THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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THOUGHTS FROM THE PRESIDENT

At this time of New Year's resolutions and new beginnings, I am thinking about a problem that affects us all from time to time, namely: defender burnout. Anyone who has been a defender for any significant amount of time knows what I am talking about. Every day we butt heads with prosecutors, probation officers, and judges, fighting for unpopular clients and causes. And even the clients we fight so hard for are often unappreciative of our efforts or even hostile to us. In this stressful environment, it is easy to grow tired and burned-out. While I don't profess to have all the answers to this problem, I wanted to share some of the things that help me get over the burnout hump whenever I feel that way.

1. Learn new things. For me, nothing invigorates me more than learning new things about my job. Continuing legal education, and especially our national conference, are wonderful opportunities to learn how colleagues across the country are meeting the same challenges I face in new and creative ways. The ever-growing number of legal blogs puts up-to-the-minute legal scholarship and new, exciting litigation tactics at the fingertips of everyone with access to the Internet. Finding a new angle to do an old task can make the old seem new again.

2. Participate in the criminal defense community. Become active in the NAFD, your local or state criminal defense lawyers associations, or the National Association of Criminal Defense Lawyers. Write an article for this newsletter (our editors will love you!) or for a bar journal. Participate in committees for the NAFD or for local, state, or national criminal defense lawyer associations. Volunteer to teach a CLE course. Helping the mission of criminal defense at the macro level can help overcome the blues of day-to-day practice.

3. "I get by with a little help from my friends." One of the greatest advantages to federal defender practice is the large number of colleagues, both in your own office and across the country, who know exactly what you're going through. Share your highs and your lows, your victories and

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your defeats, your elation and your frustration, with your colleagues. Nothing can lighten your heart better than a good *kvetch* to a sympathetic ear.

4. Know that you are making a difference. Finally, always remember, no matter how badly things seem to be going, your clients would be much worse off without you in their corner. You are doing good work for a good cause, and don't forget it.

Best wishes for a Happy New Year 2007, with many, many defense victories!

All best,
Tim Crooks, President

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
DUES AND MEMBERSHIP FORM

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Mail completed form and check in the amount of $52.00 to:
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RECIPIENTS OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS 2006 OUTSTANDING ASSISTANT FEDERAL DEFENDER AND OUTSTANDING RESEARCH AND WRITING SPECIALIST AWARDS

In a system of truly remarkable defenders, we are proud to recognize the following five persons, whose dedication, commitment and quality of representation exemplify the highest standards of our calling. The awards were presented at the Advanced Defender Training Seminar in San Francisco May 31, 2006.

JEROME KEARNEY

Jerome T. Kearney, First Assistant Federal Defender for the Eastern and Western Districts of Arkansas received his B.A. Degree in 1978 from Vanderbilt University and his J.D. Degree in 1981 from Vanderbilt Law School. Jerome served as Deputy Public Defender for Pulaski County in Little Rock, Arkansas, from 1982 to 1985 and as Assistant Attorney General of Arkansas from 1985 to 1987. Jerome was Deputy Solicitor with the United States Department of Labor in Dallas, Texas, from 1987 to 1990. He served as Assistant Federal Public Defender for the Western District of Oklahoma in Oklahoma City from 1990 to 1995 and as Senior Litigator for the Federal Public Defender Office for the Eastern and Western Districts of Arkansas from 1995 to 2002. Jerome has served as the First Assistant Federal Defender for the Arkansas Organization for the past three years. He has also served as the Eighth Circuit representative at the national *Blakely/Booker/Fanfan* conferences sponsored by the Office of Defender Services.

Jerome is the son of share-cropper farmers from a small town called Gould, Arkansas, which is about 90 miles outside of Little Rock. He grew up in poverty, and was subjected to gross discrimination as a child. He rose above all of that to become the outstanding lawyer -- and person -- that he is. His parents instilled in him (and his seventeen brothers and sisters) the importance of a good education.

Jerome attended Vanderbilt University on a scholarship and graduated with honors. He was active in college and law school -- volunteering to work in the various legal clinics which were sponsored by the Vanderbilt University.

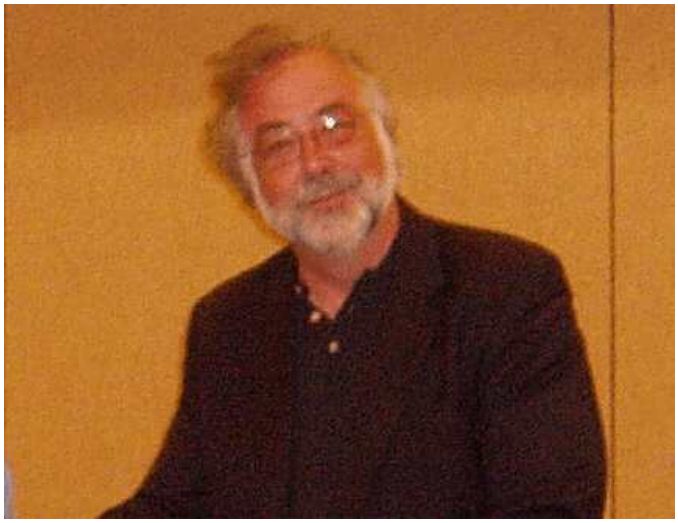
Jerome has extensive experience concerning complex and novel legal issues. He has successfully defended two death penalty cases at the Little Rock Office. The first was Shamico Peters, where he not only successfully was able to stop the death penalty (the government claimed the client was the shooter) but proceeded to trial and got a hung jury and the case was not retried. The second was Richard Smith, where again the government tried to go for the death penalty and lost. The government once again claimed the client was the shooter; he pled to life, but has deals

working where they need his testimony to make their case against who they now know is the real shooter and the master planner who is currently an escapee.

Jerome routinely takes the most difficult cases in the office. He brings diverse talents to the defender program, and excels in the courtroom, as a negotiator, as a teacher, and as a representative of the Arkansas Defender Organization. He always volunteers to assist others with difficult or time-sensitive tasks, and he invariably treats clients with dignity and respect, even when they do not afford him the same courtesy. Jerome has the respect of the court, the prosecutors, the probation office, the marshal service, and the private bar. He volunteers his time outside of the office for worthy causes. He is most deserving of the 2006 Outstanding Federal Defender Award.

LEE T. LAWLESS

Lee T. Lawless, Federal Defender, Eastern District of Missouri, has long excelled as a champion of indigent rights in the District. Lee came to the Federal Defender office in 1984. Since then he has consistently and steadfastly vigorously represented his clients, and worked to raise the level of professionalism in the office. His career is marked by not only individual achievements in the trial and appellate courts, but achievements that have benefitted the office as a whole.



The following are some notable highlights: *United States v. Sell* - Lee represented Dr. Sell in conjunction with an attorney in private practice on separate cases. Lee was the main force in developing the legal issues and litigating a defendant's right to refuse forced treatment for competency. Lee argued Dr. Sell's case in the Eighth Circuit and, while he did not argue the case in the Supreme Court, it is well known that he was the legal mind behind the development of the issue. *United States v. Templeton* - This case is probably the best example of Lee's commitment to not only trial work, but appellate advocacy. Lee represented a man who owned a tugboat that was moored on the Mississippi River and operated as a restaurant. He was charged with illegally dumping waste in the River. Lee raised the argument that the restaurant was a vessel and not covered under the Clean Water Act. Needless to say, the District Court and the government were skeptical, but the Eighth Circuit was not so skeptical. Lee tried the case, skillfully preserved the issue, and won on appeal. The Eighth Circuit not only ruled in Lee's favor, but overturned the conviction. The defendant was not subject to any further prosecution. The discharge was subsequent to Lee's successful sentencing departure argument at the District Court level. Lee's client's record is now cleaner than the Mississippi. *United States v. Bey* - During the 1980's in St. Louis many members of the Moorish Science Temple were vigorously prosecuted by the federal government. In 1988 and 1989 Lee represented members on drug charges. The results were conviction, but Lee's advocacy on his client's behalf was so vigorous that there were hung juries along the way. In addition, he earned the undying admiration of his clients and the membership of the Moorish Science Temple. When Lee was first appointed no one expected that his clients would accept a white male Assistant Federal Public Defender as their counsel. This was counter to the philosophy of the Moors. Lee's work so impressed them that they gave him a plaque in recognition of his lawyering.

From June of 2005 to November 29, 2006, Lee was the Acting Public Defender for the office. Lee was able to balance his case load and administrative duties. During this time, he was actively involved in improving the quality of representation in the office. He encouraged attendance by all staff members at training events. He increased the number of office sharing information meetings where not only administrative matters are discussed, but also reviews of the law and litigation issues in the Circuit. He is supportive of the use of technology in trial work.

He currently has members of the staff working on developing an internship program for students at a local school of social work to develop sentencing advocates for the clients in light of *Booker*.

Lee's work goes beyond this office. In the short time he was acting defender he become involved with the panel in setting up training. He is working closely with the Circuit to develop programs that meet their needs. Lee is regularly called upon by the Missouri State Public Defender System to train their lawyers. He never turns down any request for assistance and often seeks out opportunities to help the local bar. Outside the office, Lee has been involved in Habitat for Humanity. Lee has been a lifelong Cardinals baseball fan and constant critic of Tony La Russa.

Lee's nomination is long overdue. Lee has been a steadfast and constant advocate for the indigent charged in the District. He is a skilled trial lawyer who uses imagination and hard work to develop successful legal issues. He has always been a supportive colleague. He has recently shown himself to be a respected leader.

BRENT E. NEWTON

Brent E. Newton, Assistant Federal Public Defender, Southern District of Texas has been described as one of the most brilliant, energetic, and dedicated Assistant Federal Public Defenders. Brent started with the office in June of 1996, after having served as an attorney with the Texas (Capital Defense) Resource Center from 1993 to 1995 and with Dade County Public Defender's Office Capital Litigation Unit from 1995 to 1996. Having earned his law degree from Columbia University School of Law, Brent already at this early stage in his career had authored about five articles.

