publicly reviled, take heart from the many great criminal defense attorneys, both past and present, who have courageously represented persons in the same situation – including Clarence Darrow for Leopold and Loeb, the defense attorneys for the Rosenbergs, and now the Federal Public Defender's Office for the Eastern District of Virginia. In following their example, you are upholding, not undermining, the American ideal of justice for all.

I look forward to seeing you all in San Francisco.

All best,
Tim Crooks, President

In this issue . . .

THOUGHTS FROM THE PRESIDENT. 1
REASONABLE DOUBT STANDARD FOR
"SEPARATE OFFENSE" GUIDELINE ENHANCEMENTS
Or... Bringing Some "Due" to the Process of Guidelines Calculations.. 3
By Felicia Sarner, Supervisory Assistant Federal Defender, Eastern District of Pennsylvania
NONCAPITAL MITIGATION SPECIALISTS. 5
By Jacob Etner, Investigator for the Central District of California, Los Angeles
and James Tibensky, Investigator for the Northern District of Illinois, Chicago
KudosKorner. 8
ADVANCED FEDERAL DEFENDER SEMINAR SAN FRANCISCO 2006. 15
By Geoffrey A. Hansen, Chief Assistant Federal Public Defender, Northern District of California
JUSTICE IMPERILED:
THE ANTI-NAZI LAWYER
MAX HIRSCHBERG IN WEIMAR GERMANY. 16
A Book Review by Jon M. Sands, Federal Public Defender, District of Arizona
MEET THE NEW CDO OFFICE
IN THE WESTERN DISTRICT OF NORTH CAROLINA.. 18
THE MISSING LINK. 19
By Marc H. Robert, Assistant Federal Defender, District of New Mexico, Las Cruces
AMICUS COMMITTEE REPORT. 20
By Fran Pratt, Research & Writing Attorney, Eastern District of Virginia, Alexandria
RECIPIENTS OF THE
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
2006 OUTSTANDING INVESTIGATORS AND PARALEGAL AWARDS. 22
REPORT FROM MAINE. 23
By David Beneman, Federal Public Defender, District of Maine
SPECIAL RECOGNITION TO THE *MOUSSAOUI* INVESTIGATORS AND PARALEGALS.. 24

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
DUES AND MEMBERSHIP FORM

Name: ____________________ District: __________ Position: __________
Address: ______________________________
E-Mail: ______________ Telephone: ______________ Fax: __________
Renewal: ______ New: ______ I would be interested in working on a committee: ______________

Mail completed form and check in the amount of $52.00 to:
National Association of Federal Defenders, P.O. Box 22223, Nashville, TN 37202

REASONABLE DOUBT STANDARD FOR "SEPARATE OFFENSE" GUIDELINE ENHANCEMENTS
Or... Bringing Some "Due" to the Process of Guidelines Calculations

By Felicia Sarner, Supervisory Assistant Federal Defender, Eastern District of Pennsylvania

I. Introduction

Now that federal sentencing has survived a year post-*Booker*, most of us are living with the reality that the guidelines still rule. Sure, we're getting really good results in some cases, but for the most part, probation officers calculate the guidelines as they always did, the government argues the presumptive reasonableness of the ranges, and judges use the preponderance standard to enhance ranges dramatically. Everyone's so afraid of what Congress will do that in most jurisdictions, "the more things change, the more they remain the same" is the prevailing sentiment.

If the guidelines are going to remain the driving influence at sentencing, we need to focus on their correct application in addition to emphasizing why they are unreasonable in a given case. Courts have been unreceptive to the argument that a heightened burden of proof applies to enhancements in general, so let's look at certain categories of enhancements to see what due process requires. What follows is an argument currently pending in the Third Circuit: that if the enhancement is based on allegations that the defendant committed a *separate and distinct criminal offense* in the course of the offense of conviction, that separate offense must be proven beyond a reasonable doubt.[1]

II. Separate Offense Enhancements

Guideline enhancements fall into different categories. Most require the court to make findings about the nature and extent of the offense of conviction, like drug quantity, loss amount, number of victims, number of firearms, degree of injury sustained, role in offense, etc. But some enhancements require the court to find that our client committed a *separate criminal offense.* The best example is the firearm guideline's 4-level enhancement, at § 2K2.1(b)(5), if the gun was possessed in connection with "another felony offense." By its plain language, the court is required to "convict" the defendant of an independent crime, not just a factor that aggravates the offense of conviction.

In light of *Booker's* Sixth Amendment analysis of the right to a jury trial, what evidentiary burden is required to conclude that someone is guilty of conduct that they were never charged with or convicted of, and that the Constitution presumes them innocent of? In *In re Winship*, 90 S.Ct. 1068 (1970), the Supreme Court reiterated the fundamental principle that anyone accused of a crime, including a *juvenile facing a delinquency proceeding*, is presumed innocent and entitled to the essential due process protection of proof beyond a reasonable doubt. A trial by jury is not required in juvenile delinquency proceedings, and such proceedings cannot result in a criminal conviction (only an adjudication of delinquency). Delinquency proceedings can, however, expose a child to a loss of personal liberty. As such, *In re Winship* held that due process requires the highest evidentiary standard in such proceedings: proof beyond a reasonable doubt.

Federal sentencing proceedings cannot be meaningfully distinguished from the juvenile court proceeding at issue in *In re Winship*. Like the juvenile, our client does not face a formal criminal conviction of the independent crime underlying the enhancement, and s/he is not entitled to a trial by jury on the allegation (at least arguably). Nonetheless, our

[1] Ron Krauss, AFD in MDPA, argued the case in *United States v. Grier*, No.05-1698. The briefs addressed the reasonable doubt standard for enhancements in general, but his position was refined at oral argument to focus exclusively on "separate offense" enhancements, and that is what the Third Circuit is expected to decide.

client stands accused of a separate offense and surely faces increased punishment if the judge finds her/him guilty of it. The reasoning of *In re Winship* applies fully here, and the finding should be at no less an exacting standard than proof beyond a reasonable doubt.

Moreover, there is precedent in case law and the guidelines for applying different evidentiary standards to different types of enhancements. Long ago, in *United States v. Kikumura*, 918 F.2d 1084 (3d Cir.1990), the Third Circuit required the heightened evidentiary standard of clear and convincing evidence because the upward departure in that case was so extensive that it became the tail wagging the dog. A post-*Booker* look at *Kikumura* discloses that what the district court really did was find the defendant guilty of the separate crime of terrorism, which prompted the dramatic upward departure. Due process demanded a higher evidentiary standard before such a large increase could be applied.

The Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is also helpful. That opinion addressed both Fifth Amendment (due process) and Sixth Amendment (jury trial right) issues, and involved conduct that was arguably a separate criminal offense under New Jersey law: a racially motivated hate crime. The Court clearly held that such an offense must be separately charged and proven beyond a reasonable doubt before it can be relied upon to enhance the penalty beyond the statutory maximum.

USSG § 3A1.1(a) provides precedent in the guidelines system for proof distinctions between enhancements constituting separate crimes and other guideline enhancements. It reads as follows:

> (a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendre, the court at sentencing determines *beyond a reasonable doubt* that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels. (emphasis added).

Both the background commentary to § 3A1.1 and the history of Amendment 521 found in Appendix C of the guidelines manual make clear the Sentencing Commission's view that such a finding, if made by a judge at sentencing, is tantamount to finding that a *separate hate crime* was committed, and that when a sentencing judge is called upon to do so, the reasonable-doubt standard must apply. Explanatory notes to Amendment 521 clarify that the Commission received a directive from Congress to enhance penalties where the "finder of fact at trial determines beyond a reasonable doubt that the offense of conviction was a hate crime." The Commission expanded upon this directive to encompass scenarios where the conviction was secured by a guilty or *nolo* plea, and it required the reasonable-doubt standard for judicial findings "that the offense was a hate crime" in order to "avoid unwarranted sentencing disparity based on the mode of conviction."

There are important policy reasons supporting the reasonable-doubt standard for separate offense enhancements as well. In light of the Supreme Court's recent Sixth Amendment jurisprudence, defendants should not be sentenced for separate crimes that they were not charged with and convicted of, and that were not proven beyond a reasonable doubt. Carving out a "separate offense" exception will help to enhance public confidence in our justice system and ensure that defendants are not wrongfully imprisoned for crimes they did not commit.

At the very least, the doctrine of constitutional avoidance compels application of the heightened standard. This doctrine of statutory construction provides that where there are two plausible constructions and "one of them would raise a multitude of constitutional problems, the other should prevail - whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 125 S.Ct. 716, 724 (2005).

