

# THE LIBERTY LEGEND

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ASSOCIATION OF FEDERAL DEFENDERS

Spring Edition 2001  
Volume II, Issue 3

AFD NEWSLETTER  
published quarterly

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## PRESIDENT'S MESSAGE

This is an exciting time of year for our Association. We always get re-charged after our annual meeting with new officers and committee members anxious to make the Association stronger. I predict we will have our best year ever with Nancy Graven as our new President.

For some time, Nancy has been one of our most active members. She has been instrumental in getting the newsletter out and in maintaining our web page. Always having the energy, and somehow the time, to tackle our projects, I know she will do a great job.

Now is also the time to send in this year's membership dues if you have not already done so. The dues are only \$30 per year and we need to receive them in order to pay our overhead. While we try to keep expenses to a minimum, it is expensive to mail our newsletters and make an occasional telephone conference call. We also have to pay accountants to file necessary tax returns

even though we clearly are not in this for a profit. Obviously, all our members are volunteers.

If you think the Association needs to be involved in additional activities, all you have to do is tell the officers. We have committees you can join and we need your ideas and enthusiasm. There have been a few people who may have been overlooked in the past who have wanted to be involved. Please accept our apologies if you are one of those who have volunteered and haven't heard back from anyone. It is extremely difficult to be organized on a national level with all members in different states. To be involved, all you have to do is step up and you will be included.

Let's make good use of our annual revitalization. Let's pledge to get involved and help our officers and committees in making the next year the best yet for this Association. Good luck for a great next year!

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## PHARMCHEM'S SWEAT PATCH: THE "SCUD MISSILE" OF THE WAR ON DRUGS

by Franny Forsman,  
Federal Public Defender

PharmChem is a laboratory in California which holds a huge contract with the Administrative Office of the U.S. Courts to provide all the confirmatory drug testing for U.S. Probation and Pretrial Services. For a number of years, PharmChem has provided that service with regard to urine testing. In about 1995, PharmChem purchased the rights to a product known as the Sudormed Sweat Patch. The sweat patch is designed as a collection device for sweat and was presented to the Food and Drug Administration as a collection device. The FDA cleared it as a collection device. No research had been performed to determine whether the device was of equivalent accuracy to urine testing and no research had been performed to examine the risk of environmental contamination or whether false positives could result from other sources, skin storage, for instance. The patch had not been approved by any employer or by the federal government for workplace drug testing, yet the Administrative Office of the Courts accepted it and began using it in a number of districts for both pretrial and post-judgment drug testing. Like a "scud" missile, the patch will hit its target once in awhile but is likely to take out a few innocent folks along the way.

We got into this litigation because we saw a difference in the vigor with which our clients denied drug abuse when they were showing positive on the patch. We had several clients who denied drug use even when an admission would allow the client to avoid jail time. We consulted with several scientists to learn more about the science of sweat testing and the more we looked into it, the more we realized that almost no research into the risk of false positives had been done. There appeared to be a lot of research which would confirm that if you use

drugs, the patch will come out positive but there was nothing testing whether the patch would come out positive if you did not use drugs and much of PharmChem's research proved that whenever sweat testing and urine testing was used together, the two tests conflicted.

Our first hearing was confusing and far-reaching because we challenged everything about the patch. We lost the judge and got a bad decision. *United States v. Stumpf*, 54 F.Supp. 2d 972 (D.NV. 1999). However, at that hearing, we established that the PharmChem witness who testified had misrepresented his credentials and had testified inconsistently in various proceedings about the nature of the research which had been done. Then the Naval Research Laboratory, which has been involved in drug testing research for decades, decided to do some research on a possible explanation for false positives: environmental contamination. They looked at whether a microscopic amount of drug on the outside of the patch will leach into the patch and cause a positive patch and they looked at whether a microscopic amount of drug on the skin will remain on the skin even after alcohol swabbing and cause a positive patch. The answer to both of those questions in peer-reviewed published research is "yes."

In September of 1999, research, by another scientist who often testifies in PharmChem's behalf, was published and that research showed that 20-40% of positive patches may be false positives. We initially did not realize that was what the study said because it used words like "specificity" and "efficiency" and it took us awhile to realize that the scientist was talking about false positives. Then we realized that scientists probably think that a 20% "efficiency" rating is pretty good. Pretty good for a scientist, not so good for the two guys out of 10 who are going to jail for something they did not do.

Finally in November of 2000, we went to a hearing with a woman who, by the time of the hearing, had dropped 114 negative urines and 19 positive sweat patches over the same period of time. During the hearing, two major things happened. The landlord testified that the apartment she was living in had been

*(Continued from page 2)*

previously occupied by a heavy drug user and while most of the paraphernalia (including cut straws) had been removed before our client moved in, the carpet was still probably pretty dirty. Then the PharmChem witness testified that PharmChem had conducted its own research on contamination of the skin and their results showed that a microscopic amount of drug on the skin would produce a positive patch even after two separate swabbings of the skin with alcohol. PharmChem had not told Probation about this research, they had not told the Administrative Office and they had not told the prosecutor until it was disclosed on cross-examination. The prosecutor, who recently told the California Daily Journal that the patch is “bad science,” moved to dismiss the violations and several other cases around the country have now also been dismissed.