Since Brent has joined the office, he has continued to be an outstanding appellate lawyer, but also has developed into one of the best trial lawyers. Brent regularly carries a heavy case load that includes a mix of about fifty to sixty complex trial and appellate cases. On the appellate front, Brent is renowned for volunteering to read trial records of anywhere from ten to forty-volumes and producing briefs containing numerous complex constitutional and procedural issues in less than a week. For example, despite his heavy case load, he recently volunteered to brief a direct federal capital appeal when the Federal Public Defender from the Eastern District of Texas was conflicted out of the appeal. Brent also has briefed voluminous financial and health care fraud appeals to name a few.

In the trial court, Brent has developed into a fabulous attorney over his ten years. He has obtained numerous jury trial acquittals in cases that run the gamut of prosecutions, including bank and real estate fraud cases, a prison guard rape case, drug cases, and firearms cases. He also is acknowledged as the habeas corpus expert within and outside of the office

and has had a number of successes in that arena also. Brent is relentless not only in researching the law and filing novel and substantial legal motions that prevail, but also in tracking down and interviewing witnesses prior to trial. For example, in one case, he found twenty witnesses who were willing to testify that his client was in Mexico and not in Houston doing a drug deal on the day in question. He also has gathered cell phone tower records that place his client in Mexico on that day.

Brent is tireless in his devotion to the clients, not only in his unique and dogged representation of his own clients but also in his selfless support of his colleagues' representation of their own clients. He possesses what seems to be an endless wealth of knowledge and creative ideas, the product of his varied legal background, law school teaching experience, charitable work, and personal triumphs and tragedies.

But Brent is not just a stellar trial and appellate lawyer, he also is a devoted educator of panel lawyers and law students. On top of his case load, he is the editor and principal author of the office's legal bulletin, producing numerous articles on various topics of criminal defense. He also is the director of training and organizes and teaches at the CLE events for panel counsel in the district. Each year, Brent also teaches around the country at a number of panel counsel seminars put on by Defender Services. On top of that, Brent has taught one to two courses each semester at the University of Houston School of Law, which have included criminal trial advocacy, remedies, and criminal procedure.

In addition to all of that, Brent has found the time to publish two books over the past few years, one of which is on constitutional criminal law and the other of which is on the methods, strategies, and stages of trial advocacy in criminal law. During this time, Brent also has published two or three articles in the JOURNAL OF APPELLATE ADVOCACY on complex legal topics, including the Supreme Court's inconsistency in applying waiver in a number of its cases over the years.

Moreover, during the past few years, Brent has accomplished all of this while standing by and supporting his wife in her two bouts with lymphoma, one of which led to a lengthy hospitalization for months for a stem cell transplant. During that time, Brent continued his outstanding efforts in our office, but also cared for and supported his wife and his two young daughters who are in their very early years of elementary school.

Brent took over several trial cases of one of his colleagues when she had to be out of the office for an extended period of time due to her son's cancer. One of these cases was a complex, document-intensive mortgage fraud case that Brent took to trial. Brent did one of the most devastating cross-examinations of a government witness. But in addition to taking on her caseload, Brent called her every week at the hospital when her son was ill to find out how he was doing and to keep her in touch with the office. He was truly a lifeline for her at that time. In addition to being one of the best criminal defense lawyers in Houston, he is an outstanding person.

In light of all of this, to say that Brent is an Outstanding Assistant Federal Defender is an understatement. What he has accomplished with the trials and tribulations he has faced is truly miraculous. And, through it all, he has remained an attorney who is respected and admired by his colleagues and by panel counsel and looked to by them for answers, assistance, and explanations on the law, on trial and appellate strategy, and on legal theory.

DAVID SHANNON

David Shannon, Assistant Federal Public Defender, District of Arizona, Tucson, has been with the office over 20 years and was the First Assistant from 1994 until August 2006, when he started working part-time. He has an incredible wealth of experience and is knowledgeable in many areas. The past several years, David has been focusing on non-capital habeas and appeals. His successes the past few years have included acquittals to serious assault charges, dismissals in a check-washing case, and reversals in several appeals.

David does not have a reputation for being a "warm fuzzy" person, a fact he pokes fun at, though he has warmed considerably the past several years to just above freezing. He has a sense of humor, though quirky at times, and surprises many, like when he speechifies at office gatherings. He is often the butt of his own jokes. He has made special efforts in keeping an open door and making the time to listen and advise other lawyers.

Many do not know the extent of his unlauded activities, specifically in teaching, speaking, and with computers. For several years, David was an Adjunct Professor at the University of Arizona Law School (adjunct meaning unpaid), teaching trial advocacy skills and Legal Analysis, Writing and Research. He was a regular face in the national Defender-organized Panel Trainings, and he speaks regularly at Baby Defender conferences on changes of plea.

David has extensive computer experience. For several years, he has served on DAWG and served on the first committees concerning our CMS system. Within the office, he wrote the initial program to keep track of CJA Panel Attorney appointments and, more recently, wrote a program called D-Info which incorporates a computerized check-in/out board, an office directory with personnel photos, and the CMS and Panel programs.

As First Assistant, David dealt regularly with personnel issues. Others in the office have learned an incredible amount watching him resolve matters, looking to both the organization's rules and following through to resolution and beyond various courses of action. He is level-headed and innately fair and compassionate.

David has equal respect of the Office and the legal community. His clients appreciate him, and he has assisted other attorneys in dealing with difficult clients.

Last, David, while walking to the Ninth Circuit Court of Appeals for oral argument, was assaulted on the street. Bleeding, glasses broken, he continued to the Court. Everyone decided the appeal could be resolved without oral argument, but he was there. Above and beyond the call of duty.

It’s great to honor him for all he has done for the entire defense and Defender community.

SHARI ALLISON

Shari Allison, Research and Writing Specialist, Federal Public Defender's Office Las Cruces, New Mexico, has been with the office for the past 9 years. She is the only research attorney in the Las Cruces office, and serves clients of 11trial attorneys. During that time she has almost single handedly written over 200 briefs to the 10th Circuit U.S. Court of Appeals, and cert petitions to the U.S. Supreme Court. She also researches and sometimes drafts memoranda and briefs at the trial level. Shari approaches each case with skill, creativity and imagination. She has addressed extremely complex issues and has written very well reasoned and effective briefs in novel areas of the law such as offenses under the Archeological Resources Protection Act (ARPA), as well as complex issues involving juvenile sentencing and custodial credit. She is extremely well respected among her colleagues, having been requested to participate on a panel at the June Federal Public Defender conference.

Shari works in a border practice. The office handles over 1200 cases annually, most of which are checkpoint drug and immigration offenses. Despite the paucity of defenses in such matters, Shari has been innovative and very successful in issues she has raised, both at trial and on appeal. She is *the* source for panel attorneys in southern New Mexico, and is a vital participant in our regular CLE programs for panel attorneys. She is active in both NACDL and the New Mexico Criminal Defense Lawyers Association. She has presented at numerous seminars, always cheerfully offering her assistance to those in the criminal defense community. Shari is tireless in her efforts to make sure that the indigent, often migrant clients are fairly treated and represented far better than private counsel in this area.

SEXUALLY DANGEROUS PERSONS?

By David Beneman, Federal Defender, District of Maine

The Bureau of Prisons has a new tool authorized this summer as part of the Adam Walsh Act. The BOP may now "certify" inmates as "sexually dangerous persons" (SDP). Certification can occur prior to sentencing, **or** at any time after the commencement of probation or supervised release and prior to the completion of the sentence. We will all need to pay attention to the risk of this new federal SDP designation, 18 USC 4248.

SDP COMMITMENT

In the past couple of weeks, Defenders in New Mexico, South Dakota and Massachusetts have learned that just prior to release, clients are being transferred to the Butner, NC Federal Medical Center and certified as SDPs, based on a caseworker's review of records. We are told that of 500 cases reviewed to date, proceedings have been initiated in 11.

A "sexually dangerous person" is one who "has engaged or attempted to engage in sexually violent conduct or child molestation and . . . suffers from a serious mental illness, abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247. The definition was added to the existing

definitional statue in the in chapter 313 of title 18 which addresses mental disease or defect.

The Attorney General and/or the Director of the Bureau of Prisons may certify that a person is a "sexually dangerous person," 18 U.S.C. 4248, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, **or** at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Note that under amended 18 U.S.C. § 3583(k), those convicted of violating 18 U.S.C. § 1201 (kidnapping) involving a minor, or of any offense under 18 U.S.C. §§ 1591 (sexual trafficking of children), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor), 2244 abusive sexual contact), 2245 (sexual abuse resulting in death), 2250 (failure to register as a sex offender), 2251 (sexual exploitation of children), 2251A (selling or buying children), 2252 (activities related to material involving sexual exploitation of minors), 2252A (child pornography), 2260 (production of child pornography), must be placed on supervised release for a mandatory minimum term of 5 years with a maximum of life.

We can expect review by BOP of anything in the PSR. The review may include psychological evaluations submitted by the defendant or ordered by the court for sentencing purposes, previous state or federal sex offenses, **and** anything in the BOP record, including admissions and other evidence gathered in the course of sex offender treatment or management.

At some point after a certificate has been filed, the person is entitled to an adversarial hearing with the right to counsel, the opportunity to testify, to present evidence, subpoena witnesses, and confront and cross-examine witnesses. 18 U.S.C. §4246. CJA counsel or a Federal Defender will be appointed for those who qualify. The statute does not contain a timetable for a hearing and the person remains in the custody of the Attorney General or the Bureau of Prisons pending resolution. 18 U.S.C. 4247(d), 4248(a)-(b).

HOW TO ADVISE CLIENTS

At a minimum, we need to advise clients charged with sex offenses or with any hint of sexual impropriety in their record that anything they disclose in the sentencing process, or in sex offender or substance abuse "treatment," or in any conversation with a BOP caseworker or counselor may be used to commit them, possibly for life.

Sex offender treatment is voluntary. Sex offender management appears to be BOP's choice. If a client volunteers for treatment, or is placed in a sex offender management program, then refuses to talk, BOP will assume the worst. If they talk, they run a risk of talking themselves into a 4248 commitment. Based on the numbers so far, BOP has sought commitments in roughly 2.5 % of cases reviewed. BOP retains the burden of proving that the client is a "sexually dangerous person", BUT the client remains detained pending that hearing and determination. Currently we expect the less BOP has to work with the better. Until we see how widespread SDP commitments are and how the courts will react to these cases, volunteering for treatment carries a real risk. In a management program trying to remain silent may be nearly impossible depending on the context and the client.