One caveat: the question of what constitutes a "separate offense" under the guidelines may be a

slippery slope. The firearm enhancement for committing "another felony offense" is the purest example in the manual. Cross references also tend to require separate offense findings. Other enhancements that involve allegations of separate criminal conduct are less clear, because their plain language may not affirmatively demand the specific finding that a new crime was committed. Consider the obstruction enhancement, which can apply for conduct that may or may not constitute a separate criminal offense (threatening a witness vs. not fully disclosing financial data in the presentence investigation). You want to limit your argument to those scenarios where a distinct crime is clearly being alleged.

III. Conclusion

We need to carefully scrutinize the facts of our cases to see if the allegations underlying a guidelines enhancement require the judge to affirmatively find that the client committed a separate, distinct criminal offense. If that is the case, our client is presumed innocent of that offense and only the most exacting evidentiary standard – beyond a reasonable doubt – should overcome that presumption. Let's demand some due process to the application of these enhancements, if the guidelines continue being the driving factor behind the sentences our clients are receiving.

NONCAPITAL MITIGATION SPECIALISTS

By Jacob Etner, Investigator for the Central District of California, Los Angeles and James Tibensky, Investigator for the Northern District of Illinois, Chicago

And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. – G.K. Chesterton

You are as prepared as you can be for the sentencing hearing. The sentencing memorandum is in, the defendant has been prepared for allocution, the points of law are covered, the aggravating factors have been considered and countered by what mitigation you could find in the presentence investigation report as well as from your own experience with the defendant. You have rehearsed your pitch to the judge. That's it. You are ready. Nothing has been left out, has it?

Perhaps. Consider: How many visits to the client's home have you made? How many family members have been interviewed in depth to gain an understanding of your client's history? The offense for which your client has been convicted presents a problem for the judge, for you, for the client, for the community and for the victim. What solutions have you provided in your sentencing memo that might appeal to those varied and conflicting interests in order to get a sentence that is "sufficient but not greater than necessary"? Would you be willing to accept the services of someone who can do all of these things for you as part of your team?

A noncapital mitigation specialist, also known as a sentencing advocate, might be able to add a missing dimension to your presentation. The sentencing advocate's job is to lay the groundwork upon which the attorney can build a sentencing argument. The advocate's work provides information that seeks to persuade the judge to give a sentence lower than might otherwise be expected, with the least restrictive conditions. The advocate works to gain the heart of the judge, knowing that the mind often finds a way to follow the heart. She or he illustrates the client's life, painting a picture with anecdotes, examples and background facts. By taking those compelling facts and weaving them into a persuasive

story, the advocate sets your client apart from the hundreds of other defendants the judge has sentenced in the past. This story will be client-based in contrast to the crime-based presentence report that the judge has received. The judge may have heard psychiatric terms a hundred times in his or her courtroom, but the sentencing advocate provides images of what it means to be suffering from the effects of the disability. The client's diagnosis will be described by using examples from the life of the human being who is standing before the judge. An expert can pronounce a diagnosis, but only the client's personal story can make the diagnosis come alive in the mind (and the heart) of the judge. The bottom line is that the entire defense team wants to get the judge to feel sympathetic toward the client and impose a sentence which fits all the facts of the client's life and not just the facts of the crime.

The advocate often must explain to the court the influences of poverty, addiction, mental illness and family circumstances on the client's behavior. ("Judge, would you let a child of yours spend even one night in the environment in which our client lived her entire childhood?") To do this the advocate will conduct a detailed investigation of each stage of the client's life in order to uncover possible mitigating factors, to identify possible witnesses to support mitigation and to assist the defense team in preparing the case.

This requires a wide range of experience and training on the part of the advocate. He or she must be intimately familiar with the effects of mental health issues and substance abuse problems, be familiar with family systems, physiology, community and professional resources, interviewing techniques, persuasive writing, testifying in court, record-finding, and how to locate the necessary experts for evaluations in order to uncover all the important aspects of the client's life, not just the facts of the case.

Both of us are Investigators with Federal Defender offices, Jacob in Los Angeles and James in Chicago. Both of us are used as full-time noncapital mitigation specialists. One of the ways in which we differ from traditional investigators is our emphasis on clinical interviews.

A clinical interview uses open-ended questions, or prompts that are not questions at all, hoping that the responses will lead to more questions and, finally, to the type of information that a standard informational interview rarely reaches. These are examples of useful open-ended questions/prompts: "When you were a child and really scared, where did you go to be safe? What was it that made you really scared? What else did you do to be safe?" or "Describe your childhood" or "What would you tell the judge if he or she was sitting in the room with you right now?" or "What did I forget to ask you?" This type of interview lets clients know that they are being heard on their own terms and appreciated in their totality. It works to establish trust.

The important aspects of a client's life include family history, childhood development, relationships with parents and siblings and offspring and friends and coworkers and so on, school history including sports and clubs, dating history, military history, criminal record, employment, financial condition, religious activities, substance abuse, mental health, medical history, history of illnesses and injuries (especially head trauma), sexual orientation and sexual history, marital history, current level of functioning, and all the other things that might come up in the interviews. This approach does not lend itself to the use of checklists because we never know where a good open-ended question will lead. It is sometimes necessary to let an important part of the interview go in order to allow the client's answers to guide the direction of the conversation. This means that the uncovered material will have to wait for a subsequent interview.

The client's history begins before birth. It is important to know if their mother's pregnancy with them was normal, if the delivery was normal. Is there a family history of mental illness or substance abuse or physical or mental abuse? What means of coping with life's problems has your client developed? Are there clues as to what makes your client tick that you might have missed?

As anyone who has been in the criminal justice system for any length of time knows, many, if not a majority, of our clients suffer from some diagnosable form of mental illness. Routine functions for a sentencing advocate include screening for the possibility of mental illness, recommending an expert to conduct an examination, and providing the background information that the expert can use to supplement the examination of the client in order to form a diagnosis. Most effective advocates keep "experts' lists" for every type of expert that might be needed, containing the names of people that we know from prior work or from interviews with them.

A good mitigation investigation uncovers assets, not just liabilities. It is crucial to learn what the client is good at, what they have done right and what foundation there is for building a good future. Are there family traditions which give strength and support to the client? Does your client have talents that are hidden from view?

Individuals are not the only (or necessarily the best) sources of information about themselves. It is essential to interview siblings, parents, coworkers, friends, teachers, doctors, clergy, treatment professionals and anyone else who has been important in the client's life in order to fill out the portrait of the client. Collateral interviews are imperative.

A number of interviews with the client and his or her family and/or friends are usually needed to cover this ground, one is rarely enough. As trust builds, more information comes out.

The advocate can encourage the client to participate in mental health or substance abuse treatment or anger management therapy, become employed, enroll in school or otherwise engage in activities that might prove mitigating. This requires the advocate to be familiar with the treatment and other social resources of the community. It also requires the advocate to be skilled at screening for possible treatment needs.

As an example of the process, Jacob describes his recommendation of community service:

(1) It should be something the client cares about and really wants to do;
(2) It should not be service that is fungible, i.e., picking cigarette butts off the freeway, or helping out in an emergency room;
(3) It should be something **unique** to the client, and if he doesn't do it, no one will because they don't know how, or can't; and
(4) It should be of significant value to the community.

I have always found it to be a good policy to be generous about community service, i.e., suggest a humongous number of hours in exchange for incarceration, e.g., 5000 hours spread over a 3-5 year supervised release period. Clients, and attorneys sometimes balk at this, thinking it is too restrictive, may give rise to a future violation, etc. Basically, I explain it to the judge this way (perhaps a bit more formally): A typical 40 hour a week job works out to 2000 hours per year. 4000 hours then say, is the equivalent amount of full-time work the guy could do instead of being in prison for two years. So, if the judge is contemplating sentencing the client to two years, maybe he could give him this community service sentence (which is important to the community) instead and we'll all come out ahead. Maybe this is superstition on my part, but I've always felt it is easier to persuade the judge with a substantial proposal. At the very least it shows we've thought about it, not just thrown it in as something to propose.

I've almost always been a proponent of having the client start the community service **before** sentencing. This really does work better if the project is something the client has an interest in anyway. Of course this is tricky; on one hand you want the judge to know how seriously the client is committed to the community service, how important he thinks it is, and his starting in on it is much more powerful than passively asking for it as a disposition. On the other, you don't want the judge to start thinking you're trying to manipulate him or force his hand. So the recommendation has to be managed carefully.

Another value of having the client start the community service is being able to get a letter from the agency where he's doing the work to detail the value and importance of his work, and to point out how detrimental to the project, clients, the public, etc., it would be if it were interrupted.