On January 30, 2001, the Administrative Office issued a Memo responding to these new disclosures by PharmChem. Pursuant to that Memo, PharmChem is not to report a patch result as positive unless a “requisite” amount of metabolite is found in the sample. Many of the samples of our clients have no metabolite at all so the number of clients at risk should be reduced significantly. However, the presence of metabolites does not insure that the client has used drugs. First, the Administrative Office has not defined what is the “requisite amount.” PharmChem thinks that “requisite” means “any.” Second, if the skin is contaminated, the drug can metabolize on the skin. Third, if the positive is due to skin storage, there would be metabolite. Fourth, the metabolite for cocaine is produced by the conversion of powder to crack; so if there is skin contamination with crack residue, a false positive with metabolite will result.

To try to refute the negative published research, PharmChem contracted with a facility in Utah to do what the AO is calling “independent” tests. PharmChem has resisted disclosing anything about the research in Utah and has refused to provide any data on its own in-house research but the AO asked another contractor to review the scientific research regarding possible false

positives for cocaine and the AO summary reveals that the Utah research found the same thing that the previous scientists had found: 20% of the patches applied to skin which had been exposed to microscopic amounts of cocaine were positive above the cut-off level after cleaning with both alcohol (the current practice) or alcohol and soap (a new recommended practice). The Utah research apparently also found cocaine metabolite in a patch applied to skin which had not been treated with cocaine!

So now, four scientific studies establish that there is a significant risk of false positives resulting from environmental contamination. There is no scientific research which conflicts with those results. You would think that the Corrections & Supervision Division would immediately notify Probation Offices that there is a problem with the patch. Instead, the Division told Probation Offices that it still had confidence in the patch and simply told the offices to add a soapy wash to the alcohol rub. This instruction was given despite the fact that the Utah research revealed that 1 in 5 patches would be reported positive in a non-user when 500 nanograms of cocaine (a microscopic unseeable amount which has been found on the foreheads of children in inner city schools) is on the skin, even after the extra washing.

Clients who have successfully beaten a drug habit should not be accused of drug use because of a bureaucratic unwillingness to admit a mistake. Clients should not be sent to jail because scientists think that a 20% error rate is “pretty good.”

La lucha continua.

## New Support For Defending Felon-in-Possession Cases

by David McColgin  
Supervising Appellate AFD  
Philadelphia

The Eastern District of Pennsylvania has been a guinea pig for a number of pilot law enforcement projects over the years, the most recent being a firearms initiative dubbed "Operation Cease Fire." For two years, the district has received massive funding to prosecute state court defendants charged with unlawful gun possession in federal court. The United States Attorney's Office established a separate unit to focus exclusively on these cases, and additional prosecutors (local and federal) and support staff were hired specifically for this purpose. In the federal system, these defendants face substantially higher sentences than those called for in state court, and many qualify as armed career criminals under 18 U.S.C. § 924(e). Apparently pleased with this and several similar initiatives around the country, Attorney General Ashcroft has identified the federal prosecution of local firearms cases as a priority.

Two recent and very helpful decisions, one from the Eastern District of Pennsylvania, and one from the D.C. Circuit Court of Appeals, provide new support for defending against charges brought under 18 U.S.C. § 922(g)(1), the felon-in-possession statute. In *United States v. Alfonzo Coward*, No. 00-88, 2001 WL 360110 (E.D. Pa. April 10, 2001), Judge Stewart Dalzell concluded that the government cannot prove the commerce clause element of § 922(g) merely by evidence that the gun once crossed states lines. And in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. Dec. 15, 2000), the D.C. Circuit Court of Appeals held that "innocent possession" is a valid defense to a charge under § 922(g).

*Coward* (Commerce Clause):

In *Coward*, Judge Dalzell ultimately ruled that he was bound by contrary Circuit precedent, but in a

lengthy memorandum opinion he outlined the argument for why recent Supreme Court decisions compel the conclusion that the commerce clause element of § 922(g) - that the gun was possessed "*in or affecting commerce*" - should be interpreted to require proof that the defendant's current (i.e., at the time the offense is committed) possession of the gun had some effect on commerce. The opinion does not address whether that effect on commerce need be "substantial."

The evidence in *Coward* was typical of felon-in-possession cases. In response to a radio call, police stopped the defendant's car and found a gun inside. At trial, the only evidence of the commerce clause element was that the gun was manufactured at some unknown time in Massachusetts. Thus, in order for the defendant to have possessed the gun in Pennsylvania, it had to have at some point (no matter how remote) crossed state lines. The government argued that it need prove nothing more in order to show that the defendant possessed the gun "in or affecting commerce."

The defense argued in a Rule 29 motion that due to the lack of evidence that defendant himself had carried the gun across state lines, or that he possessed it for any commercial purpose, the evidence was insufficient for a conviction. The argument was based on a trilogy of recent Supreme Court Commerce Clause decisions: *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000).