We need to be advising clients charged with sex offenses or with any hint of sexual impropriety in their record that anything they disclose in the sentencing process, or in sex offender or substance abuse "treatment," or anything they might say to a BOP counselor or caseworker may (will) be used against them for a possible SDP civil commitment under 18 U.S.C. 4248. Advise clients on the risks of participating in any voluntary treatment program, the choice not to participate, the option of remaining silent in any mandatory management program, and then remind them of the 5th Amendment rights regarding sexual misconduct or thoughts during any interaction or conversations with BOP personnel. "While the Fifth Amendment does not generally attach in civil commitment proceedings, it may nonetheless apply where a truthful answer might incriminate a defendant in future criminal proceedings

or increase his punishment". See *Allen v. Illinois*, 478 U.S. 364, 372, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986); *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). This remains an evolving area and we need to keep a vigilant eye.

For some ideas, see the cases addressing sex offender treatment which in the past often including use of polygraphs, as a condition of supervised release. These cases look at some of the 5th Amendment issues. Several circuits have endorsed polygraph testing as part of sex offender treatment for those on supervised release. See; e.g.,

United States v. York, 357 F.3d 14, 22 (1st Cir. 2004);

United States v. Dotson, 324 F.3d 256, 261 (4th Cir. 2003);

United States v. Lee, 315 F.3d 206, 213 (3d Cir. 2003);

United States v. Zinn, 321 F.3d 1084, 1089-90 (11th Cir. 2003)(a polygraph may provide an added incentive for the offender to furnish truthful testimony to the probation officer. Such purpose would assist the officer in his or her supervision and monitoring of the appellant.)

A case that stands for stronger 5th amendment rights is *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005)(defendant who had been incarcerated for a refusal to answer questions that he deemed incriminating while on supervised release could raise a Fifth Amendment challenge to the revocation of that release.) The case notes the difference between admitting conduct to which you have been convicted vs. uncharged conduct.

On penile plethysmograph testing as a condition of supervised release see *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006)(the particularly significant liberty interest in being free from plethysmograph testing requires a thorough, on-the-record inquiry into whether the degree of intrusion caused by such testing is reasonably necessary "to accomplish one or more of the factors listed in § 3583(d)(1)" and "involves no greater deprivation of liberty than is reasonably necessary, given the available alternatives.")

SEX OFFENDER TREATMENT AND MANAGEMENT PROGRAMS

BOP currently has one sex offender treatment program (SOTP) at Butner with 112 beds, and a sex offender management program (SOMP) at Devens with 400 participants. In the Adam Walsh Act, Congress directed BOP to expand these programs. See 18 U.S.C. §3621(f)(1). According to Dr. Andres Hernandez, the Director of Sex Offender Treatment for BOP, the BOP is "actively working to expand sex offender services by implementing SOMPs and SOTPs, as well as a forensic evaluation service." See Statement of Andres E. Hernandez before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (hereinafter Hernandez Statement), available at http://energycommerce.house.gov/108/Hearings/09262006hearing2039/Hernandez.pdf

BOP counts as""sex offenders" those serving a sentence for a sex offense **and** those with any sex offense in their history. This regulation has been struck down for including past offenses, but it remains on the books and BOP continues to follow it. See *Fox v. Lappin*, 409 F. Supp.2d 79 (D. Mass. 2006) (enjoining BOP from notifying local jurisdiction under section 4042(c) of release of prisoner serving federal felon in possession sentence based on 1981 state sex offense); *Simmons v. Nash*, 361 F.Supp.2d 452 (D.N.J. 2005) (enjoining BOP from notifying local jurisdiction under section 4042(c) of release of prisoner serving federal drug sentence based on 1983 state offense of attempting to promote adult prostitution). See *United States v. Whitney*, 2006 U.S. Dist. LEXIS 74524 (D. Mass. Oct. 26, 2006)(Civil commitment sought for drug defendant with a juvenile history of sexual assaults).

Inmates participating in the SOTP do so on a voluntary basis, are subjected to polygraph exams and penile plethysmography, must accept responsibility for their "crimes," and are either required or

encouraged to admit previously undetected offenses and bad thoughts. BOP keeps a record of all of this. Dr. Hernandez used this information in studies, which he reported to treatment professionals and to Congress, finding that while only a small percentage of Internet offenders had known contact offenses at the time of sentencing, over 80% disclosed contact offenses during "treatment." Dr. Hernandez concluded, "these Internet child pornographers are far more dangerous to society than we previously thought." See Hernandez Statement.

Sex offender management involves "risk assessment" and "management." This apparently is not voluntary. It is a way to segregate sex offenders and control what they do, say and read. It may also involve disclosure of undetected offenses and bad thoughts.

Dr. Hernandez' testimony seems to push for a BOP assumption that regardless of what our clients have actually been convicted of, or admitted, most "sex crime" related clients are dangerous, serial hands-on sex abusers. For example, Dr. Hernandez says, "Eighty-five percent of inmates [convicted of possessing or distributing child pornography] were in fact contact sexual offenders, compared to only 26 percent known at the time of sentencing." His message; in reality the "lookers" are really "touchers" so they are dangerous. As for his facts, those come from the self confessions of those he and the BOP work with.

My thanks to fellow defender Miriam Conrad for much of the SDP information in this article.

TENTH CIRCUIT WEIGHS IN ON SUPPRESSING IDENTITY EVIDENCE IN REENTRY CASES

By Shari Lynn Allison, Research and Writing Specialist
District of New Mexico, Las Cruces Office

As you read the police reports, you are chortling with glee at the thought of the suppression hearing. This is a slam dunk; there was no reasonable suspicion to stop the car in which your client was riding. Then you remember: Your noncitizen client isn't charged with possession of the drugs found in the car, but only with violating 8 U.S.C. § 1326, illegal reentry after deportation. Is it worth the effort to pursue a possible suppression motion? It may be, especially in the Tenth Circuit or one of the circuits that has not addressed the issue yet.

The goal is to prevent the government from using unlawfully obtained evidence pertaining to a defendant's identity – including an officer's identification of the defendant, the defendant's statements of identity, the defendant's fingerprints, and the official records located using the unlawfully obtained evidence – to prosecute that individual. This evidence is the basis for proving all the elements of the charge against a defendant charged with illegally reentering the United States after deportation in violation of 8 U.S.C. § 1326. A recent split decision from the Tenth Circuit, *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006), affirms that such evidence can be suppressed while adding to the circuit split on the issues.

Mr. Olivares was the passenger in a pick-up truck that was intercepted by Border Patrol agents as it was driving out of a trailer park in Vado, New Mexico. Agent Almendariz testified that a reliable informant had provided information that residents of a trailer in the park were illegal aliens and possibly burglarizing local homes. (The Tenth Circuit failed to observe in its statement of the facts that the district

court found Agent Almendariz to not be credible based on his partner's contrary testimony.) The agents visited the trailer park several times over the next few weeks, but did not find anyone until February 4, 2004. This time, they saw a green pickup truck exiting the narrow driveway. The agents blocked the truck from leaving the trailer park. After stopping the truck, Agent Armendariz claimed to have recognized Mr. Olivares as an illegal immigrant he had arrested a month or two earlier. Mr. Olivares and the other occupants of the truck were questioned regarding their citizenship before they were given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Mr. Olivares admitted he was a Mexican citizen and illegally in the United States. He was then arrested, taken to the Border Patrol station, fingerprinted and questioned further. This information was used to obtain his A-file and criminal records. He was finally read his *Miranda* rights and delivered to jail.

The district court granted Mr. Olivares' motion, suppressing "all statements and fingerprints seized from [Defendant], as well as the immigration and criminal records located using that evidence of identity." *Id.* at 1107. First, it concluded that both the stop and arrest of Mr. Olivares violated the Fourth Amendment. Second, it determined that the fingerprints and statements seized at the Border Patrol station were"fruit of the poisonous tree." Third, it held that the Government had not met its burden of proving the evidence would have been inevitably discovered. Fourth, it rejected the government's contention that, under *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), the body or identity of a defendant is never suppressible. Finally, because the A-file and criminal records had been located using the evidence the district court found to be suppressible, it also suppressed those records.

Importantly, the government waived and so the majority refused to address some issues. First, the majority found the issue of whether Agent Armendariz's identification of Mr. Olivares was not suppressible because a defendant "'has no reasonable expectation of privacy in his visual appearance when exposed to the public eye'" had been waived because the government had not argued it. 458 F.3d at 1106 n.1. However, it noted that it did not disagree with this statement by the dissent. *Id.*

Second, the government did not contest the district court's conclusion that both the stop and subsequent arrest of Mr. Olivares violated the Fourth Amendment, thereby waiving the issue of probable cause. *Id.* at 1107.

On appeal, the government argued only that evidence of a defendant's identity (including statements, fingerprints and an A-file) was never suppressible. The Tenth Circuit disagreed. The government relied on the statement in *Lopez-Mendoza* that:

> The "body" or "identity" of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.

468 U.S. at 1039. The Tenth Circuit recognized that this statement did not "exempt[] from the 'fruits' doctrine all evidence that tends to show a defendant's identity." 458 F.3d at 1111. Rather, the statement applies to challenges to the court's jurisdiction based on the unlawful arrest, not to cases in which the defendant is challenging the admissibility of the evidence against him or her. *Id.*

Turning to the specific evidence suppressed, the Court affirmed the district court's suppression of Mr. Olivares' statements made at the time of the arrest and later at the station. 458 F.3d at 1112. However, the Court did not affirm suppression of Mr. Olivares' fingerprints; instead, it remanded the issue to the district court for an evidentiary hearing on whether the fingerprints were obtained as the result of "a routine booking procedure." The Court recognized the factual nexus between the unlawful arrest and the fingerprints, saying:

> Nevertheless, we distinguish between fingerprints that are obtained as a

> result of an unconstitutional investigation and fingerprint evidence that is instead obtained merely as part of a routine booking procedure. In doing so, we hold that fingerprints administratively taken in conjunction with an arrest for the purpose of simply ascertaining or confirming the identity of the person arrested and routinely determining the criminal history and outstanding warrants of the person arrested are sufficiently unrelated to the unlawful arrest that they are not suppressible.