The sentencing advocate may present her or his information in a number of ways. The facts developed may be used by the attorney in the sentencing memorandum. Or those facts may be put into a separate report written by the advocate in support of the sentencing memo. Either way, the compelling facts will give the judicial officer an alternative to what the prosecution is asking the judge to do. The facts developed in the mitigation investigation will explain how the important factors in the client's life up to this point have contributed to the offense behavior. The facts can be used to address the defendant's potential treatment or other needs and to provide a foundation to suggest ways in which a sentence can be fashioned that solves the problem which the crime represents. In contrast to the presentence investigation report, a mitigation report will be client-based, not crime-based. The advocate may be asked to present oral information at the sentencing hearing or even testify. Preparation for this by the entire defense team is important because we advocates have not been trained in testifying.

Creative ways in which to present the facts include photos, videos and live witnesses, especially non-family members such as clergy, who will appear less biased.

Much of the information developed in mitigation may be useful at trial. It also can be helpful in other proceedings, such as bond hearings or rules to show cause why probation or supervised release should not be revoked. Moreover, good mitigation information can sometimes persuade the prosecutor to reduce the charges or even defer prosecution. While we strongly believe that we should be brought into the case to begin the mitigation process as early as possible, we also know that a sentencing advocate can be a valuable member of the defense team at any stage.

KUDOSKORNER

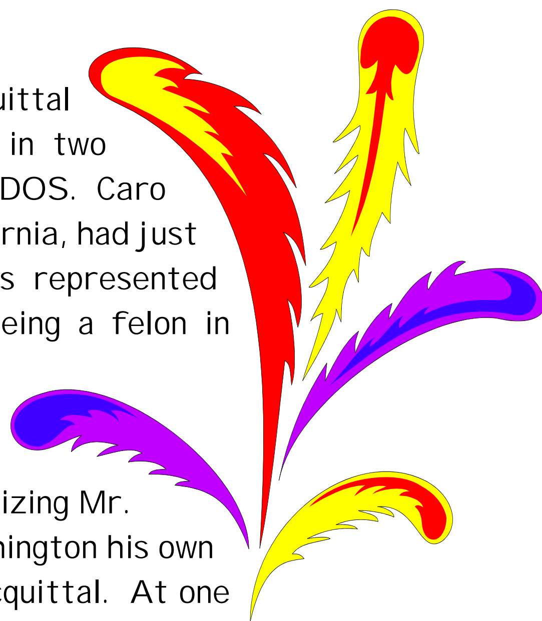
Congratulations to Carlos Williams, AFD for the Southern District of Alabama, and to Jackie Page, Mitigation Specialist, for their hard work in winning a fantastic sentencing victory! The client was charged with possession of unregistered firearms. They compiled a compelling sentencing memorandum and at sentencing following the guilty plea, presented it along with other character witnesses to the district court to demonstrate that the client was not a violent offender; rather, gun ownership and use was an integral part of his upbringing. Carlos also submitted legal authority with legislative history to the court to persuade it that the client did not represent the kind of harm that Congress intended to protect society from when it passed the possession of unregistered firearms law. Instead of the guideline sentence of 37-46 months, the client received 5 months' probation.

Bob McWhirter, AFD for the District of Arizona, Phoenix, recently won an appellate case that has national implications for juveniles. The 9th Circuit Court of Appeals overturned a 1999 U.S. Bureau of Prisons policy that refused to give juveniles who were sentenced for federal crimes any credit for presentencing confinement. As a result of the ruling, the first by any federal

appeals court on the issue, the policy will be changed to treat juveniles the same as adults. His client, a 17-year-old identified as Jonah R., was arrested in June 2001 for firing a gun from a car that police pulled over on the Salt River Pima-Maricopa Indian Reservation near Phoenix. After successfully appealing a decision to prosecute him as an adult, Jonah R. was charged and convicted as a juvenile and sentenced to 2 1/2 years in a federal juvenile prison in June 2004. An adult receiving the same sentence would have been released at that point because he would have been credited with the nearly three years he had been confined before sentencing. But Jonah R. was denied any sentence reduction under the Bureau of Prisons policy and was sent to the juvenile prison, where he was being held. The ruling entitles him to immediate release. The policy was based on a 1998 ruling by a federal judge in the U.S. Virgin Islands, who said juveniles in federal custody were "delinquents" in "official detention" and thus were not entitled to sentencing credits available for criminal defendants jailed before their trials. But the appeals court said that the federal system for juvenile offenders, established in the 1930s primarily for rehabilitation, was not intended to be more punitive than the adult system. "We can think of no sensible reason why Jonah's liberty, which he lost for almost three years before his culpability was adjudicated, is worth less than a similarly situated adult's," Judge William Fletcher said in the 3-0 ruling.

Bob McWhirter also deserves kudos for an illegal reentry case in which he argued that the government failed to prove alienage. The judge granted a Rule 29 dismissal of the charges. This was a somewhat unique case because the client did not make a statement that could be used in his criminal trial. After Bob cited for the court the proper 9th Circuit case, the judge found that the fact of the deportation could not be used to establish alienage.

Celia Rumann and Gerald Williams, AFD's, District of Arizona, Phoenix, and their defense team got an acquittal for their client in a aggravated sexual abuse of a young girl. The defense focused on others, the child's proclivity to lie, and the FBI agent's own misstatements. The defendant's supposed confession was obviously, as argued, a result of FBI manipulation. Well deserved congratulations to the defense team.



Outright jury acquittals are rare events, but an acquittal and a successful motion to suppress in the same week in two different cases are certainly deserving of some special KUDOS. Caro Marks, senior litigator for the Eastern District of California, had just such a week in March. First, she and AFD Jeff Staniels represented Darryl Washington in connection with the charge of being a felon in possession of a firearm. Darryl was driving a car at 4:00 a.m. , chased by the police, cornered, then run down when he got out of the car. Left behind, in front of the driver's seat was a handgun. Caro and Jeff did such a good job of humanizing Mr. Washington at trial that the Deputy Marshal lent Mr. Washington his own sport coat to wear at trial and let him keep it after the acquittal. At one point during trial, the prosecutor asked for a sidebar because he was so

frustrated at Mr. Washington's testimony. The judge's response: "Go ahead, if you can find anyone in this city who will impeach his testimony, I'll let you put him on. But you won't find anyone, can't you see that?"

Then, as soon as this verdict was reached, Caro had a suppression hearing in the case of U.S. v. Michael Carr. Mr. Carr was charged with possession and distribution of 700+ grams of meth/ice and several counts of possession of a firearm during a drug trafficking offense. Caro, being assisted this time by AFD Ned Smock, cross examined several "citizen informants" and police officers who obtained a search warrant to search a warehouse associated with Mr. Carr. Armed with the results of some excellent investigative work by AFD Investigator Melvin Buford, Caro and Ned were able to show that the police had misstated the informants' information and knowingly put false information into the warrant application. The hearing was so successful that the presiding judge (a former U.S. Attorney) stated that based upon what he'd heard he did not believe he could continue to trust any U.S. Attorneys' pleadings when they argued against the need for Franks hearings. Congratulations to all.

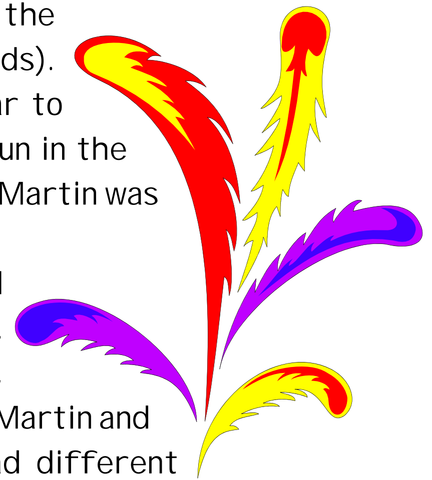
Parolees in California were the Rodney Dangerfields of the prison system -- they got no respect. It didn't seem to matter whether the governor was a Democrat or Republican -- in the very few instances that the Board of Parole Hearings granted parole, it was a very safe bet that the governor would reverse its decision. Overcoming great odds, Ann McClintock, AFD, Eastern District of California, won federal habeas relief for a client for whom the board failed to conduct a fair parole suitability hearing. Ann was assigned the case in 1997 and did a tremendous job in discovery, obtaining and analyzing over 100,000 pages of parole hearing transcripts, deposing parole commissioners, and compiling and analyzing statistics. Ann presented overwhelming evidence that there was a blanket policy against parole for murderers that was not only contrary to the state constitution but also deprived the client of his due process right to a fair hearing by neutral decision-makers. Last year, the district court judge adopted the findings and recommendations of the magistrate judge, and ordered the client released unless the state provided a fair parole suitability hearing, conducted by a board free of any prejudice stemming from a gubernatorial policy against parole for murderers. Ann's tireless work, in conjunction with the efforts of other assistant federal defenders and criminal defense lawyers throughout the state, on behalf of this client and others has started to turn the tide and given lifers a fighting chance.