Judge Dalzell agreed with the defense, concluding that the government's argument rested on a "legal fiction," established as a matter of statutory interpretation by the Supreme Court in *Scarborough v. United States*, 431 U.S. 563 (1977). Under this legal fiction, "the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession sufficient interstate aspect to fall within the ambit of the statute." The result of this fiction is, for example, that "a felon who has always kept his

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father's World War II trophy Luger in his bedroom has the weapon 'in' commerce." *Coward*, 2001 WL 360110 at \*5.

Judge Dalzell reasoned that this fiction does not survive the *Lopez* trilogy of cases decided under the Commerce Clause of the Constitution. These cases reject the argument that the aggregated economic effects of a crime can save a statute under the Commerce Clause "where no economic activity is in commercial reality involved." *Coward*, 2001 WL 360110 at \*7.

*Lopez* held that the Gun-Free School Zones Act (18 U.S.C. § 922(q)(1)(A)) was unconstitutional under the Commerce Clause because it contained no jurisdictional element requiring a connection with interstate commerce, and it was a purely criminal statute which had nothing to do with economic activity.

In *Morrison*, the Supreme Court invalidated the Violence Against Women Act, which provided a federal civil remedy for victims of gender-motivated violence. Like the Gun-Free School Zones Act invalidated in *Lopez*, the Violence Against Women Act did not contain any jurisdictional element to limit it to cases affecting interstate commerce. But Congress did include extensive findings to support its view that gender-motivated violence has an aggregate effect on interstate commerce. Casting aside deference to Congressional findings, the Supreme Court followed its *Lopez* decision and rejected the aggregated economic effects argument, reasoning that such an argument would permit the federal government to federalize all violent crime and would break down the "distinction between what is truly national and what is truly local." 120 S. Ct. at 1754.

With the "economic effects" prop withdrawn, "*Morrison* left a single reed," as Judge Dalzell put it, to support the continued vitality of the statute: the jurisdictional element of § 922(g). But his reed "had only one more week of life." 2001 WL 360110 at \*8. The week after *Morrison*, the Supreme Court decided *Jones*, where it made clear that even when a criminal

statute has an express jurisdictional element, that element must be interpreted to require that the crime have some "current" (i.e., at the time of the offense) effect on commerce.

*Jones* involved a prosecution under the federal arson statute, which makes it a crime to burn down any "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." There, however, the house that had been torched was not at the time being used for rental or other commercial purposes; it was an owner-occupied residence. The Supreme Court, in order to avoid an interpretation that would be constitutionally doubtful under *Lopez*, ruled that the arson statute "covers only property currently used in commerce or in an activity affecting commerce." Since the residence in *Jones* was not being currently used in commerce, the conviction was reversed. Judge Dalzell concluded that the *Jones* reasoning applies equally to § 922(g) and "negates a fiction that allows the past to become the present.... In short, abandoning the *Scarborough* fiction allows the present to be 'current', unencumbered by the past." 2001 WL 360110 at \*9.

Having concluded that the government must, therefore, prove that defendant's possession had some current effect on commerce, the judge quickly concluded that it did not because "it had no commercial or transactional context." However, mindful of Third Circuit precedent to the contrary in *United States v. Gateward*, 84 F.3d 670 (3d Cir. 1996), the judge denied the defendants' Rule 29 motion, but stated that he was doing so "in the expectation of a reversal." This issue is currently on appeal before the Third Circuit in three other cases being handled by the Federal Defender Office in Philadelphia.

**Practice Note:** The Federal Defender Office in Philadelphia (with assistance from Larry Kupers and Steve Kalar of the San Francisco Federal Defenders Office) has prepared a *model two-part motion* that may be used to challenge the constitutionality of § 922(g), both on its face, and as applied to the facts of

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the case. The facial challenge should be filed pre-trial, but this argument can be raised even after a trial or guilty plea since it attacks the jurisdiction of the court, and jurisdictional claims cannot be waived. The as-applied challenge can be raised as a Rule 29 motion either after a stipulated trial or after a full-fledged trial. The stipulated trial approach is for cases where there is no other defense and the defendant would otherwise be pleading guilty. The purpose of the stipulated trial is to allow the as-applied challenge to be raised and preserved as a challenge to the sufficiency of the evidence, while also allowing the defendant to argue for the three-point reduction for acceptance of responsibility.

To obtain a copy of the motion, either by postal mail or by e-mail, contact Bonnie Keller, Appellate Paralegal/Legal Secretary, at (215) 928-1100, or [bonnie\\_keller@fd.org](mailto:bonnie_keller@fd.org).

*Mason* (innocent possession):

In *Mason*, the D.C. Circuit has also provided the defense with ammunition for defending against felon-in possession charges. *Mason* recognizes the defense of *innocent possession*. There, the defendant claimed to have taken possession of a gun he found in a paper bag near a school only for the purpose of keeping it out of the reach of the young school children. He intended to give it later that day to an officer he knew, but police found it in his possession first. Justification was not a viable defense because there was no evidence of an imminent threat of death or bodily injury. The defendant asked for, but was denied, a charge on the defense of innocent possession.