Id. at 1112-13. The Court recognized that "[i]n *Davis* and *Hayes*, the Supreme Court held that when an illegal arrest was used as an investigatory devise to obtain fingerprints, the fingerprints were regarded as an inadmissible fruit of an illegal detention." *Id.* at 1114. However, it limited the applicability of those cases to situations where the officers' motive was to obtain the fingerprints and read those cases "as requiring the suppression of fingerprint evidence only when the illegal arrest was for the purpose of obtaining fingerprints without a warrant or probable cause." *Id.* at 1115. It then broadened its reading, holding that "if an illegal arrest was purposefully exploited for the objective of obtaining fingerprints, then the fingerprint evidence must be suppressed." *Id.* The Court declined to conclude, on the record before it, "that the illegal arrest was not in part for the purpose of obtaining [Mr. Olivares'] fingerprints to link him to criminal activity." *Id.* at 1117. Accordingly, it remanded for an evidentiary hearing on the issue.

The Court then turned its attention to the suppression of the A-file. It rejected the government's argument, based on Fifth and Third Circuit decisions, that Mr. Olivares lacked standing to challenge the admissibility of the records. Instead, it correctly concluded that Mr. Olivares' standing to challenge the admissibility of the evidence was based on the alleged violation of his Fourth Amendment rights (the unlawful arrest). "There is no independent requirement that a defendant also have standing or a proprietary interest in the items sought to be suppressed under the fruits of the poisonous tree doctrine." *Id.* at 1119. Thus, Mr. Olivares could challenge admissibility of the records.

The Tenth Circuit, however, determined that the admissibility of the records relied on the admissibility of the fingerprints, because the government used those fingerprints to locate the A-file. *Id.* at 1119. It rejected the government's argument that the records could not be suppressed because they were in the government's possession before the illegal arrest. The Court recognized that, while "Defendant's A-file was not *developed* as a result of any illegal activity, but rather was compiled prior to, and independently of, the illegal seizure of Defendant, the Border Patrol did not effectively have Defendant's A-file in their grasp. Instead, the practicality of the situation is that they obtained Defendant's A-file only by first taking his fingerprints." *Id.* at 1120.

I wish I could tell you the result on remand. However, shortly before the decision was issued, Mr. Olivares was finally let out of jail on bond, after being held for 29 months, and promptly deported. In his absence, no evidentiary hearing has been held in the district court and the government has declined to agree to allow the Court to rule on the existing record, which contains testimony by the agent that he took Mr. Olivares' fingerprints not just to book him but to see if he had a prior criminal record which would allow the agent to file criminal charges. Thus, Mr. Olivares' case is in limbo. However, just two weeks before the Tenth Circuit issued its decision, the U.S. District Court for New Mexico granted a motion to suppress in a reentry case and further refused to grant a government motion for fingerprint exemplars, as the Ninth Circuit has allowed. *United States v. Juarez-Torres*, 441 F.Supp.2d 1108 (D.N.M. 2006). The Court succinctly reasoned: "The government through a motion for fingerprint exemplars should not be allowed to accomplish the same thing that it is barred from accomplishing to begin with because of its illegal conduct." *Id.* at 1122.

Olivares-Rangel supports the argument that

statements, observations, fingerprints, and official records are suppressible as fruits of an unlawful arrest. Consequently, pursuing such arguments may bear results, even if only in the form of an improved plea offer. This office recently had such a case, in which investigation showed that Border Patrol officers had gone to a motel room to question the occupants based solely on their Hispanic names. Rather than proceed to a suppression hearing, the government offered a plea agreement, which the client accepted. In fact, the government made the offer even though a co-defendant had already litigated and lost a suppression motion! Thus, investigating and pursuing possible suppression issues is worthwhile, even where the only evidence at issue is "identity" related.

Note: AFPD Barbara A. Mandel was trial and appellate counsel for Mr. Olivares-Rangel.

KUDOSKORNER

Congratulations to **AFDs Jennifer Hart** and **Michael Petersen**, **CSA Jimmie Fisher,** and **Investigator Danny Carmichael, Middle District of Alabama**, for their victory in a child pornography case. The government had 11 images of child pornography on a government computer used by the client, and the client's alleged confession. However, the images were discovered as the result of a security notification that the computer in question had a malicious code incident. None of the images were larger than "thumbnail" size and all had been deleted. Jimmie analyzed the government's forensic report and discovered that an unknown hacker had accessed the computer four days earlier using a "Trojan horse" and several hundred viruses had infected the computer. In addition, Jennifer Hart won a motion requiring the government to show only the images to the jury in their "native format" – that is, in the thumbnail size as they had appeared originally. The jury came back "not guilty" on all counts.

A little farther south, in the **Southern District of Alabama**, congratulations go to **Community Defender Carlos A. Williams**, **CSA Chris Feaster**, and **Mitigation Specialist Jackie Page** for their recent sentencing victory in a possession of child porn case. The client was not a pedophile; just a lonely guy who reached out for communication on the internet. The hard and thorough work by the defense team revealed this. Through their excellent work, the client, who was facing a low end sentence of 97 months, received a downward post-**Booker** variance to 5 months' probation. Among other things, Chris was able to retrieve from the computer an e-mail that the client sent to the person that had sent to him a child porn image. In the e-mail, the client stated that he did not wish to receive child porn. This e-mail had not been discovered by the government. Also, mitigation

evidence that was diligently discovered and organized by Jackie and which was compellingly presented at the sentencing hearing by Carlos, further convinced the district court to impose the probationary sentence. Job well done!

A tip o' the hat to appellate attorney **Kristen Gartman Rogers**, **Southern District of Alabama**, for her victory in United States v. Hunt. In this case, the 11th Circuit ruled that the advisory guidelines post-Booker are not presumptively reasonable, and that the courts must conduct a case-by-case analysis of how much weight to give the guidelines in consideration of the rest of the 18 U.S.C. § 3553(a) factors. Congratulations!

Also in the **Southern District of Alabama, AFD Latisha Colvin**, represented a client charged with possession of a listed chemical with intent to manufacture methamphetamine. The client's advisory guidelines range was 46-57 months. Latisha submitted a sentencing memorandum and argued that based on most of the 18 U.S.C. § 3553(a) factors, which involved an in-depth presentation of the client's history and characteristics among other factors, the client was due a variance from the guidelines. The district judge agreed and sentenced the client to time served and 3 years' supervised release.

Way out west, **AFD Gerald Williams**, **District of Arizona**, got a "not guilty" on an assault with a dangerous weapon, involving a car and a car struck victim. Gerald's client and the victim had an on going feud. On the night of incident defendant and his girlfriend were taking a friend home in a small housing development where cars are easily identified, especially if your last name is displayed in the back window. The victim was in a neighbor's yard drinking. As the client drove through the neighborhood, the victim came towards the car and threw a rock at the windshield. The client swerved and hit the victim. The client left the area and stopped when he saw a police vehicle - reporting the incident and wrote out a statement, denying the intentional act. During the statement, a local officer familiar with the feud, commented that he thought what happened was an accident. The jury agreed, proving accidents do happen.

AFD Saul Huerta, **District of Arizona, Tucson**, recently won "not guilty" verdicts in a 17 count indictment charging mail fraud and identity theft. The case involved a Liberian who received amnesty several years ago and was working for a company shipping products charged by credit cards. The client stored things for a "friend," (fellow Liberian) and forwarded items. After lots of paper, an FBI statement, and a five day trial, Saul got a directed verdict on 2 counts and "not guilty" verdicts on 15 counts.

In the **District of Massachusetts**, **AFD Tim Watkin's** extraordinary work and persistence in US v. Henderson, 463 F.3d 27 (2006), ultimately resulted in the First Circuit's reversal of the district court's denial of a motion to suppress in another ACCA case. The grounds for reversal: the district court judge clearly erred in crediting the police testimony at the suppression hearing. **CJA** appellate lawyer **Jane Lee** also deserves kudos for raising the clear error argument. The opinion lays out Tim's incredible diligence and creativity - assisted by **Investigator Winfred Meadows-Marquez** - in investigating and presenting the issues.

AFD Stellio Sinnis, ably assisted by **AFD Syrie Fried** and **Investigator Winfred Meadows-Marquez, District of Massachusetts,** got a big NOT GUILTY in his first federal criminal trial. The client was a guy charged with felon in possession of a single bullet. The defense, which Stellio credits Syrie with, was a creative one, and one worth noting for future cases (should we be so lucky to have the facts supporting it): that the defendant was in "innocent possession" of the bullet, which he found in front of his family's home and picked up so he could throw it away later. Worth noting is the 1st Cir. decision in U.S. v. Teemer, 394 F.3d 59 (1st Cir. 2005)("Relying upon the jury is reasonable, for common sense is the touchstone in situations of innocent contact, and the occasions that might warrant leniency are myriad and hard to cabin in advance." "If a jury wished to acquit in such a situation, it could do so...."). The jury instruction given in Teemer was, in pertinent part, as follows: An act is done knowingly if it is done voluntarily and intentionally and not because of a mistake or accident or some other innocent reason. The purpose of adding the word knowingly in the indictment and in the statute under which the indictment is returned is to insure that no one will be convicted for an act done because of a mistake or an accident or for any other innocent reason. The following week, Stellio won a motion to suppress in another ACCA case after the judge found that the police were not credible. Credit also goes to **RWS Martin Vogelbaum**, whose post hearing memo creatively used a chart to contrast the changes in each officer's story over time.