Kudos are due to Carolyn Wiggin, AFD, Eastern District of California. Last year, the psychiatrists at the local jail became concerned for the welfare of an inmate named Martin -- a deaf, illiterate man, who was unable to communicate using either American Sign Language or Spanish Sign Language, who the government was trying to remove to Mexico. The office was asked

to investigate. Carolyn did a phenomenal job, along with paralegals Julie Denny and Tom Richardson, investigator Linda Humble and intern Ed Delgado, and certified law student Sarah White, investigating Martin's history. Carolyn researched arcane areas of immigration law, located and secured a declaration from the "gesture interpreter" on one of Martin's cases from a decade earlier, and finally prevailed on an advocacy group to represent him in the removal proceedings. Earlier this year, an immigration judge ruled against INS and finally ordered Martin's release. He was no longer terrified of being deported to Mexico, but now he had nowhere to go. But Carolyn and "Team Martin" arranged for Martin to stay at a shelter, got him a backpack, and have assisted him in applying for government support.

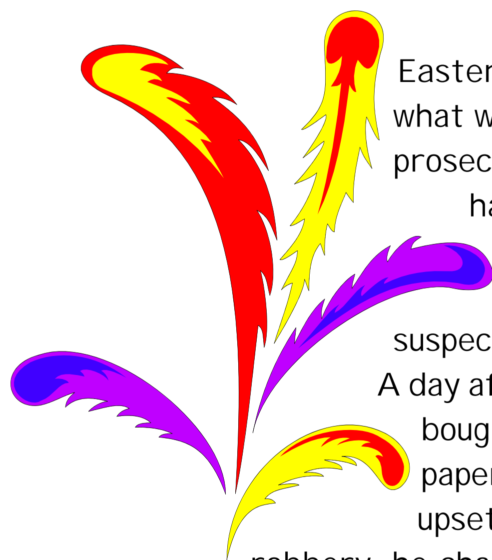
Sarah Gannett, AFD, District of Maryland, Baltimore, received a probationary sentence with six months of a halfway house and six months of home confinement for her client, a pre-PROTECT child pornography case where the guidelines were 33-41 months. The case involved hundreds of pictures that were seized after the client was caught on the "Candy Man" internet site. The judge departed from the guideline range for post-offense rehabilitation. The client had a history of child abuse, sought voluntary treatment, lost his career earning $80,0000 a year, and worked his way back up by working for $7.00 an hour in a bakery, earning $30,000 a year by the time of sentencing.

Nancy Price, AFD, Western District of Missouri, won two felon in possession cases recently. In the first, when her client, Martin, went to check in with his state probation officer, his P.O. called the Springfield Police out to arrest him on a failure to appear warrant. After he was arrested he asked the officers to go tell his friend who had come with him (waiting in car) that he was not going to be coming home. After the officers started asking the client questions about his "friend" he said never mind (in so many words). One of the two officers of course still wanted to go out to the car to question Martin's friend. Long and short of it is they found a handgun in the passenger floorboard (which is where the friend had been sitting and Martin was driving).



Gov't thought they had a lock on a conviction because they had a supposed confession from Martin witnessed by three officers. Thrust of the case was the government's sloppy investigation, evidence somewhat linking the gun to others, officers' harassment of Martin and that Martin didn't mean his confession. Martin and the police had different accounts of how the police questioning occurred. Martin testified he only said the gun was his because an officer said, "you're going to get charged by the feds, we're going to charge your friend, you might as well admit about the gun." Martin then said "you're going to charge me anyway, fine, it's mine." Officers of course denied this exchange. Officers testified Martin admitted the gun was his at least three times, blah blah. After about 35 minutes of deliberation, the jury returned a not guilty verdict.

In the next case, the government violated the client's speedy trial rights under the Interstate Agreement on Detainers Act. Nancy filed a motion to dismiss with prejudice. There was no question that the indictment had to be dismissed, the only question was whether it would be dismissed with or without prejudice. Nancy could not argue actual prejudice, but argued instead the fact that this was the third IADA violation by the government in this division in as many years against her clients. Nancy argued that administration of the IADA required dismissal with prejudice to force the government to respect the mandates of the statute. After internally debating the motion for about two months, the government threw in the towel. The district court then quickly signed the order dismissing the indictment with prejudice!



Congratulations to Cathy Henry and Ben Cooper, AFD's, Eastern District of Pennsylvania, for getting a not guilty verdict in what would otherwise appear as an unwinnable bank robbery case. The prosecution had a surveillance tape which showed that the perpetrator had a fever blister at the time of the bank robbery. The picture from the tape was put in the Daily News and the defendant's daughter called in for the reward and reported the client as a suspect. The client had a fever blister at the time of the bank robbery. A day after the robbery, the client paid all his back rent and tickets and bought several pieces of jewelry. The day the picture was in the paper, the client's reaction was captured on tape at work looking upset, and he immediately left complaining that he was sick. After the robbery, he changed his appearance by cutting his long hair short and shaving. The client gave two different confessions to his girlfriend, he was identified by the bank manager, and picked from a photo array. Nine other family members and co-workers testified that the picture in the paper was the client. A hoax bomb was a camcorder case left at the bank, and a co-worker saw the client with a similar case a few weeks before the robbery. So how is it that Cathy and Ben won the case? Cathy and Ben hired an expert, a forensic anthropologist from Penn, who testified that the robber in the surveillance picture had attached earlobes and the client had unattached earlobes.

Special congratulations to Gino A. Bartolai, Jr. AFD, Middle District of Pennsylvania, Scranton for his recent "not guilty" verdict. The client was charged with the interstate transportation of stolen goods, in this case, cases of wine. The reports from the court house are that it was his outstanding cross examination of one of the two co-defendants who testified against his client after pleading guilty himself.

Continuing our series (which soon may qualify as a spate) of wins for the good guys, AFD Jay Finkelstein, Western District of Pennsylvania, won TWO complete acquittals recently. One was a jury acquittal of arson followed immediately by the Court's judgment of acquittal on conspiracy

despite the jury's conviction on that count. Jay won on the facts, then to the Court by demonstrating the government's failure to adduce sufficient evidence of his client's participation by agreement.

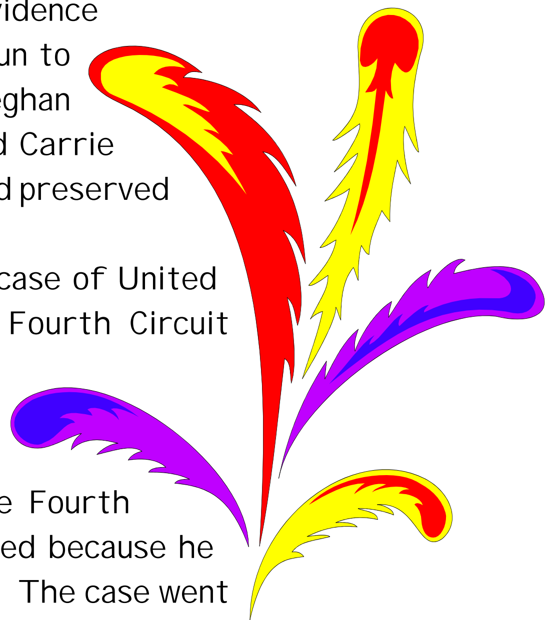
Jay's next victory (March 14, 2006) was a jury acquittal on all counts of an indictment alleging car jacking, 924(c) (the 10 year minimum), and 922(g). Jay first obtained a severance of the 922(g) count for prejudice, then he wonderfully proved that the identifications of his client were simply wrong, and showed why the circumstantial evidence of finding the car near the client's uncle's home was not nearly as probative as it might appear to be at first blush.

Amazing Jay also had a suppression motion granted after proving that the policeman was not "struck lightly" by his client's car, thus eliminating the purported probable cause justification for the stop by arresting officers who heard the "be on the lookout" report.

Most recently (March 15, 2006), AFD Michael Novara, Western District of Pennsylvania, and RWS Kim Brunson convinced the Court to suppress a gun and marijuana seized from the home our client was visiting over night. The police arrested Mike's client peaceably outside the home on an arrest warrant following a 5-hour siege by SWAT officers due to a supposed "hostage situation." Since Mike's client, as well as his girlfriend and their children, were safe and in custody, the police justification of "post-arrest protective sweep" was held to be insufficient because the police could not point to a "reasonable suspicion" that OTHERS constituting a danger were in the home, especially given the constant police presence and communication with the inhabitants over the preceding five hours.