Noting that this case is the first to address the question squarely in the context of a § 922(g)(1) prosecution, the D.C. Circuit ruled that the district court should have given a charge on the defense of innocent possession. The Court held that this defense has two general requirements:

(1) Evidence “that the firearm was attained

innocently and held with no illicit purpose,” and

(2) evidence that the defendant’s “possession of the firearm was transitory - *i.e.* in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible. In particular, a defendant’s action must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of action.”

The D.C. Circuit reasoned that as long as these two elements are met, the possession is both excused and justified in that it aids and enhances “social policy underlying law enforcement.” And because the defense is a narrow one, “it does not offend the statute’s goal of keeping guns out of the hands of convicted felons.”

For defending against what otherwise may seem like defenseless felon-in-possession cases, this affirmative defense could be very helpful. Like the justification defense, however, the defense of innocent possession will most likely be a defense in which the defendant must bear the burden of persuasion. *See United States v. Dodd*, 225 F.3d 340 (3d Cir. 2000) (defendant bears burden of persuasion on justification defense in § 922(g)(1) cases). *But cf. United States v. Talbott*, 78 F.3d 1183 (7<sup>th</sup> Cir. 1996) (government bears burden of disproving justification defense beyond a reasonable doubt).

### Apology from the Editor

**I want to apologize to those of you who joined the Association and did not receive a newsletter. No excuses, but from now on, we’ll try better. (Also, from now on I can blame Felicia Sarnier and Tony Lacy.)**

**Nancy Graven**

## OUTSTANDING INVESTIGATOR OF THE YEAR AWARDED IN KANSAS CITY TO HOMETOWN BOY!

Congratulations to Ron Ninemire, Chief Investigator for the Federal Defenders in the Western District of Missouri. The Association of Federal Defenders named Ron Ninemire as Outstanding Investigator Of The Year and awarded him with a beautiful plaque at the annual seminar for Federal Defender Investigators and Paralegal Specialists held in conjunction with the meeting of the National Defender Investigator Association in Kansas City the week of March 26, 2001.

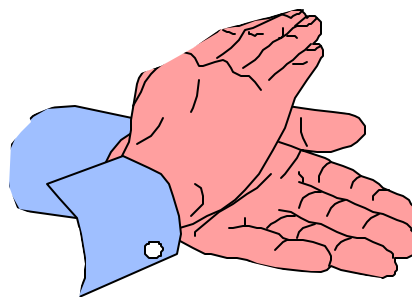


Ron is tireless in his investigation and assistance in the preparation of cases for trial. He assists the attorneys, organizes the files and is in essence an invaluable second-chair. Ron has worked intensively on high profile cases, which are familiar to those in the Kansas City metropolitan area, including U.S. v. L-Donna and death penalty cases, such as, U.S. v. Ortiz, U.S. v. Nelson and U.S. v. Emery. In addition, Ron is qualified to act as a mitigation specialist in capital cases.

Additionally, Ron has devoted a great deal of his time and energy to an understanding of the guidelines and is a specialist upon whom many attorneys in the office rely when considering the impact of the guidelines on a particular client.

The Defenders in the Western District of Missouri were so impressed with the investigations performed and the assistance provided by Ron, that his example has led to the hiring of four additional investigators in this office. Ron has sought to show by his words, as well as his deeds, that he truly believes in the

Sixth Amendment and does everything he can to assure that each and every client has the assistance of counsel which necessarily includes a thorough and complete investigation in preparation for plea or trial. Thus, the staff of the Office of the Federal Public Defender for the Western District of Missouri believes Ron is totally deserving of the award as the Outstanding Investigator Of The Year!





Congratulations to the entire Little Rock, Arkansas office, including FPD Jennifer Horan and Senior Investigator

## KUDOS KORNER

**Floyd Hancock**, for successfully defending their district's first case charging that death resulted from the client's sale of meth to someone who subsequently took the drugs, overdosed, and died. The government was seeking a mandatory life sentence. The defense had to admit the client's sale of meth to the decedent on the day before and the day of the death, but it challenged the prosecution's allegation that the drugs sold by the client actually caused the death. The Allen charge delivered to the deadlocked jury clinched it, and the jury returned a not guilty verdict!

Great work by **AFD Juan Matos in Puerto Rico**, who convinced the court to dismiss charges of assaulting a federal officer against his client on speedy trial grounds. His client had gone to the INS office with her mother to clarify the mother's status. Both were detained and placed in holding cells, but the client's cell wasn't locked! After leaving the cell and entering the hallway, she was confronted by the hulking, displeased officer, and as so often happens, the client was charged with assaulting the officer when in fact the reverse had occurred. Nice win, Juan!

Congratulations to **Yasmin Irrizari, AFD in Puerto Rico**, for winning an acquittal for her client charged with sham marriage. The star government witness was the client's ex-wife, who initially stated that she was paid to marry the client so that he could obtain legal status here, but later recanted. At the three-day trial, she was an unavailable witness because she claimed the Fifth. The court allowed her initial incriminating statement into evidence but *not* her recantation, because it was allegedly self-serving. Regardless of that, the client was acquitted!