The **Southern District of Mississippi** had a banner month this fall. The district has six AFDs (4 in Jackson and 2 in Gulfport). Between September 7 and October 13, 2006, all six AFDs went to jury trial seven times, resulting in 5 not guilty, 1 hung jury (8 to 4 for the defense) and 1 conviction. That's not counting a string of dismissals. Among the victors: **Senior Litigator/AFD George Lucas** - 2 not guilty verdicts; **AFD Kathy Nester** - 2 not guilty verdicts; **AFD Omodare Jupiter** - 1 mistrial;

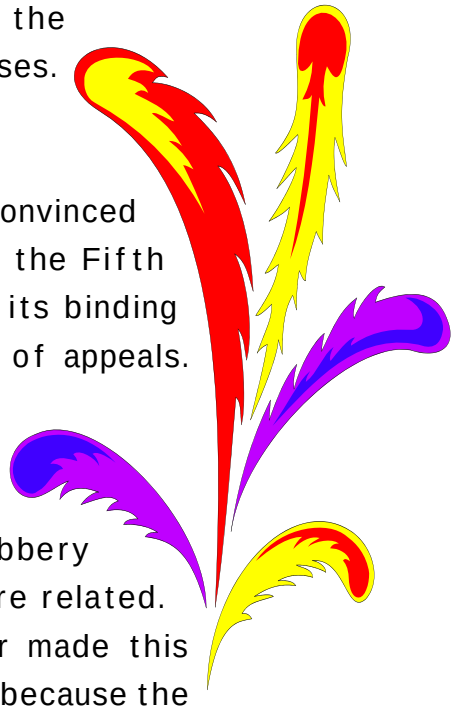
AFD Ellen Allred and **AFD John Weber** - 1 not guilty. **AFD Abby Brumley** came on board September 6, 2006 being one year out of law school. She second chaired 4 not guilty trials in a row. Of course, it would have been impossible without an excellent support staff. The defender troops have gotten the respect of the Judges and now the respect of the US Attorney's office (even though they don't like it). Major Kudos are deserving!

In the **Western District of Oklahoma**, **1st AFD William Earley** got a full acquittal on a two count indictment charging assault on a federal officer (an FBI Agent) and attempting to escape from an arrest. Agents approached Bill's client to arrest him on a bank robbery warrant from a neighboring district. When the client tried to "walk away", an agent grabbed him, got swung around and subsequently fell, suffering significant injuries. To Bill's surprise, the jury exonerated.

In hockey it is called a hat trick, but what is it called in the world of criminal defense? **AFD Tony Lacy**, **Western District of Oklahoma** (and co-editor of The Liberty Legend) won three jury trials in a row. The first two were counterfeiting cases. In the first, the client received some old, rare, gold coins from his father, but it turned out the coins were not genuine. The Secret Service contacted the client about selling the coins and during the ensuing conversations all parties acknowledged the coins were fake. The client testified that he just tried to sell fake coins, as fake coins, with no intent to defraud. The jury acquitted . In the second case, the client printed some bills in his apartment to play craps with friends, because the money, even fake, made it more exciting. Apparently one of the kids went off with some of the bills and tried to make some purchases. The defense was pleasantly surprised when some government witnesses collapsed and told mis-matched and contradicting stories--clearly off-script and divergent from what was in the investigative reports. The craps story carried the day. In the third case, Tony put the government to the test and did not even have to wait for the jury to acquit his client because the judge did it for him! Tony's client, a recently retired Deputy United States Marshal (talk about pressure) was charged by Indictment with cockfighting in Indian Country. The U.S. Attorney's Office for the Western District of Oklahoma recused, as did all the judges in the charging district. The government's case began to unravel the week before trial when government witnesses recanted the identification of the client. That count was dismissed. By the time of trial, the government's case fell apart further when witnesses did not testify in conformity with their interview reports and the government had no other direct evidence of the client's involvement in fighting roosters. The visiting judge granted the Motion for Judgment of Acquittal. That little string of victories won Tony the Oklahoma Criminal Defense Lawyers Association's annual Clarence Darrow Award for zealous criminal

defense advocacy by an individual attorney and the Oklahoma County Criminal Defense Association's annual Barry Albert Award for excellence in advocacy. Way to go!

A big applause for the new guy, **AFD Max Perez**, **District of Puerto Rico**, who has been in the FPD office for one year. He won a suppression hearing on a case that started as a domestic terrorism investigation but morphed into a drugs and gun case. In brief, the territorial law enforcement agents, under the pretext of a weapons safety law, entered defendant's apartment. Once there, they illegally seized his properly registered weapons, and found literature and "material" they interpreted as indicating subversive activities. They reported the same to the FBI and a federal search warrant was issued based on the illegal state search. During the search under the federal warrant, they found an illegal gun and marijuana. The attack was on the original search and the information derived from it, which formed the basis for the federal warrant (fruit of the poisonous tree). The defense called the state agents as witnesses. A job very well done, especially in the investigative stages.



AFD Philip G. Gallagher, Southern District of Texas, convinced the Supreme Court to grant certiorari and reverse because the Fifth Circuit failed to follow the plain language of the Guidelines, its binding precedent and the consistent holdings of the other courts of appeals. *Salinas v. United States*, 126 S. Ct. 1675 (2006). Phil had argued in the District Court and the Fifth Circuit that the defendant should not have been sentenced as a career offender for bank robbery because his two previous robbery convictions, which occurred within an hour of each other, were related. Although neither the government nor the probation officer made this suggestion, the Fifth Circuit held that there was no plain error because the defendant also had a felony conviction for possession of a controlled substance. Of course, as all circuits, and now the Supreme Court, have recognized, the career offender provisions do not include mere possession of a controlled substance. USSG §§ 4B1.1(a), 4B1.2(b). Unfortunately, on remand, the Fifth Circuit found that the previous offenses were not related and affirmed the sentence.

If you read The Liberty Legend regularly, you may have wondered why your much deserved Kudo was conspicuously missing. The editors solicit Kudos before every edition. If we are not told of successes and achievements, we have no way of sharing them with the Association. Brag on yourself or someone else. What are you waiting for? The editors are accepting Kudos 24/7 at Lori.Ulrich@fd.org and Tony.Lacy@fd.org

MOUSSAOUI DEFENSE TEAM GIVEN SPECIAL NAFD RECOGNITION

By Tim Crooks, NAFD President , Supervisory Assistant Federal Public Defender, Southern District of Texas, Houston Office

At the Advanced Defender Seminar held in San Francisco last year, the National Association of Federal Defenders presented a special award to the attorney team from the Federal Public Defenders for the Eastern District of Virginia, for their defense of Zacarias Moussaoui, the alleged "21st hijacker" in the tragic events of September 11, 2001. Acting Defender Michael Nachmanoff accepted the award on behalf of his office.

In 2001, then-Defender Frank Dunham took on representation of Mr. Moussaoui as his office's very first client, and the office diligently defended Mr. Moussaoui over the course of several years. Through the talents and hard work of the EDVA team, Mr. Moussaoui was spared the death penalty.

Special kudos go out to the EDVA attorneys that bore primary responsibility for representation of Mr. Moussaoui: Gerald Zerkin, Anne Chapman, Ken Troccoli, and, of course, Defender Emeritus Frank Dunham, who sadly passed away later last year. The EDVA team was also assisted by CJA panel attorneys Edward MacMahon and Alan Yamamoto.

The EDVA Moussaoui team exemplify the ideals that we, as federal defenders, all seek to uphold. For their hard work and dedication, and their grace under pressure, we at NAFD salute them.

FEDERAL RULE OF CRIMINAL PROCEDURE 29: A NUTS AND BOLTS GUIDE TO JUDGMENTS OF ACQUITTAL FOR CRIMINAL DEFENSE ATTORNEYS

By John Balazs, Attorney At Law, Sacramento, California

A successful motion for judgment of acquittal under FEDERAL RULE OF CRIMINAL PROCEDURE 29 is the equivalent to winning a not guilty verdict and it bars the government from retrying your client. But the rule has a few counter-intuitive traps that can snare a careless attorney, especially one who practices primarily in state court where the rules may be quite different. This paper is designed as a practical guide to making and successfully litigating Rule 29 motions and avoiding potential land mines.

THE TEST

The standard for evaluating a Rule 29 motion is the same as the standard used in evaluating whether the evidence is sufficient to sustain the verdict: whether viewing all the evidence in the light most favorable to the government, any rational jury could find the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, the court will uphold a conviction if the evidence, *including evidence that was erroneously admitted*, was sufficient to sustain the verdict. *Lockhardt v. Nelson*, 488 U.S. 33, 40-42 (1988). But where the court instructs the jury that some evidence was admitted only for a limited purpose, in examining the sufficiency of the evidence, that evidence is restricted to its purpose. *United States v. Arteaga*, 117 F.3d 388, 397-99 (9th Cir. 1997). Also, the verdict cannot be sustained based on a theory of liability that the jury was not instructed on. *United States v. Tarallo*, 380 F.3d 1174, 1183 (9th Cir. 2005) (verdict cannot be sustained on securities fraud conviction based on theory of co-schemer's liability where jury was not instructed on theory).

IN WHICH CASES SHOULD YOU MAKE A RULE 29 MOTION?

In which cases should you make a Rule 29 motion for judgment of acquittal at a jury trial? Answer: in ***every case***! Even if you don't see a legitimate ground for moving for an acquittal, the appellate attorney with more time to scrounge through the record might see one that you missed. And there are examples of cases where a district judge has said he or she would have granted a judgment of acquittal if only the defense attorney had moved for one. *See, e.g. United States v. McCormick*, 72 F.3d 1404, 1411 (9th Cir. 1995) (Court gives "some deference" to the trial judge's comments at sentencing that he would have granted a post-trial Rule 29 motion if one had been made). When faced with a case with overwhelming evidence of your client's guilt and where you can't think of any possible argument that any juror could possibly find your client not guilty, make the motion anyway, saying: "I move for a judgment of acquittal on the ground that the prosecution has failed to present sufficient proof from which any rational juror could conclude beyond a reasonable doubt that my client is guilty on any count."

If you can't say this to your judge with a straight face or you forget to make a motion before the verdict, you can file a short, written motion after the verdict under Rule 29(c) saying the same thing. This "general" motion for acquittal should be enough to preserve the sufficiency of the evidence claim for appeal. *United States v. Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (agreeing with "[s]everal of our sister circuits [that] have held that *Rule 29* motions for acquittal do not need to state the grounds upon which they are based because 'the very nature of such motions is to question the sufficiency of the evidence to support a conviction"), with the exception of venue claims. *See, e.g. United States v. Bala*, 236 F.3d 87, 95-96 (2d Cir. 2000); *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998) (general Rule 29 motion does not preserve challenge for improper venue). In fact, in some cases it might be the better approach not to specify grounds for the motion as courts of appeal sometime find insufficiency arguments other than those raised before the district court to be waived and thus subject to only plain error review. *See, e.g., United States v. Moore*, 363 F.3d 631, 637 (7th Cir. 2004); *United States v. Herrera*, 313 F.3d 882, 884-85 (5th Cir. 2002) ("Where, as here, a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count."); *United States v. Dandy*, 998 F.2d 1344,

1356 (6th Cir. 1993).