This is to congratulate all those responsible for an amazing Fourth Circuit sweep. Fran Pratt, Research and Writing Specialist and Meghan Skelton and Geremy Kamens, AFDs, Eastern District of Virginia, Alexandria, handled four cases this Fall in the Fourth Circuit, which resulted in three published opinions and four reversals.

In United States v. Nunez, decided December 21, 2005, the Fourth Circuit reversed Judge Williams, who had permitted the government to introduce evidence (a police report rife with hearsay) after the jury had begun to deliberate, and ordered a new trial. Congratulations to Meghan who briefed and argued the appeal and to Mary Maguire and Carrie Grady, AFDs in the Richmond office, who tried the case and preserved the issues.



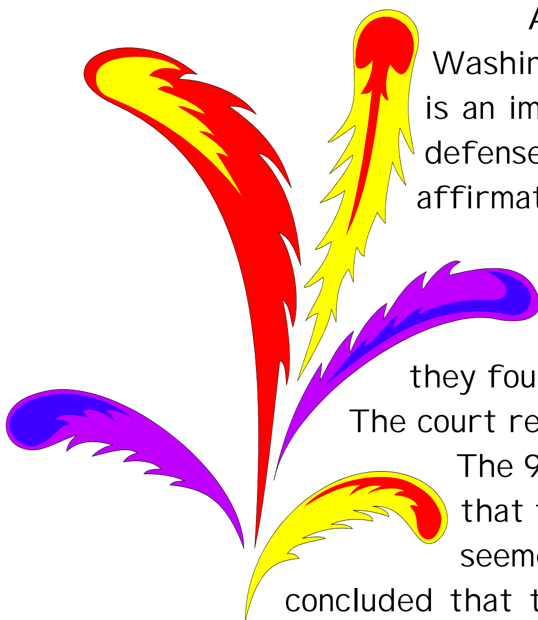
The Fourth Circuit gave Fran a total victory in the case of United States v. El-Shami, decided December 27, 2005. The Fourth Circuit reversed Mr. El-Shami's conviction for unlawful re-entry after deportation based upon the argument that the government failed to prove that the INS provided adequate notice to the defendant of his deportation hearing. The Fourth Circuit agreed and found that the defendant was prejudiced because he might actually have successfully contested the deportation. The case went

back to Judge Hudson for re-sentencing on fraud counts that did not play a major role in the original sentence for illegal re-entry. Mr. El-Shami originally received a sentence of 137 months; the court at that sentencing expressed its desire to impose a sentence of 180 months. On remand, Fran realized that there had been a two-level error in his original guidelines for the fraud counts, brought this to the attention of Rob Wagner, Supervisory AFD, Richmond, who successfully argued the error at the resentencing, among other persuasive arguments, at which time Mr. El Shami received a sentence of 46 months.

In United States v. Belyea, decided December 28, 2005, the Fourth Circuit reversed Judge Brinkema, who amongst other things, had refused to hold a Daubert hearing to determine whether the defendant could introduce evidence regarding false confessions. The Fourth Circuit reversed and sent the case back to Judge Brinkema for an evidentiary hearing, suggesting that the evidence could have made a substantial impact in the case. The Court also sent the case back to determine whether newly-discovered evidence was be admissible, which would warrant a new trial. Geremy tried the case and did the appeal. It is an extraordinary victory.

Finally, in a fourth victory, Geremy successfully argued in United States v. Rodriguez, decided January 3, 2006, that Mr. Rodriguez preserved his Booker objection when he argued a 6th Amendment violation under Blakely before Booker was even decided.

Victories in the Fourth Circuit do not come along too often, so to have four in a row is a tremendous achievement. Congratulations to everyone who worked on these cases at the trial level, on the briefs, and assisting with the moots. What a way to end 2005 and begin 2006.



A nice win for Kim Deater, AFD, Eastern District of Washington, Spokane, in the case of United States v. Southwell. This is an important decision regarding jury instructions and affirmative defenses. The 9th Circuit held that a jury must unanimously reject an affirmative defense, in this case insanity. The defendant was charged with arson. He raised the defense of insanity. The court instructed on the charge, and on insanity. During deliberations, the jury asked whether they could convict if they found him guilty of the charge but were not unanimous on sanity. The court refused to answer, referring the jury back to the instructions. The 9th found that the instructions were unclear on what to do, and that there was, strangely, no controlling precedent. The Supremes seemed split on this. The 9th reviewed various state courts, and concluded that the requirement was that an affirmative defense had to be unanimously rejected. The jury couldn't find guilt on the element, and then a split on the affirmative result in a conviction. A jury united on guilt but divided on an affirmative defense is hung. A very nice opinion.

ADVANCED FEDERAL DEFENDER SEMINAR SAN FRANCISCO 2006

A WARM WELCOME FROM SAN FRANCISCO

By Geoffrey A. Hansen, Chief Assistant Federal Public Defender, Northern District of California

As the host office for the San Francisco Advanced Seminar May 31-June 2, we wanted to send out an advanced welcome for those of you who are coming out for the soiree. We thought we would let everyone know what we are trying to do to make your visit here as memorable and fun as we can, so here is the story. When you arrive, we will have packets for everyone telling you where to go and what to do. Because we are expecting between 500-600 participants, there will be no set dinner for us all to attend during the seminar as has been the case in the past. Instead, we will have some designated clubs in North Beach where folks can go after dinner each night to meet the other participants.

We have heard that a lot of folks are coming out early for the Memorial Day weekend, and we are trying to put together some information for you to use as you explore the Bay Area. We will be contacting some wineries to arrange special tours and tastings, and at some point I will send out a list of those special events to see if any of you would be interested in participating. More importantly, there are a few events which you may want to attend which require you to make advance purchases if you want a ticket. Our opera is performing Madame Butterfly on May 27 and 30th,and Joan of Arc on June 3, but there are a limited number of tickets left so if you want to attend the opera you may want to go to www.sfopera.com and order your tickets now. The Giants are in town against the Rockies on May 26, 27, and 28th, and although there will probably be plenty of tickets we may be able to get a group discount for the tickets if some of you are interested in going to a Giants game. The A's are playing in Oakland (a short BART ride away) on May 29, 30 and 31 against Minnesota, but they never sell out so you can get cheap tickets at the park if you are would like to see the better Bay Area team. The tour of Alcatraz is great, but you may want to order your tickets before the conference. If that tour is something you want to do, go online to www.blueandgoldfleet.com and order your tickets because that tour sometimes sells out as well.

If you have heard of other places, attractions or events which you would be interested in seeing, let me know if we can be of any help to you in planning the trip. We are genuinely looking forward to seeing you here and showing you a great time.

* * * * * CORRECTION * * * * *

In the Winter Edition of The Liberty Legend, 2005, we mistakenly reported that Michael Sokolow personally briefed and argued two Supreme Court cases, *Deal v. United States* and *Witte v. United States*. Michael corrected us on that and reported that it was Dola Young, an AFD at the time in the Southern District of Texas, who argued the *Deal* case while he briefed and second-chaired the argument. He did however, brief and argue the *Witte* case. Our apologies!

JUSTICE IMPERILED: THE ANTI-NAZI LAWYER MAX HIRSCHBERG IN WEIMAR GERMANY

By Douglas G. Morris, Trial Attorney, Federal Defenders of New York, Inc.
The University of Michigan Press, Ann Arbor, MI, 2005. 443 pages, $35.00.

A Book Review by Jon M. Sands, Federal Public Defender, District of Arizona
Originally Printed in THE FEDERAL LAWYER, JULY 2006
Jon M. Sands is professionally acquainted with the author

Justice Imperiled is a study of Max Hirschberg, an activist lawyer involved in key political trials in the Weimar Republic. It is a fascinating mix of biography, European history, and legal history. In the aftermath of the first world war, with German society in turmoil, reactionary conservatives sought to undermine the fledgling German republic with a series of political trials aimed at discrediting leftist political parties. Stepping up to defend socialists, and enduring the bias of openly hostile judges, Hirschberg won victories, mitigated defeats, and exemplified the highest calling of the legal profession. As a Jew, he encountered the rising virulent anti-Semitism and confronted the takeover of the legal system by the Nazis. Throughout his experiences, including his escape to the United States and his return to Germany after World War II, Hirschberg retained his belief in the law as an honorable profession.

In 1918, Germany was a defeated society but did not accept its defeat, believing that it had been "stabbed in the back." The November revolution that removed Kaiser Wilhelm II left the country's authoritarian and militaristic elites otherwise intact. Most of the nation viewed the Versailles peace treaty as unjust and punitive, the new republic as illegitimate, and the society itself as riven between reactionaries and Communists — between true Germans and meddling outsiders.