Congratulations to **Patrick Casey, AFD, Middle District of Pennsylvania**, for his innovative and tireless work in securing a fair sentence for his client. Client pled to delivering crack and faced a 63-78 month guideline range. She was the mother of five minor children, one of whom had Tourette's Syndrome and required extensive care. Patrick ably persuaded the sentencing judge of his client's extraordinary circumstances, and the court departed to probation with home confinement conditions based on a combination of factors including post-offense rehabilitation, over representation of criminal history, and extraordinary family responsibilities. The government appealed, and managed to win a disheartening remand after a unanimous panel ruled that the district court abused its discretion in departing 11 levels for family responsibilities. At the resentencing hearing, Patrick went to the mat, presenting expert testimony from a sociologist, DPW testimony about client's success at getting off welfare and securing full time employment, testimony from school teachers about the client's key role in the success of her children in school, etc. The district court, so constrained by the appeals court, still managed to fashion a departure to 27 months, which included crediting the client's completion of the home confinement portion of the first sentence. Client has since been accepted into boot camp. Great advocacy, Patrick!

The Death Penalty Federal Habeas Corpus Division in the **Western District of Oklahoma** had a great week in April. On April 9, 2001, **AFD Randy A. Bauman** and **AFD Vicki Ruth Adams Werneke** obtained, *for the first time in thirty-five years*, a grant of clemency for their client. Their client's death penalty was commuted to life without the possibility of parole after Mr. Bauman and Ms. Werneke presented substantial evidence undermining the prosecution's case at trial. Just two days later, on April 11, 2001,

# KUDOSKORNER

AFPD **Vicki Ruth Adams Werneke** learned the Tenth Circuit Court, sitting en banc, granted a new trial for

her client. The Court overturned his conviction and death sentence after determining there was a bona fide doubt regarding her client's competency to stand trial. Two lives saved in one week, way to go Randy and Vicki!



Congrats to the **Defenders in Nebraska** who recently had a **string of six complete acquittals in a row**. **John Vanderslice**, an AFD in the Lincoln office won a major wire and mail fraud case which had over a million documents in pre-trial discovery. **Karen Shanahan** won a methamphetamine case saving her client from a mandatory minimum twenty-year sentence. **Shannon O'Connor** beat an assault on the reservation with a self-defense theory which could only happen again on television. **Jeff Thomas** won a child support case in a bench trial where his client had never paid any support. Lastly, even the boss, **Dave Stickman**, got in on the action with a jury win and a bench trial acquittal. Remarkable about these wins was also the fact that they occurred before four different district judges in cases prosecuted by five different AUSA's.

The Federal Defender Office in **Detroit had three acquittals in 30 Days!** Kudos to **Andrew Densemo, Jonathan Epstein, Jill Price, and Stacey Studnicki**. Each attorney was victorious in receiving a not guilty verdict. In **Mr. Densemo's** case, our client was charged with attempted arson of a business. The government's theory was that client and others had been hired by a competitor party store owner to burn down a nearby store that was about to obtain a liquor license. The government had eyewitness testimony and fingerprint evidence pointing to our client. However, Mr. Densemo was able to demonstrate through tough cross-examination that the witnesses were testifying inconsistent with each other and with the other physical evidence that the government introduced. **Mr. Epstein's** client was stopped at Detroit Metropolitan Airport on a flight from Frankfurt, Germany. When two kilos of ecstasy tablets were found in his traveling companion's luggage, client was questioned and later indicted for importation and conspiracy to import ecstasy. At trial, U.S. Customs agents testified as to client's statement that he knew his companion had some kind of drug. Mr. Epstein contended that the so-called statement was not reliable and that there was a woeful lack of evidence of a conspiracy. The jury acquitted the client of both counts. In **Jill Price and Stacey Studnicki's case**, our client was charged with bank robbery. The case initially proceeded to trial in January of 1998. At trial, the government presented the testimony of three eyewitnesses from the bank -- two tellers and one customer. One of the tellers had identified client from a photo display. All three witnesses identified client as the robber at trial despite the fact that at the time of the robbery they had failed to observe a prominent scar on his neck. The only other evidence tying client to the robbery was a description of the getaway car which was similar to a car he owned. Prior to trial, the defense filed motions seeking to introduce the testimony of an identification expert. The district court denied the motion. The jury returned a verdict of guilty. The office won a reversal on appeal with the able assistance of attorney **Andrew Wise**. The Sixth Circuit held the district court erred in its refusal to hold a *Daubert* hearing. See *U.S. v. Smithers*, 212 F3d 306 (6th Cir. 2000). On retrial, the jury acquitted in less than one hour after having heard the testimony of the eyewitness identification expert called by the defense! Without subjecting their clients to the vicissitudes of the jury, **New Mexico** had two major victories on pre-trial suppression motions which resulted in the dismissal of charges. In the first, agents stopped a vehicle 60 miles north of the border, ostensibly to conduct an immigration check. The agent testified that one of the factors which he considered suspicious was that the car had a Mexican license plate. After