If no motion is made at the trial level, review on appeal is only to avoid a manifest miscarriage of justice or for plain error, a much more difficult standard to overcome. *See, e.g.*, *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990), though a savvy appellate attorney would rely on case law to argue that there is no real difference in application between the two standards in dealing with insufficiency of the evidence claims. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1110 (9th Cir. 1995) (dicta); *United States v. Cox*, 929 F.2d 1511, 1514 (10th Cir. 1991).

In a bench trial, no motion for acquittal is necessary to preserve an insufficiency of the evidence claim because the district court must already enter a judgment of acquittal unless convinced beyond a reasonable doubt of your client's guilt. *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en banc); *United States v. Rosa-Fuentes*, 970 F.2d 1379, 1381 (5th Cir. 1992). The same standard of appellate review for insufficiency of the evidence claims applies to both jury and bench trials. *United States v. Randolph*, 93 F.3d 656, 660 (9th Cir. 1996).

WHEN SHOULD YOU MAKE A RULE 29 MOTION?

In general, a Rule 29 motion may be made at three points in a criminal case: first, after the close of the government's case-in-chief; second, at the close of all the evidence and before the verdict; and, third, after the jury's verdict.

Before The Case Is Submitted To The Jury

Under its terms, a Rule 29(a) motion may be made at the close of the government's case or after the close of all the evidence.[1] But a motion made at the close of the government's case is *waived* unless renewed after the close of all the evidence so that review is only for plain error. *United States v. Alvarado*, 982 F.2d 659, 662 (1st Cir. 1992); *United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997); *United States v. Pennyman*, 889 F.2d 104, 105 n.1 (6th Cir. 1989); *United States v. Brinley*, 148 F.3d 819, 821 (7th Cir. 1992); *United States v. Sherod*, 960 F.2d 1075, 1076 (D.C. Cir. 1992); *United States v. Mora,* 876 F.2d 76, 77 (9th Cir. 1989). The converse, however, is not true. One can make a motion for judgment of acquittal at the close of *all* the evidence even if no motion was made when the government completed its case-in-chief. It is thus essential to make a Rule 29 motion at the close of *all* the evidence, regardless whether any motion was made earlier. On appeal in a case where a Rule 29 motion after the government's case-in-chief was not renewed after all the evidence, it may be worth pointing out that *United States v. Baxley*, 982 F.2d 1265, 1268 n.6 (9th Cir. 1992), held that, because the waiver rule is not required by statute or the text of Rule 29, the Court has discretion to depart from the rule in appropriate circumstances.

Where a motion is made after the government finishes its case-in-chief, the district court may reserve decision on the motion until after the jury reaches a verdict or a mistrial is declared. FED. R. CRIM. P. 29(b). Under Federal

[1] There is some case law to support a motion for judgment of acquittal even before the government has finished its case. *See United States v. Capocii*, 433 F.2d 155, 158 (1st Cir. 1970) (after opening statements); *United States v. Ubl*, 472 F. Supp. 1236, 1237 (N.D. Ohio 1979) (whenever it appears inevitable that the prosecution's case must fail); *see also Fong Foo v. United States*, 369 U.S. 141, 142 (1962) (affirming entry of acquittal after only 3 witnesses in a long and complicated trial).

law, if defense counsel decides to present evidence after the district judge has denied a Rule 29 motion at the close of government's case-in-chief, the defense waives its motion to challenge the sufficiency of the evidence presented in the government's case-in-chief. Rather, the appellate court will review whether the total evidence presented in both the government's case and the defense case is sufficient to uphold the conviction. *United States v. Byfield*, 928 F.2d 1163, 1166 (D.C. Cir. 1991); *United States v. Bowie*, 892 F.2d 1494, 1497 (10th Cir. 1990). This is different from the law in some states where the courts of appeal evaluate only the evidence presented before the close of the government's case upon ruling on a motion for acquittal, even if the defense later presented evidence on its own behalf. *See, e.g., People v. Trevino*, 39 Cal.3d 667, 695, 217 Cal.Rptr. 652 (1985); *cf. LaMere v. Slaughter*, No. 05-35558, 2006 U.S. App. Lexis 20256 (9th Cir. Aug. 8, 2006) (in a § 2254 action, federal court reviews the evidence in both the state and defense's cases in ruling on a *Jackson* due process insufficiency claim) (following *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000)).

An exception to this rule occurs where the judge defers decision until after the verdict on a motion for acquittal made after the government's case. In that case, a defendant may challenge on appeal whether the government presented sufficient evidence in its case-in-chief to sustain the conviction--without reference to any of the evidence presented in the defense case or the government's rebuttal. *See* FED. R. CRIM. P. 29(b) ("If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved."); *see also* Notes of Advisory Committee on 1994 Amendment to FED. R. CRIM. P. 29 . Moreover, if a defendant refrains from presenting evidence on a particular count, there is a good argument that he reserves the right to review of the evidence at the end of the government's case on that count, even if he or she submits evidence on other counts. *United States v. Thomas*, 987 F.2d 697, 702-03 (11th Cir. 1993).

The federal rule forces defense counsel to make a tactical choice where the trial judge denies a potentially meritorious Rule 29(a) motion at the close of government's case-in-chief and the defense's case could serve to strengthen the evidence on a weak count. Option one is to rest without presenting any evidence, thus preserving the Rule 29 motion. Option two is to present evidence in the defense case to increase the chances of obtaining a not guilty verdict from the jury, but waiving a challenge on appeal to the state of the evidence at the close of the government's case. Under this second approach, the appellate court would consider *all* of the evidence at trial in deciding whether the evidence was sufficient to sustain the verdict.

What should an alert defense attorney do when he or she realizes the government has completely failed to put on any evidence on one element of an offense that it could easily correct if the absence of evidence was brought to its attention? Tough call. If you move for an acquittal during trial on that ground, the district court would likely have discretion to permit the prosecution to reopen its case to supply evidence on the missing element. *See United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001); *United States v. Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980). If the judge is likely to do so, the better option may be to wait to move for a judgment of acquittal until after the jury returns a verdict, when it is too late for the judge to allow additional evidence.

Motions For Acquittal After Trial

Under FEDERAL RULES OF CRIMINAL PROCEDURE 29(c) and 45(b), a post-trial motion for acquittal must be made or an extension requested within seven days after the jury's verdict or from discharge of a jury that failed to reach a verdict.[2] Under Rule 45(b)(1)(B), if the defendant fails to file the Rule 29 motion within the specified time, the Court may nonetheless consider an untimely motion if the failure to file the motion resulted from "excusable neglect." Otherwise, a district court cannot grant a motion for judgment of acquittal filed even one day late. *Carlisle v. United States*, 517 U.S. 416 (1996). Rule 29(c)(3) specifically states that "[a] defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge."

As a general rule, every post-trial motion for judgment of acquittal should also be accompanied by a motion for new trial under Federal Rule of Criminal Procedure 33 on the ground that, even if the evidence is found sufficient to sustain the verdict, it "preponderates heavily against the verdict." *United States v. Pimental*, 654 F.2d 538, 545 (9th Cir. 1981) (quoting 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)). The Ninth Circuit has held that a Rule 29(c) motion for judgment of acquittal by itself does not give the district court authority to grant a motion for new trial, absent a separate Rule 33 motion. *United States v. Viayra*, 365 F.3d 790 (9th Cir. 2004).

Unlike a successful motion for new trial before the jury's verdict, however, the Double Jeopardy Clause does not bar the government from appealing the district court's grant of a *post-trial* motion for judgment of acquittal. *United States v. Jenkins*, 420 U.S. 358 (1975).

SOME GOOD CASES (OR BAD CASES WITH GOOD LANGUAGE) FOR INSUFFICIENCY OF THE EVIDENCE CLAIMS.

Finally, the cases cited below are intended to jump start your research in making rule 29 motions in the district court or arguing them on appeal.

In General

"When there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." *United States v. Bautista-Avila*, 6 F.3d 1360 (9th Cir. 1993) (quoting *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992)); *accord United States v. Cartwright*, 359 F.3d 281, 291 (3d Cir. 2004) (evidence found insufficient where government asked the jury to make a series of inferences on weak facts where "countless other scenarios that do not lead to the ultimate inference the government seeks to draw" were also plausible).

Specific Types of Evidence

1. Identification Evidence

"The cases teach that in the absence of connecting or corroborating facts or circumstances, resemblance identification *alone* will not

[2] Before a 2005 amendment, a post-trial motion for acquittal had to made within 7 days of the jury's verdict or discharge or within a longer period only if the extended period was set by the district court within that 7-day period. Fed. R. Crim. P. 29, Notes of Advisory Committee on 2005 amendments."

sustain the beyond a reasonable doubt standard essential for conviction." *United States v. Ezzell*, 644 F.2d 1304, 1306 (9th Cir. 1981); *see also United States v. Johnson*, 427 F.2d 957, 961 (5th Cir. 1970).

2. Fingerprint Evidence

Although "fingerprint evidence alone may under certain circumstances support a conviction," . . . "in fingerprint only cases in which the prosecution's theory is based on the premises that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date." *Mikes v. Borg*, 947 F.2d 353, 356-57 (9th Cir. 1991) (emphasis in original); *accord United States v. Lonsdale*, 577 F.2d 923, 926 (5th Cir. 1978); *United States v. VanFossen*, 460 F.2d 38, 41 (4th Cir. 1972); *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967).

3. Confessions

A confession alone is insufficient to establish a conviction unless the government introduces sufficient corroboration (1) to establish criminal conduct at the core of the offense and (2) "independent evidence tending to establish the trustworthiness of the admissions, unless the confession itself is, by virtue or special circumstances, inherently reliable." *United States v. Norris*, 428 F.3d 907, 914 (9th Cir. 2005).

Conspiracy Cases

"Mere presence coupled with flight is not sufficient evidence to sustain a conspiracy conviction." *United States v. Ramos-Rascon*, 8 F.3d 704, 710 (9th Cir. 1993) (*quoting United States v. Ard*, 731 F.2d 718, 724 (11th Cir. 1984)).

A defendant's proximity to duffel bags containing drugs near border was found insufficient to establish guilt of conspiracy to possess marijuana, even with evidence that defendant traveled with other conspirators and brandished a handgun just prior to his arrest. *United States v. Corral-Gastelum*, 240 F.3d 1181 (9th Cir. 2001).