In this tumultuous society, the courts were actively thrust into the political arena. Both the left and the right sought to score points in political trials by accusing the other side of treason or of stealing state secrets. Although the prosecution of Hitler for his 1923 Beer Hall *Putsch* was a notable exception, it was usually socialists and other leftists who were dragged into court on such charges. The judiciary was sympathetic to the reactionaries, and this was especially so in Munich, where Hitler came to power.

Douglas Morris portrays the lawyers and judges in these cases as individuals, not merely as institutional players. The judges tended to be holdovers from Wilhelmian Germany — not only conservatives, but monarchists. Nevertheless, some lawyers argued cases well enough to cause the judges either to adhere to the law or to torture logic so much that they would be reversed on appeal. Hirschberg, who practiced in Munich, was one of the best of these lawyers.

Hirschberg had served in the Great War, and had leftist leanings. In trial after trial, defending criminal prosecutions and libel suits, Hirschberg deftly caught the opposition's "experts" in his sights, and with his cites. He exposed their inconsistencies, undercut their legal claims, and managed, against judicial resistance and bias, to present evidence that either proved his clients' innocence, or greatly mitigated their transgressions.

But Hirschberg was not just a political lawyer. He had a wide-ranging practice, defending common criminals as well as political ones, and showed special concern for the falsely convicted. Handling an appeal of a celebrated rape conviction, Hirschberg uncovered contradictions in testimony, questioned witnesses' motives, and showed that a man other than his client was guilty. Retaining a lifelong interest in such miscarriages of justice, Hirschberg recognized the

dangers of mistaken identity and proposed forensic safeguards that anticipated the call today for broader use of DNA and other scientific evidence to help ensure that only the guilty are punished. Hirschberg's concern about mistaken convictions led him also to become an ardent opponent of the death penalty. Plus ça change ...

In the 1930s, when the rise of Hitler began to envelope Germany in darkness, Hirschberg continued his activist representation, trying to use the law against the Nazis' political thuggery. But the Nazis perverted the ideal of law — its logic and fairness so beloved by Hirschberg — and, increasingly, cowed the courts and jurists. The law became an instrument to implement Nazi policies, and the courts lost all semblance of a protective bulwark. Statutes were enacted that crushed the left and, indeed, most political parties. Anti-Semitic laws included restrictions on Jews' participating in the professions, and Hirschberg, as a Jew, was personally affected. His wide-ranging and lucrative practice shrank, as he could represent only Jewish clients. The courts grew hostile to claims brought by Jews and overtly biased against Jewish litigants. Hirschberg's prominence and his past affiliations made him a marked man. This defender of others' rights soon found himself a defendant, accused of lying and other ethical lapses. In defending himself and his honor, he witnessed an all-too-rare display of courage when judges and prosecutors stood up for him.

Although Hirschberg was cleared, it was apparent that he had to leave Germany. Hirschberg did not want to abandon those who would need him, but his friends finally convinced him that he must go. He and his family fled Germany in 1934, and he was a refugee until he managed to get a rare visa to the United States and landed in New York in 1939. He became a U.S. citizen in 1944, but the American legal system remained foreign to him and he did not return to the courtroom. He did represent German Jewish expatriates in seeking restitution and reparation from Germany and German interests, but did not have to be a member of the bar for that purpose. He took advantage of the cultural resources of New York City, devoting considerable time and energy to historical and literary research and writing, and pursued his interest in the plight of the wrongfully convicted. A few years after the war's end, he returned to Germany — a bittersweet homecoming.

In Germany, Hirschberg continued his scholarship, embarking on a project comparing the German civil-law tradition, in which the judge is trier of fact, with the Anglo-American tradition of the jury as trier of fact. Although Hirschberg had firsthand experience of the state's co-opting the judiciary and bending and thwarting justice, he nevertheless, being a product of elitist German culture, concluded that it was better to have trained judges weighing the evidence than to trust the matter to juries. In this respect, Hirschberg remained an idealist, hoping that law could transcend the problems and prejudices of society.

When Hirschberg died in 1964, he had long been out of the spotlight and was soon forgotten. It is to Morris's credit that he rescued Hirschberg. Morris uses this biography to cast light on party politics in Bavaria, on how courts and the law were used in the political drama of the Weimar Republic, and on how one man — one lawyer — could make a difference. Morris sees Hirschberg as having been an outsider: "He was a defense lawyer among judges, prosecutors, and civil servants; a political leftist among conservatives and reactionaries; a Jew among Christians. He was an enlightened man among provincial political hacks and vicious fanatics; a democrat among men who thought in terms of hierarchy; a man of conscience among men preoccupied with honor." Hirschberg lived and practiced at a time when it was a rare type of man "who focused his legal talents, political fervor, and moral passion to bring to life the meaning of fairness in criminal justice in liberal democracies."

Justice Imperiled makes a notable contribution to the scholarship on Weimar Germany. The book started as a Ph.D thesis, so it is not a page-turner, but its scholarship is strong, and Morris' deft understanding of Hirschberg's efforts to represent individuals facing specific charges is marvelous. Morris' experience as a federal public defender

enables him skillfully to portray the role of the courts and the legal profession in the political drama of the Weimar era, and his ability to locate transcripts and contemporaneous journalistic accounts enables him to bring to life the trials that he discusses. He is especially adept at recounting the early days of the Weimar Republic, and explains well the German legal system, the status of law as a profession, and the role of judges. This work will be a standard study of the law and the courts in the midst of a social revolution.

MEET THE NEW CDO OFFICE IN THE WESTERN DISTRICT OF NORTH CAROLINA

Federal Defenders of Western North Carolina, Inc. ("FDWNC") was established as a federal community defender office in 2005 after a long and tortuous journey. In 1995, the judges in the district voted to support the creation of a federal defender office. Due to political opposition by a senator (who will remain nameless), the office was never funded. Finally, after the senator's retirement, the office was funded and the thirteen member board of directors was chosen by Chief Judge Graham C. Mullen.

The Board of Directors selected Claire Rauscher, a private criminal defense practitioner and former assistant federal defender from Philadelphia as the inaugural Executive Director. At the time, she was also serving as the Chief C.J.A. Panel Representative to the Defender Services Committee and the DSAG representative for the 3rd, 4th and D.C. Circuits. Her first day on the job was April Fool's Day 2005. By October 1st, she had completed hiring the staff of fifteen and they reported for work on October 3rd, 2005. The headquarters is located in Charlotte and there is a branch in Asheville.

The diverse staff came from defender offices and firms throughout the country: California, Nevada, New Jersey, D.C., Indiana, Maryland, and Virginia. After moving in to their permanent offices in mid-November, FDWNC immediately began having an impact on the judicial system. Pre-trial motions were filed leading to improved results. The first cased tried to a jury was dismissed at the close of evidence on a Rule 29 motion. Through aggressive and knowledgeable advocacy, the indigent defendants are receiving improved representation in a district that was repeatedly cited for poor CJA panel representation. For example, in 2003, the Western District of North Carolina had the longest mean sentences in the country per the U.S. Sentencing Commission and the Chief Judge was on record reporting a "crisis" in indigent defense in the district. The Western District of North Carolina is a high volume district with an inordinate amount of drug and gun prosecutions. The U.S. Attorney's office just touted they rank 9th in the country in number of cases per AUSA (that includes border districts). Even though Charlotte, NC is now the second largest financial center in the country, the white collar prosecutions have taken a 'back seat' to a zealous "numbers oriented" prosecutors office.

As a newly established office, FDWNC has created a "paper light" environment. All discovery is scanned into CaseMap along with ECF notices, motions, investigation, etc. There is very little paper in the office as evidenced by a very small storage area and clutter-free offices. The Computer Systems Administrator has created a 'user-friendly' system that allows for both the Charlotte and Asheville offices access to all files and information. The office also has a website, newsletter, and has run numerous CJA training sessions in past five months.

THE MISSING LINK

By Marc H. Robert, Assistant Federal Defender, District of New Mexico, Las Cruces

Many searches and arrests at border patrol checkpoints, as well as in other places, are based on alleged alerts by drug detecting dogs. The courts have said that a “dog sniff” is not a search, and therefore doesn’t require a warrant, consent or exigency. *United States v. Place*, 462 U.S. 696 (1983); *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990). If the dog alerts, the cops have probable cause to search the vehicle. Nothing more is required. The dog’s alert, therefore, is the single constitutional link between a nice drive and an arrest and conviction.

Although it has not been scientifically quantified and verified, it is recognized that dogs can detect odors in much smaller concentrations than humans can. An interesting discussion of a history of the use of dogs in criminal investigations is found in “Does the Cold Nose Know? The Unscientific Myth of Dog Scent Lineup”, 42 Hastings L.J. 15 (1990).