## KUDOS KORNER

proof was shown that all of the occupants were legally in the country, the agent continued his investigation until his search ultimately revealed a quantity of marijuana. The defense presented evidence of the traffic patterns of vehicles bearing Mexican license plates legitimately traveling within New Mexico, as well as the fact that numerous United States citizens reside in Mexico. The trial judge held that the Mexican license plate was insufficient to establish reasonable suspicion to stop the vehicle, and suppressed the marijuana. **Congratulations to AFD**

suspi-

**Barbara Mandel and Investigator Isabel Figueroa!**

In the other suppression win, a highway stop was conducted more than one hundred miles from the border. The agent testified that the time of travel, the fact that the vehicle was traveling under the speed limit, had tinted windows, and the driver failed to look at the agent when he shined a flashlight into the moving car, were indications that the vehicle was transporting undocumented persons. The judge held that most of the indicia of suspicion cited by the agent were equally capable of an innocent explanation; i.e. the driver was cautious in driving below the speed limit at night on an unfamiliar road, and was prudent in keeping his eyes on the road, rather than averting his gaze to stare directly into the agent's flashlight. Evidence of the undocumented workers who were passengers in the vehicle was suppressed. **Great work by AFD Lissa Gardner and Investigators Tim Kling and Eduardo Contreras!**

Despite a video tape and confession, **AFD Barbara Mandel, assisted by Investigator Isabel Figueroa**, was successful in obtaining a not guilty verdict in a theft case. The defendant was accused of stealing \$10,000 from a casino. The confession/statement was admitted at trial. Ms. Mandel ably argued that the "confession" was the product of coercion and lies told by the FBI agents. The jury returned their verdict based in large part upon the cross examination of the agents, which exposed the contradictory testimony of the FBI and BIA agents.

In *United States v. Lourdes Fuentes Chavez*, **AFD Robert McDowell, assisted by research attorney Shari Allison**, persuaded the judge to grant a downward departure to 36 months to a defendant subject to a 5-year mandatory minimum sentence, even though the defendant was not safety valve eligible. The defendant previously served 24 months for her conviction for possession of a controlled substance. The previous offense conduct was relevant conduct to the conspiracy charge. Counsel argued for departure so the client would receive credit for the two years she had already served. Counsel also argued that because of the government's delay, the defendant had lost the opportunity to have the conspiracy and possession charges grouped. Defendant also relied on the policy underlying USSG 5G1.3, to avoid double punishment for related offenses. The Court departed downward without violating the mandatory minimum requirement because the defendant would still be serving the entire five year sentence.

It's not over until after the appeal! In the case of *United States v. Victor Manuel Rivera-Avelar*, the Tenth Circuit remanded a drug case for resentencing after a sitting Circuit judge improperly applied a per se rule denying the client a 3-level role reduction. The reduction had been stipulated to by the parties and included in the written plea agreement. (If you're wondering why Circuit judges are conducting sentencing hearings, that's a story for another newsletter!) In a

footnote, the Court noted the role reduction was established by the government's stipulation in conjunction with the court's awarding acceptance of responsibility based upon defendant's statement. **Excellent job by AFD Peter Edwards and research attorney Scott Davidson!**

Remand was granted regarding conditions set for supervised release on a sex offender who ordered child pornography over the internet, and whose violations were limited to the use of alcohol. The trial court imposed conditions that the defendant not possess a computer with internet access, and that he undergo physiological testing, including the possibility of a plethysmograph. Remand involved clarification of physiological testing and a narrowing of the condition regarding computer use. The Court said that the use of computer condition was vague and both too narrow and too broad. *United States v. Robert White*, 2001 WL 293175, CA 10. **Congratulations to AFD Judy Rosenstein and research attorney Scott Davidson!**

**District of Arizona, Tucson Immigration Unit — Nancy Olmstead:** 8 USC § 1325 petty illegal entry dismissed because the complaint erroneously listed the entry date as 1968, which is beyond the statute of limitations. AUSAs don't bother appearing at petties! **Yendi Castillo-Reina:** Juvenile female was arrested with her mother who was, unknown to the teen, transporting marijuana. Client's dad was in prison, her mom was going there, and no one wanted her except for a woman living without documents in Phoenix. Client pled to misprision. The sentencing recommendation was BOP because there was no viable place for her to live. AUSA was persuaded to dismiss rather than have the client sentenced to BOP custody. And the § 1325 was dismissed because the client is actually a citizen. **Rosemarie Valdez:** Client, a legal permanent resident taxi driver, was charged with alien transportation, an aggravated felony. Charge dismissed after video depositions were taken and a misprision offer turned down for no factual basis. **Chris Kilburn:** Client charged with alien smuggling. Dismissed after Chris persuaded AUSA of Client's impairing mental problems, after everyone found him competent.

Congratulations to all you hard working folks. Due to your efforts, we had a tremendous response from across the country to our request for Kudos.

Also, congratulations to all who are not mentioned in this section. We know you are doing great work and deserve kudos too!