"Once the existence of a conspiracy is established, only a slight connection [to the conspiracy] is necessary to support a conviction of knowing participation in that conspiracy. . . . However, that connection must be proved beyond a reasonable doubt." *Ramos-Rascon*, 8 F.3d at 707 (citation omitted); *see also United States v. Esperaza*, 876 F.2d 1390, 1392 (9th Cir. 1989) ("the word 'slight' properly modifies 'connection' and not 'evidence'. It is tied to that which is proved, not to the type of evidence or the burden of proof.").

"[T]he inferences rising from keeping bad company are not enough to convict a defendant of conspiracy." *United States v. Wexler*, 838 F.2d 88, 91 (3d Cir. 1988). "[G]uilt of a conspiracy cannot be proven solely by family relationship or other type of close association." *United States v. Ritz*, 548 F.2d 510, 522 (5th Cir. 1977).

Specific Types Of Offenses

1. Sexual Assault Cases

Proof of sexual assault found insufficient to show that defendant committed charged crime on any date within or reasonably near the period in the indictment, where child victim did not remember *when* crime occurred. *United States v. Tsinhnahijinnie*, 112 F.3d 988 (9th Cir. 1997).

2. **Mail/Wire Fraud**

In mail fraud cases, "[t]he government may not prevail without demonstrating that the mailings were incident to the execution of the scheme, rather than part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the scheme." *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000); *see also United States v. Manarite*, 44 F.3d 1407 (9th Cir. 1995).

3. Money Laundering

Evidence that defendant was a leader of an organized crime gang, his apparent lack of legitimate income, and his parents' meager income were insufficient to conclude that charged proceeds were derived from the specific, charged specified unlawful activity. *United States v. Carucci*, 364 F.3d 339, 347 (1st Cir. 2004).

4. Drugs/Contraband

Evidence found insufficient because it did not show that defendant knew he was participating in a drug transaction rather than some other form of contraband, such as stolen jewels. *United States v. Cartwright*, 359 F.3d 281, 287 (3d Cir. 2004).

Mere knowledge of contraband without evidence showing dominion or control is insufficient to prove possession of the contraband. *United States v. Ramirez*, 176 F.3d 1179, 1181 (9th Cir. 1999).

Entrapment

Cases where courts have found evidence insufficient as a matter of law on ground that government failed to disprove entrapment beyond a reasonable doubt: *Jacobson v. United States*, 503 U.S. 540, 548 (1992); *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000); *United States v. Skarie*, 971 F.2d 317 (9th Cir. 1992).

Pinkerton liability

Pinkerton liability does not necessarily support a gun conviction in a drug conspiracy because "there is no presumption of foreseeability" of a gun. *United States v. Casteneda*, 9 F.3d 761, 767 (9th Cir. 1993). "Where a defendant has little or no connection to the predicate drug offense, another conspirator's use of a firearm may, in some fact situations, be unforeseeable. In those cases, it would violate due process to find that defendant vicariously liable for the firearm's use under [18 U.S.C.] § 924(c). *Id.*; *see also United States v. Alvarez*, 755 F.2d 830, 850 (11th Cir. 1985) ("we are mindful of the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive count").

ADVANCED FEDERAL DEFENDER SEMINAR – SAN FRANCISCO 2006

Thanks to our host defender office, the Federal Public Defender's Office for the Northern District of California, the 2006 Advanced Federal Defender Seminar held in San Francisco in May-June of 2006, was a "Giant" success. Special kudos should go to the members of Barry Portman's FPD office. Thanks to all of the people whose tireless efforts made for a memorable professional and social event.

"STATUTORY" ENHANCEMENT BY JUDICIAL NOTICE OF DANGER: WHO NEEDS LEGISLATORS OR JURORS?

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Editor's Note: This article is an update of *Judge-Made Sentence Enhancements: A Question of Fact, of Law, or of the Constitution?,* by William R. Maynard, THE CHAMPION, June 2001 at 14.

There are at least three provisions in federal sentence enhancement statutes that judges cannot apply without *simultaneously* finding facts *and* making law – thereby violating multiple constitutional safeguards. I will call these three provisions "judicial danger assessments" for reasons explained below.

In the provisions, Congress provides that (1) any dangerous prior offense supports statutory sentence enhancement, and (2) courts decide which *categories* of prior offenses are dangerous. Judges decide based on their subjective opinions of an offense's inherent (*i.e.,* categorical) dangers. In the process they overwrite jury verdicts and statutory elements to add "danger" to the offense. Danger becomes a sort of quasi-element – a categorical "sentencing factor" – by judicial fiat, as a matter of law.

Enhancement by Judicial Notice

This is a reasoning process that legal scholars call "judicial notice of legislative facts." It conflates fact and law questions into one judicial inquiry, to the exclusion of both legislatures and juries.

A court's finding that an offense is categorically dangerous, in addition to whatever its elements may be, is the fact-finding dimension. But courts do not treat the danger as a sentencing factor in the sense of an "adjudicative fact" (a circumstance of the defendant's particular prior offense). Instead, courts impute danger to an entire *category* of offenses, as a matter of law, in addition to its statutory definition. This is the lawmaking dimension of the process. It qualifies the category as a predicate for statutory sentence enhancement as if Congress had expressly included it in the enhancement law.

This article explains the process and why it is unconstitutional. It simultaneously usurps both the fact-finding power of juries and the lawmaking power of legislatures. The process is incompatible with the Sixth Amendment as well as the separation of powers and non-delegation doctrines of Article I.

In addition, although this is beyond the scope of the article, this process deprives defendants of any right to an evidentiary hearing, confrontation, cross examination, evidence rules, burdens of proof, and fair notice. Such protections cannot function if judges arrogate to themselves the power to simultaneously make law and find facts.

No court has squarely addressed this constitutional conundrum. The Supreme Court first struggled with the danger assessment in an oral argument as recently as Nov. 7, 2006, without exploring the constitutional issues.[1]

Defendants usually dispute the correctness of a court's application of the danger assessment, not its constitutional power to apply it in the first place. In the federal circuits, a few defendants[2] have recently articulated bits and pieces of the arguments discussed here. This article is written in the hope that the conundrum will soon be squarely before the Supreme Court.

The provisions that violate the Constitution are in italics below.

Violent Felony Under ACCA

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), increases punishment for possession of a firearm by a convicted felony from 0 to10 years, to a statutory minimum of 15 years, and up to life. The enhancement applies if a defendant has three prior convictions for a violent felony. Pursuant to § 924(e)(2)(B)(ii), a "violent felony" includes any felony that "*otherwise involves conduct that presents a serious potential risk of physical injury to another*."

Serious Violent Felony Under VCCA

The Violent Crime Control Act of 1994 ("VCCA"),[3] at 18 U.S.C. § 3559(c), increases a sentence to mandatory life imprisonment upon conviction of a third serious violent felony. Congress defines "serious violent felony" in § 3559(c)(2)(F)(ii) as including any offense punishable by 10 years or more of prison "*that by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense*."

Crime of Violence and Aggravated Felony Under INA

The Immigration and Nationality Act ("INA") (8 U.S.C. § 1326(b)(2)) increases the maximum sentence for illegal reentry after deportation from two to 20 years based on a prior conviction for an aggravated felony. The complex definition of "aggravated felony" provided by Congress is at 8 U.S.C. § 1101(a)(43). Subsection (F) of § 1101(a)(43) provides that a "crime of violence," as defined in 18 U.S.C. § 16, is an "aggravated felony" if punished by at least a year of imprisonment.[4] Section 16(b) defines "crime of violence," and thus, through § 1101(a)(43)(F), the term "aggravated felony," as including any felony "*that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*." (emphasis added).

This article examines the subtle but profound operation of these three provisions. For context, it briefly reviews two foundation doctrines. The first doctrine is that the Constitution separates lawmaking and fact-finding powers and reserves them to the Legislative Branch and to the jury, respectively. Second, "judicial notice of legislative facts" is a reasoning process that combines judicial fact-finding and judicial lawmaking.

In order to apply the three danger assessments, judges must rely on "judicial notice of legislative facts," *not* statutory construction and *not* prior jury findings ("adjudicative facts"). This reasoning violates the Sixth Amendment right to jury trial, as vindicated by three key statutory sentencing cases: *Apprendi v. New Jersey,*[5] *Taylor v. United States,*[6] and *United States v. Shepard.*[7] Also, this reasoning violates the separation of powers doctrine by delegating lawmaking power to judges. In Part VI, I suggest some rhetoric to jar a federal judge into recognizing the constitutional issues.

I. The Constitution's Law-Fact Dichotomy

With respect to *statutory* definitions of offenses and their maximum sentences, the Constitution mandates a dichotomy and symmetry between laws and facts. It reserves separate powers to separate entities. Otherwise, our justice system could not function.

Laws from the legislature. Article 1, Sec.1, of the Constitution and the separation of powers doctrine entrust Congress with the sole power to enact substantive criminal laws that define offenses and statutory maximum sentences. "[D]efining crimes and fixing penalties are legislative, not judicial functions."[8]

Facts by the jury. The Sixth Amendment provides that only juries have the power to find facts that determine guilt and the maximum statutory sentence.[9] The narrow, sole exception is that judges retain power to find the mere existence of a prior conviction.[10] (As I explain below, a prior conviction is merely a prior jury's findings. *Apprendi's* rule, its purpose, and its logic also bar judges from finding

facts related to prior offenses.).

Elements. Statutory elements join law and fact. "Elements" of offenses are "those constituent parts of a crime which *must be proved by law* and *found by juries*."[11] Without elements, legislatures cannot define crimes, the public has no fair notice, grand juries cannot indict, petit juries cannot make findings, and trials have no purpose. A sentencing law that does not rely on statutory elements cannot rely on what *"must be proved by law"* or what was *"found by juries."*

Guidelines. The U.S. Sentencing Guidelines constitute a huge exception to this separation of lawmaking and fact-finding. But this exception is limited because, among other things, guidelines do not affect statutory sentence ranges. Further, in *Booker v. United States,*[12] the Supreme Court reconciled judicial fact-finding with the Sixth Amendment by declaring the federal guidelines "advisory." In *Mistretta v. United States,*[13] the Supreme Court reconciled judicial lawmaking with the separation of powers doctrine by emphasizing that the guidelines restrict judicial discretion and do not increase statutory penalties.