It is all too common for the dogs, or their handlers, to lack the training to provide confidence in the quality of the dogs’ work. Training a dog to detect a scent is a rigorous proposition. One of the preeminent experts in detection dog training has said that training a drug dog takes a decent dog, a great deal of patience, a great deal of time and a great deal of tenacity. Dog training should follow an accepted regime, and should result in a known manner of alert. The alert is followed by a reward and by encouraging behavior by the trainer/handler. Training a dog to alert, and to avoid false alerts to achieve the reward, requires interminable repetitions. The trainer must be cognizant of all kinds of trainer behavior to which the dog will respond. The handler can cue the dog to respond in subtle ways which may not be apparent to an untrained observer, and sometime not apparent even to the handler. *See United States v. Trayer*, 898 F.2d 805 (D.C. Cir. 1990) (“we are mindful that less than scrupulously neutral procedures, which create at least the possibility of unconscious ‘cuing’, may well jeopardize the reliability of dog sniffs”). Thus, it is very important for the handler, as well as the dog, to receive rigorous training. In order for the reliability of the dog/handler team to be verified, detailed records are also required. To know where the dog needs work, the trainer must know how the dog has succeeded, and how it has failed. Without records, there is no basis for determining the dog’s reliability.

Once a dog and handler are trained, they work in the field. Constant training is still required for the dogs (and their handlers) to avoid developing bad habits based on the variety of experiences they have in the field. Detailed records are necessary for the handler, the trainer and others to understand what problems need to be addressed. Without those detailed records about training and field performance, continuing training is useless and again, reliability cannot be gauged.

In an article in the New York Times (12/24/2004), Dr. Lawrence J. Myers, an expert on “dog olfaction” at Auburn, talked about the scientific basis for the dog’s superior percipience. He also talked about the significant diminution of dogs’ abilities under substandard handling and training. In order to know whether the probable cause is faith-based, complete documentation is essential.

Whether we’re dealing with a legitimate exercise or a coin flip, then, we must have records. If we employ an expert to help us assess the dog’s reliability, those records are essential to enable the expert to form and express an opinion about the dog’s reliability. In one case, *United States v. Cantrall*, 762 F.Supp 875 (D. Kan. 1991), the handler claimed in an affidavit that his dog was accurate 90% of the time. The dog’s records, obtained in discovery, disclosed that the dog’s accuracy was nothing like 90%, and was in the 50% to 60 % range. The court, however, said that accuracy over 50% is adequate for probable cause!

The Tenth Circuit has said that those critical records don't have to be disclosed if the dog was certified on the day of the search. *United States v. Gonzales-Acosta*, 989 F.2d 384 (10th Cir. 1993) (denial of 17(c) subpoena for dog training and performance records affirmed; dog was certified on the day of search) ; *see also United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (reliability established by an affidavit indicating that dog was certified, no detailed records required). The Tenth Circuit has also said, however, that a dog's poor performance record can negate probable cause. *United States v. Ludwig*, 10 F.3d 1523 (10th Cir. 1993) ("A dog alert might not give probable cause if the particular dog had a poor accuracy record."). The First Circuit has also said that "[t]he existence of probable cause based on an alert by a drug dog depends upon the dog's reliability." *United States v. Owens*, 167 F.3d 739, 749 (1st Cir. 1999). The dog's reliability cannot be determined without a thorough examination of the dog's training and field performance records. In *Owens*, the defendant obtained those records and presented the testimony of a nationally recognized expert in detection dog training, Dan Craig, in support of his motion to suppress. The court in that case found that the district court's determination that the government's expert was more credible was not clearly erroneous. In *United States v. Patterson*, 65 F.3d 68, 72 (7th Cir. 1995), the Seventh Circuit implicitly accepted an exploration of a drug dog's history in affirming the denial of a suppression motion. During the suppression hearing, testimony was taken regarding the dog's training and accuracy. The court relied on that testimony in concluding that the dog's accuracy was sufficiently established to support the district court's decision.

In an unpublished Tenth Circuit case, the court treated dismissively counsel's efforts to have a dog's alert evaluated under *Daubert* principles. The court, citing *United States v. Outlaw*, 134 F.Supp.2d 807, 809 (W.D.Tex.2001), held that *Daubert* is an inappropriate mechanism by which to challenge the reliability of a dog and its handler in creating probable cause. *United States v. Berrelleza*, 90 Fed. Appx. 361 (10th Cir. 2004) (unpublished).

Courts have sometimes granted discovery limited to a "relevant" period of time. The government, however, recognizing that probable cause will evaporate if the dogs' training isn't up to snuff [sorry], has taken to claiming national security as a basis for denying disclosure of these crucial records. In a recent case in New Mexico, the judge initially granted disclosure of the training records for the year prior to the arrest. However, after the prosecutor whined that disclosure would jeopardize national security, the judge denied discovery. Without those records, there is no way to determine whether the probable cause provided by the dog search has any empirical basis, leaving us with faith-based jurisprudence.

For now, make detailed discovery requests. Ask the court to order disclosure. Tell the court why the records are critical for determination of the reliability of the probable cause provided by the dog. Explain that an expert can't evaluate the situation without those records. Demand and preserve. Sik 'em.

AMICUS COMMITTEE REPORT

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

Since the last report in the Spring 2005 issue of the Liberty Legend, the NAFD has been involved as an amicus in several cases. In the Supreme Court, we filed an amicus brief on the merits in *United States v. Grubbs* in December 2005. Marc Reichel and his colleagues in the Sacramento office represented Mr. Grubbs. Ric Simmons, an assistant professor at Moritz College of Law, The Ohio State University, authored the amicus brief. Unfortunately, the Supreme Court reversed the Ninth Circuit's ruling in

favor of Mr. Grubbs, holding that anticipatory search warrants do not violate the Fourth Amendment. 126 S. Ct. 1494 (2006).

In a case in which the NAFD had previously joined in an amicus for rehearing *en banc* in the Third Circuit, *O'Donald v. Johns* (as reported in the Spring 2005 *Liberty Legend*), the NAFD again joined in an amicus brief, this time at the cert. petition stage. This case challenged the BOP's method of calculating good time credit. David Lewis, of the New York City FPD office, authored the Supreme Court brief on behalf of the NAFD, FAMM, and NACDL. Unfortunately, the Court denied cert. in *O'Donald* and a companion case, *Moreland v. Federal Bureau of Prisons*, on April 24, 2006. Justice Stevens, however, submitted his own statement. *See* 2006 WL 1060536.[1]

In contrast, the Supreme Court granted cert. in *Lopez v. Gonzales*, No. 05-547, an immigration case that addresses whether simple possession of drugs constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43). The NAFD had joined with other criminal justice and immigration organizations in urging the Court to hear the case. The Court consolidated *Lopez* with another case, *Toledo-Flores v. United States*, No. 05-7664, which presents the same question in the criminal law context. NAFD President Tim Crooks represents Mr. Toledo-Flores. The NAFD will be supporting the respondents as amicus.

The NAFD has also been involved at the circuit level. In *United States v. Campa*, 419 F.3d 1219 (11th Cir. 2005), the panel reversed the district court's denial of the defendants' motion for change of venue in a major Cuban spy case. The *en banc* court, however, granted the government's petition for rehearing. 429 F.3d 1011 (11th Cir. 2005). The NAFD, along with NACDL and the FACDL, submitted a brief in support of the panel decision that was authored by University of Miami Law School professor Ricardo Bascuas. Richard Klugh, of the Miami FPD office, which represents one of the defendants, argued on their behalf on February 15, 2006; the *en banc* decision remains pending.

If you know of a case that might benefit from NAFD amicus support, please contact an Amicus Committee co-chair (listed below) as early in the process as possible so that we can look at the issue, send the issue to the full committee for input and a vote, and if it is decided that the NAFD should participate, to find a writer or another organization with which to join, etc.

On a different note, there has been a partial change in the leadership of the Amicus Committee. After several years as a co-chair, David McColgin, in the Philadelphia office, stepped down from that position last spring. The Committee extends its collective thanks to David for his service, stewardship, and sage advice on amicus matters. Ably filling David's shoes is Paul Rashkind, head of the appellate unit for the Miami office, whom many of you will also recognize as a regular co-presenter on Supreme Court cases at the National Seminar for Federal Defenders. Paul also authored the NAFD's amicus brief in the *Booker* and *Fanfan* cases in the fall of 2004.

Finally, if you are interested in being involved in the work of the Amicus Committee, please contact any of the three co-chairs: Henry Bemporad in San Antonio, Texas, Paul Rashkind in Miami, Florida, or me, Fran Pratt, in Alexandria, Virginia.