## News from the Editor

### **Pennsylvania Governor Blocks Leading Defense Experts From Participating As Faculty In Death Penalty Training:**

*by Felicia Sarner,  
Supervisory AFD, Philadelphia.*

Last year, the Pennsylvania legislature allocated \$614,000 to train defense attorneys statewide to handle capital post-conviction litigation. The allocation, which equaled that provided to a special "death" unit in the state Attorney General's office, was intended to help ensure effective post-conviction capital representation throughout the state. Nearly a year later, the money remains unspent and Pennsylvania. Governor Tom Ridge persists in placing unprecedented restrictions on its use. Specifically, the governor has refused to allow the state's most experienced and successful capital litigators, the Philadelphia Federal Defender's Capital Habeas Unit (CHU), to participate as faculty. The governor has made agreement to that prohibition (barring participation of Philadelphia's CHU) a condition precedent for receipt of the funds.

Most recently, Dickinson School of Law, where Governor Ridge received his legal education, rejected an offer to administer the funds because of the condition prohibiting the CHU attorneys from participating as faculty. The Philadelphia CHU attorneys have been dominating post-conviction capital litigation statewide with a remarkable streak of winning stays of execution and reversals of capital convictions and death sentences. "The governor's office wanted to place restrictions on who we could or could not use as members of the faculty," said Peter G. Glenn, dean of the law school. Said Nancy LaMont, the law school's director of continuing education and outreach, "We need to maintain our credibility.... If the restrictions that [the Ridge Administration was] talking about were placed in the program ... we don't think that we would have been able to offer the

best possible program that we could." Representatives of other schools, including Temple University's law school, echoed similar concerns.

A spokesman for the governor, Ken Shivers, has denied that the CHU's track record of successful litigation had anything to do with the decision to bar those attorneys as faculty. Rather, he said the governor was concerned about CHU's "tactics," such as filing appeals even after the offender has accepted his sentence, or "fil[ing] appeal after appeal in an effort to thwart the will of a jury." As the *Pittsburgh Post-Gazette* said in an April 30, 2001, editorial, "Perhaps it is Mr. Shivers, or the governor himself, who should attend a training session or two to figure out that the appeals process is an integral part of the system. The fact that the Philadelphia unit wins appeals is an indication that there may be problems with the way capital cases are handled at the trial level.... [T]o suggest that those who are most expert in appealing death penalty cases cannot be involved in training others is shabby political posturing and gamesmanship."

This controversy in Pennsylvania will likely continue into the coming months. We'll keep you posted.

### **COMMITTEE MEMBERS WANTED!**

It's time once again to think about joining a committee. We need your support. We are particularly seeking individuals to serve on the Amicus, membership and newsletter committees.

Additionally, at the meeting, we will discuss the possible formation of a few new committees. We want your input and hope to see you at the annual Association meeting held during the conference (time and place to be determined in L.A.)

## THE FEDERAL DEFENDER'S GUIDE TO LOS ANGELES

*by Dennis Landin, AFD, Los Angeles*

For those attending this year's national seminar in LA, here are some helpful suggestions about where to eat, drink, dance and party (when you're not studiously attending the seminar, that is!). Based on the assumption that federal defenders are a more adventurous lot than the typical Southern California tourist, I offer the following thoughts for a short stay in "L.A." Some of the attractions listed below will be found in various established guidebooks, most will not. As a consequence, do not expect cab drivers or the hotel concierge to know about them. My suggestion is that you call ahead for directions. If you call 411 for a number that is not listed below, make sure you get the area code - there are five area codes within eight miles of the civic center.

Unfortunately, Los Angeles still does not have a decent public transportation system and once again was named the city with the worst traffic. That said, there is a "DASH" bus that has two routes which can get you around the downtown area. There is also a modern subway system, but it does not get you to many places of interest. If you plan to visit the neighboring areas of Beverly Hills, Santa Monica, Venice Beach or Pasadena, renting a car or asking one of the L.A. based attorneys for a lift may be your only alternative to getting out of town and back in time for the next morning's session. If you do choose to drive, carefully study freeway maps. If you take a wrong exit it may be quite a challenge to get back on track.

The restaurants within walking distance of the Wilshire Grand Hotel cater to the downtown professional who makes more money than anyone in a defender office. Here are a few worth trying for lunch or dinner:

- ?? **CIUDAD** (Gringo owned but very good) (213) 486-5171
- ?? **ENGINE CO. NO. 29** (213)624-6996
- ?? **THE WATER GRILL** (213)891-0900
- ?? **MCCORMICK AND SHMICK-S** (213)629-1929
- ?? **STEPS**

**A short cab ride away are three distinct dining areas:**

**LITTLE TOKYO** - the site of the Federal Defender's Office

- ?? **SUSHI GEN** at Central and 2nd
- ?? **YATSUHASHI** on San Pedro St.
- ?? **THE BREWERY** on First and Central
- ?? **R-23** (Sushi bar — very hard to find and expensive, but worth it) (213) 687-7178

**OLVERA STREET**

- ?? **LA GOLONDRINA**
- ?? **EL PASEO**

**CHINATOWN**

- ?? **YANG CHOW** on Broadway

?? **ABC SEAFOOD RESTAURANT** on Ord St.