However, regarding *statutory* offenses and *statutory* punishment, judges are almost powerless. They have no lawmaking power, and have the fact-finding power to find only one type of fact – the existence of a prior jury's verdict (*i.e.,* a prior conviction).[14]

II. Judicial Notice of Legislative Facts

Judges and lawyers often use the terms "law" or "question of law" on the one hand, and "fact" or "question of fact" on the other, without realizing they are ambiguous terms. Each pair of terms has at least two different meanings, depending on whether the law is made by a legislative body or by a court.

> Facts may be either "adjudicative" or "legislative."
>
> Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process.
>
> *[J]udge-made law* would stop growing if judges, in thinking about questions of law and policy, were forbidden to *take into account the facts they believe*, as distinguished from facts which are "clearly … within the domain of the undisputable." Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly undisputable.[15]

"Adjudicative facts" relate to proving an element of an offense. They *are* subjected to the truth-testing of cross examination, confrontation, evidentiary hearings, rules against unreliable opinion and hearsay, and burden of proof, not to mention the Sixth Amendment and Due Process. Fed. R. Evid. 201 normally bars courts from taking judicial notice of "adjudicative facts." Juries decide if adjudicative facts are true. Statutory elements are the ultimate adjudicative facts in a criminal case. A jury's findings of adjudicative facts become *res judicata,* affecting only one case.

"Legislative facts" are the policy considerations, factual assumptions, and philosophies that underpin lawmakers' lawmaking decisions. They are *not* subjected to the truth-testing of cross-examination, confrontation, evidentiary hearings, rules against unreliable hearsay or opinion testimony, or burdens of proof. They are not "adjudicated." As the commentary to Rule 201 notes, they are usually disputable and not even necessarily true. Juries do not decide legislative facts. Legislators rely on legislative facts to enact laws. When judges declare a judge-made rule, they rely on legislative facts. Such facts relate to *stare decisis* affecting future cases, not *res judicata*.

"Statutory law" involves pure law questions. A question of law may relate to construing the meaning of an ambiguous statute. This is a "pure"

question of law. Judges base their answers to such questions solely on rules of statutory construction, grammar, semantics, legislative history, shades of common law, and dictionary meanings of words already enacted into law. An example is the way the Supreme Court defined "burglary" in § 924(e)(2)(B)(ii) of the ACCA in *Taylor v. United States*.[16] A legislative body enacts the law. Courts only interpret and apply it. They do not make it.

"Judge-made law" involves mixed law-fact questions. When courts make law, their rules are grounded in their underlying factual beliefs or values, not rules of statutory construction. This is the process of "judicial notice of legislative facts," mixing fact and law. The commentary to Rule 201 cites *Hawkins v. United States*[17] as an example of courts making law by notice of "legislative facts." *Hawkins* refused to discard a common law evidence rule of spousal privilege, stating: "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." The judge's opinion of the likely effect of a spouse's adverse testimony on a typical marriage (not necessarily on the marriage of the particular witness) is the "legislative fact" supporting the ruling.

Another example is *Michigan Dept. of State Police v. Sitz,*[18] a fact-intensive holding that relied on arguably cherry-picked highway traffic safety statistics about the aggregate societal harm of drunk driving (legislative facts) to rule that sobriety checkpoints are "reasonable" under the Fourth Amendment. *Sitz* performed, accurately or not, a classic Fourth Amendment test balancing individual and societal interests.[19]

Sitz and *Hawkins* made law. They relied on legislative facts. They did not find adjudicative facts. Courts have the constitutional power under Article III to decide Fourth Amendment law[20] and to decide evidence law.

Sitz is particularly relevant, because several circuits have relied on *Sitz* to rule that felony DWI inherently "involves conduct that presents a serious potential risk of physical injury to another" and is therefore an ACCA "violent felony."[21]

However, in relying on *Sitz,* those courts failed to question the constitutional limits of the judiciary's power. There is no precedent that Congress may authorize judges to use factual balancing tests or judicial notice of "legislative facts," as contrasted with rules of statutory construction, to decide the scope of substantive criminal laws.

III. Analyzing the danger assessment test

The three danger assessments, which help define "violent felony, "serious violent felony," and "aggravated felony," have common traits that require judicial notice of "legislative facts" to resolve *statutory* questions.

First, the danger assessments determine *statutory* sentence enhancements. They are not guidelines. Since they affect statutory maximums, their application must comport with the Sixth Amendment as construed by *Apprendi*.

Second, each of the three provisions actually constitutes a danger assessment. "Danger" is simply an "exposure or liability to injury, pain, or loss,"[22] or "liability or exposure to harm or injury; risk; peril."[23] Each test describes a risk in similar terms, using the words "substantial risk" or "serious potential risk." The hazard each refers to is one of either (1) injury to a person, (2) use of physical force against another person's property, and/or (3) use of force against another person.

Moreover, the danger assessment is just one part of a three-part scheme Congress used to define violent felony, serious violent felony, and aggravated felony. In each definition, Congress also used enumerated offenses and enumerated elements. For example, § 924(e)(2)(B) provides that "violent felony" includes (1) certain enumerated offenses, such as "burglary, arson, or extortion,"and (2) any felony that "has *as an element* the use, attempted use, or threatened use of force against the person of another." (emphasis added). The "serious violent felony" and "aggravated felony" definitions have a parallel

structure, with enumerated offenses and enumerated elements.[24]

Unlike the enumerated offenses and elements in each definition, the danger assessment does *not* require any particular statutorily defined offense or element. In setting forth the danger test, Congress avoided the phrase "as an element." Instead, it used phrases such as "otherwise involves conduct that presents" or "by its nature, involves" a type of danger. This directs courts to determine whether a prior offense involves a specified danger, *in addition to and apart from whatever a legislature said are its statutory elements.*

It is noteworthy that the danger test requires neither an *actus reus* nor a *mens rea* requirement – no act, no mental state. It might include any offense, as long as a court believes it is dangerous.

In addition, the danger of the prior offense is also a fact or sentencing factor other than the existence of the prior conviction itself.

Since the supposed danger is not an element of the prior offense, the issue can *never* be presented to a prior jury in the prior prosecution. For example, a person with a prior conviction for escape never had an opportunity to present the danger assessment to the prior jury because it is not an element of escape.

Although the danger assessment relates to the *prior* offense of conviction, not the *instant* offense, as in *Apprendi* (enhancement based on racial motive), *Apprendi*'s rule still applies. "[A]*ny fact* [past or present] that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt."[25] See more on this point below, discussing how *Shepard* [26] confirmed the Sixth Amendment link between *Taylor* and *Apprendi*.

A court, *not* Congress, determines which *categories* of prior offenses inherently involve the proscribed dangerous conduct. Courts may include any offense, regardless of what a legislative body may have said are the category's "constituent parts," *i.e.*, its elements. Courts superimpose their opinion of dangerousness onto the elements defined by a legislative body.

END NOTES FOR "Statutory" Enhancement Article

1. On Nov. 7, 2006, in *United States v. James,* No. 05-9264, on appeal from *United States v. James,* 430 F.3d 1150 (11th Cir. 2005) (holding that attempted burglary presents a risk of physical injury and satisfies the ACCA's definition of "violent felony").
2. *United States v. Maysonet,* 2006 WL 2769414 (11th Cir. Sept. 27, 2006) (carrying concealed weapon is an ACCA violent felony); *United States v. Gwartney,* 2006 WL 2640616 (10th Cir. Sept. 14, 2006) (felony DWI is an ACCA "violent felony"); *United States v. George,* 2006 WL 2356137 (11th Cir. Aug. 16, 2006) (same, escape).
3. Pub. L. 103-322, sec. 70001, 18 Stat. at 1982-84.
4. The term "imprisonment" in this provision includes a sentence of imprisonment that is suspended. 8 U.S.C. § 1101(a)(48)(B).
5. 120 S. Ct. 2348 (2000).
6. 110 S. Ct. 2143 (1990).
7. 125 S. Ct. 1254 (2005).
8. *United States v. Evans*, 68 S. Ct. 634, 636 (1948).
9. *Apprendi v. New Jersey, supra.*
10. *Id.*
11. BLACK'S LAW DICTIONARY 467 (5th ed.) (emphasis added).
12. 543 U.S. 220 (2005).
13. 488 U.S. 361 (1989).
14. *Apprendi, supra.*
15. Commentary to Rule 201, Fed. R. Evid., Judicial Notice of Adjudicative Facts, quoting from *A System of Judicial Notice Based on Fairness and Convenience, in* Professor Kenneth Davis, PERSPECTIVES OF LAW 82 (1964) (emphasis added).
16. 110 S. Ct. 2143 (1990).
17. 358 U.S. 74, 79 (1958).
18. 110 S. Ct. 2481 (1990).

19. *Sitz* took the datum from 4 LAFAVE & SCOTT, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 10.8, P. 71 (2d ed. 1987). La Fave took it from 71 GEORGETOWN L.J. 1457 N. 1 (1983). The law journal footnote cites H.R. Rep. No. 867, 97th Cong., 2d sess. 7, reprinted in 1982 U.S. CONG. & ADMIN. NEW. 3367, a report related to a proposed Alcohol Traffic Safety - National Driver Register Act of 1982. The House report's source is unknown.

20. *See Marbury v. Madison,* 5 U.S. 137 (1803).

21. *See* endnote 20.

22. WEBSTER'S NEW COLLEGIATE DICTIONARY 287 (1977).

23. THE AMERICAN COLLEGE DICTIONARY 306 (1966).

24. The "serious violent felony" includes, for example, murder, extortion, arson, among others, and felonies punishable by up to 10 years having "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 3559(c)(2)(F). The "aggravated felony" definition enumerates offenses throughout 8 U.S.C. § 1101(a)(43), using generic names such as "burglary" or statutory references. The "elements" approach is at 18 U.S.C. § 16(a), which subparagraph § 1101(a)(43)(F) incorporates by reference. Section 16 contains Title 18's definition for the term of art "crime of violence." Section 16(a) includes any offense "that has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another." (emphasis added).

25. 120 S. Ct. at 2362 (emphasis added).

26. 125 S. Ct. at 1254.