---

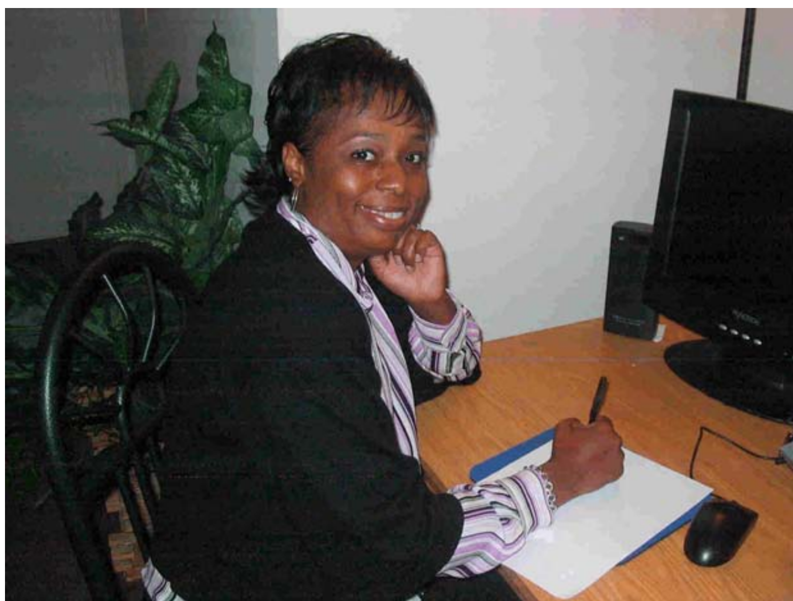
[1] In a related case in the Ninth Circuit, *Mujahid v. Daniels*, the NAFD joined the Ninth Circuit Federal Defenders, NACDL, and FAMM last August in a brief supporting rehearing en banc that was authored on extremely short notice by Sarah Gannett, of the Baltimore FPD office. The Ninth Circuit denied rehearing in October. Steve Sady, of the Portland, Oregon office, who has been representing Mr. Mujahid for several years, filed a cert. petition in January that is scheduled to be considered at the May 18 conference.

RECIPIENTS OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS 2006 OUTSTANDING INVESTIGATORS AND PARALEGAL AWARDS

On April 26, 2006, at the "Federal Day" of the National Defense Investigators Association Annual Conference, the National Association of Federal Defenders presented awards to outstanding investigators and paralegal specialists in the Federal Defender system. From a field of amazing nominees, awards were presented to two outstanding investigators and one paralegal specialist.

The first Outstanding Investigator Award recipient was **Shelley Strayer**, investigator in the Laredo office of the Federal Public Defender's Office for the Southern District of Texas. Shelley started with the FPD office in 1976 as a legal secretary/"jack of all trades." She worked more than full-time, wearing a number of hats, at the same time attending college part-time. She obtained her college degree in 1990, and in 1991 became an investigator for her office. In 2004, she was elevated to the position of Assistant Chief Investigator in her office. She has assisted her office in cases ranging from tax fraud to interstate threats to drugs and innumerable illegal reentries, with stellar results. She is a resource not only to her own attorneys but also to local panel attorneys. She genuinely cares for the clients and gives 110% of herself and her talents to their cause.

The second Outstanding Investigator Award recipient was **Teri Moore**, investigator in the Trenton office of the Federal Public Defender's Office for the District of New Jersey. She has been with her office for about 15 years. She is described as adept at getting witnesses and in keeping on top of the latest legal issues. She is beloved by clients, and justifiably so, for the compassion and humanity she shows to them. She is well respected by local law enforcement and the local panel attorneys. She is a uniting force within her office, and is willing to drop everything to help her attorneys out. She is also currently an officer in the NDIA. Her nominator concluded by saying, "Her one fault is humility. She'll kick my a** down the block if she finds out I wrote this."



The Outstanding Paralegal Specialist Award recipient was **Margarita ("Maggie") Gonzales**, paralegal specialist in the San Diego office of the Federal Defender Program in the Southern District of California. Her nominator reported that, despite being the mother of five children, Maggie is the first one through the office door in the morning, and frequently stays late at the office, sometimes until 11:00 p.m., to help her attorneys with appeals. She goes beyond mere cite checking of briefs, to actually read the cases and provide additional authorities to her attorneys. She has helped free innumerable clients from pending state court proceedings. And she is also beloved by her clients. As her nominator indicates, "every Christmas card, greeting, or thank you letter I have received from a client over the least two years was also addressed to Maggie."

REPORT FROM MAINE

By David Beneman, Federal Public Defender, District of Maine

I became the Federal Public Defender for the District of Maine on January 1, 2006. Interesting to start my new job on a Sunday followed by a holiday on Monday. I am Maine's first Federal Public Defender. Our first public defender of any kind; Maine has no state P.D., all indigent defense is done by panel attorneys. We become the 90th out of 94 Districts to have a Federal Defender Organization.

I come to the job with 20 years experience in private practice, all at one small law firm. My practice has been about half civil and half criminal defense, both state and federal. I have been the CJA Panel Representative and Resource Counsel for Maine. I know many of you through the world of e-mail, newsletters and speaking trips around the country.

Our main office is in Portland, the largest city in Maine (population 65,000). I would provide an address but GSA does not move quite that quickly, after all it is May, a mere 5 months since my appointment and far too soon to have actual office space squared away. If we can get the numbers to work out we will probably be on the second floor of an office building about two blocks from the Courthouse. A non-GSA, privately owned office building. Eric Vos, will be our assistant FPD in Portland. Eric has most recently served as the defense community "mole" at the Sentencing Commission, on loan from PA(E) where he has been a trial attorney since 1997. Portland has 2 federal judges, 1 magistrate judge and 18 AUSAs. That seems fair.

Bangor, two hours north (if it is not snowing) is home to our branch office consisting of one attorney and a secretary. Virginia Villa will oversee the Bangor office. Virginia has been with the Minnesota FPD office since 1991. Bangor has one judge, one magistrate judge and 5 AUSAs. I am gratified to have two attorneys with the extensive experience Eric and Virginia bring. I thank their respective offices for so graciously supporting the moves. We hope to have the physical offices open by labor Day.

Margaret Laughlin is our Administrative Officer. Margaret has worked in law firms and in the health care system and brings a wealth of administrative and organizational expertise to our office. Eventually we will have an Investigator in Portland and a secretary in each location for a total office of 7. I look forward to learning from all of you and to the day when we have an office and clients.

SPECIAL RECOGNITION TO THE *MOUSSAOUI* INVESTIGATORS AND PARALEGALS

At the National Defense Investigators Association Annual Conference, the National Association of Federal Defenders presented a special award to the **investigator-paralegal specialist team from the Federal Public Defender's Office for the Eastern District of Virginia** for their work on the Zacarias Moussaoui case. Honored were **Investigator Jim Allard and Paralegal Specialist Sandra Schidlo, from the Alexandria office, and Investigator Linda McGrew and Paralegal-Investigator Pam Bishop, from the Richmond office.** Because this dedicated team had stayed back from the conference, awaiting the verdict in the case, the award was accepted on their behalf by their EDVA colleague, investigator Lee Hush.

PAM BISHOP

While the precise scope of the government's investigation is not fully known, it is fair to say that the FBI had more than 10,000 agents investigating this case and generated hundreds of thousands of FBI 302s. The government produced well over one million documents (probably more than two million at this point), and the FPD office received thousands of CDs, DVDs, videos and other types of discovery, much of which is (or was) classified.

SANDRA SCHIDLO

From the beginning of the case, Pam and Sandra worked tirelessly to organize the discovery, assist the attorneys, provide necessary documents to experts, coordinate witnesses, arrange travel, and keep the Moussaoui team from going insane in a case that defies superlatives. Their powers of organization and determination in the face of almost insurmountable challenges cannot be overstated. To the detriment of their families and personal lives, they worked and worked to ensure that the attorneys in court would be better prepared than the government; they accomplished that goal admirably.

JIM ALLARD

Likewise, Linda and Jim also devoted enormous amounts of time and effort to the investigation of the case. From traveling all over the United States and to other parts of the world to assisting the attorneys with the location of witnesses and documents, the investigators played critical roles in preparing the attorneys for the grueling trial of the past month. Although both Linda and Jim worked on numerous other cases over the past four years (as did Pam and Sandra), both investigators spent thousands of hours poring through the mountains of discovery and tracking down countless leads in a case that could be investigated for years without mastering all of the necessary facts.

LINDA McGREW

In short, in considering that these four individuals formed the core of the Moussaoui non-attorney staff and to compare that to the thousands of investigators, paralegals and other non-attorney specialists who worked for four years without any distracts for the prosecution, it is astounding to consider what they have accomplished.