**A longer cab ride away are the following:**

- ?? **360 RESTAURANT**, Sunset/Vine in Hollywood, food/view/jazz.
- ?? **EI CHOLO**, Western Ave. (this place has been here forever, good margaritas) (323) 734-2773
- ?? **MUSSO AND FRANKS**, old time Hollywood hangout (323) 467-7788
- ?? **GUELAGUETZA**, down home Oaxacan food, 8th Street west of Normandie — try the chapulines (fried grasshoppers) (213) 427-0601
- ?? **CHA CHA CHA**, North Virgil Avenue, (323) 664-7723; Caribbean food, in the infamous “Rampart” area - don’t drive with a burnt out taillight!
- ?? **ORSO**, W. 3rd. St. supposedly celebrities hang out here for pizza and pasta (310) 274-7144.
- ?? **TRATTORIA AMICI**, Beverly Hills, intimate Italian, on the pricy side
- ?? **MI PIACI**, (626)795-3131
- ?? **TWIN PALMS**, Owned by Kevin Costner before the divorce, outdoor “California” cuisine. (626) 577-2567
- ?? **WOK 'N ROLL**, Chinese and sushi, good beer!
- ?? **MARKET CITY CAFE**
- ?? **OLD TOWN PASADENA** (Many shops, theaters and restaurants)

**Other areas to visit:**

- ?? **UNIVERSAL CITY WALK**, in San Fernando Valley next to Universal Studios (lots of shops, restaurants, theaters and other attractions; can be reached via subway but check to make sure you know how late it will run.)
- ?? **SANTA MONICA THIRD STREET PROMENADE RESTAURANTS**, try *MARIO-S PIZZA* on Broadway/Third.
- ?? **SANTA MONICA PIER**
- ?? **VENICE BEACH** (be prepared to see just about anything here).
- ?? **GRIFFITH PARK OBSERVATORY** (great view; try to catch the laser light show).

**MUSIC/DANCING**

- ?? **LOS FELIZ RESTAURANT**, (323) 666-8666, Los Feliz area, near Griffith Park, good jazz. (If you plan to stay the evening of June 1, the Jeff Hamilton Trio will be there for the serious jazz lover.)
- ?? **CATALINA BAR AND GRILL**, (323) 466-2210, Hollywood, Jazz
- ?? **HOUSE OF BLUES**, Jazz/blues/rock, West Hollywood. (323) 848-5100
- ?? **KEY CLUB**, Jazz/blues (310) 264-5800
- ?? **THE ROXY, THE WHISKY A GO GO, THE TROUBADOUR**, Rock/rap/blues/and everything else, Hollywood
- ?? **CONGA ROOM**, Wilshire Blvd. big dance floor salsa, samba and swing (323) 938-1696.
- ?? **MAYAN**, downtown LA, strictly salsa dancing
- ?? **THE DERBY**, (323) 663-8979, Los Feliz area, 40’s swing dancing, near the Dresden Room ( site of the movie "Swingers"), good martinis

## ASSOCIATION OF FEDERAL DEFENDERS Dues Notice and Membership form

**Renewal** \_\_\_\_\_

**New Member** \_\_\_\_\_

**Name:** \_\_\_\_\_ **Position:** \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

\_\_\_\_\_ **Fax No.:** \_\_\_\_\_

\_\_\_\_\_ **Defender Office:** \_\_\_\_\_

**E-mail Address:** \_\_\_\_\_

**Mail completed form  
and check to:**

I would be interested in working on the following committee(s):

\_\_\_\_\_ **AMICUS**

\_\_\_\_\_ **AWARDS** (Dennis Landin)

\_\_\_\_\_ **LEGISLATIVE/TRAINING**

\_\_\_\_\_ **MEMBERSHIP**

\_\_\_\_\_ **DIVERSITY**

\_\_\_\_\_ **SOCIAL** (Geoffrey Hansen)

\_\_\_\_\_ **NEWLETTER** (Nancy Graven & Felicia Sarner)

\_\_\_\_\_ **WEBSITE** (Nancy Graven)

**Association of  
Federal Defenders  
P.O. Box 22223  
Nashville, Tennessee 37202**

## Nominations for Association Officers and Board of Directors

It's that time again. We need nominations for officers and for the board of directors. Remember, this is *your* Association. We want and encourage all interested to participate in a more active role by being an officer or board member. The elections will be held at the Los Angeles seminar and we look forward to hearing from all of you. If you are unable to attend the conference, please have an associate bring your nomination for you.

**President Elect**      name: \_\_\_\_\_ office: \_\_\_\_\_

**Secretary**            name: \_\_\_\_\_ office: \_\_\_\_\_

**Treasurer**            name: \_\_\_\_\_ office: \_\_\_\_\_

**Board of Directors**   name: \_\_\_\_\_ office: \_\_\_\_\_

name: \_\_\_\_\_ office: \_\_\_\_\_



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**[www.federaldefenders.org](http://www.federaldefenders.org)  
[association@federaldefenders.org](mailto:association@federaldefenders.org)**

**PLACE LABEL HERE**