



THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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PRESIDENT'S MESSAGE

Hello members and all fellow defenders.

All in Germany first they came for the communists and I didn't speak up because I wasn't a communist. Then they came for the Jews and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was a Protestant. Then they came for me - and by that time no one was left to speak up. @ Pastor Martin Niemoller (victim of Nazis)

On September 11, 2001, I, as did the world, watched in horror as the buildings came crashing down. Stunned and almost unable to comprehend this was a deliberate act with the sole goal of killing so many. As the world struggled to respond and America went to war, I felt an unease and wariness wondering whether government officials would try to curtail civil liberties guaranteed by the constitution. In my naivete, I actually believed (briefly) they would not. I was wrong.

We have all watched as one edict after another, either by statute or regulation, seriously threatens many of the core constitutional rights the protection of which we are devoting our lives. The National Association of Federal Defenders is a small young professional association. We are not yet, and may never be, a powerful political voice. Being this young and small, it is difficult to speak up and think we will be heard. However, in these times, we must.

As you are all aware, the Attorney General approved the interception and eavesdropping of attorney-client communications for inmates confined within the Bureau of Prisons. After this regulation was enacted and effective, the Attorney General solicited comments.

Although, NAFD was asked to join in the Comments submitted by the People for the American Way, after considerable debate and thought, NAFD chose to instead submit Comments on its own. As is discussed further in this newsletter, in our Comments, we specifically joined in the Comments submitted by NACDL and in the Comments submitted by the Federal Public and Community Defenders. We also borrowed liberally from the latter's Comments. Special

(Continued on page 2)

<i>President's Message</i>	1-2
<i>NAFD Responds to A.G.s Eavesdropping Regulation</i>	2-3
<i>Kathy Williams Next Chair of Defender Services Advisory Group</i>	4-5
<i>Report of the Amicus Committee</i>	6
<i>Meet the (Fairly) New FPD Office for NY-Northern and Vermont</i>	7
<i>Kudos Korner</i>	8-10
<i>There Must Be Some Way Out of Here - The conundrum of discussing cooperation with defendants</i>	11-14
<i>Alert - Federal Court Precludes Fingerprint Identification</i>	15
<i>NAFD Award Nominations</i>	2,3,14,15

(Continued from page 1)

thanks to Tom Hillier and the rest of the folks who worked on the Defender Comments.

Submitting Comments in opposition to this regulation is a good start, but that is all it is. I ask and entreat us all to become involved to try to stem the tide of governmental infringement of our rights. Whether the government is easesdropping on formerly sacred legal conversations, indefinitely detaining citizens of another country, or conducting secret military trials, we must do what we can in opposition. Political climates invariably ebb and

flow and although I am confident the pendulum will someday swing in the other direction, neither we nor those who are victimized by these actions can afford to merely sit and wait for times to change. I ask you all for greater involvement in *your* association and anticipate spirited dialogue and great ideas during our meeting in Philadelphia. Thank you for your ear.

Nancy R. Price (formerly known as Graven)
President, NAFD

NAFD RESPONDS TO A.G.'s EAVESDROPPING REGULATION (66 Fed. Reg. 55062)

by Felicia Sarner
SAFD, Eastern District of Pennsylvania, Philadelphia

The National Association of Federal Defenders (NAFD) has submitted formal comments in opposition to Attorney General Ashcroft's October 31, 2001 Order regarding the monitoring of confidential attorney-client communications. Although the regulation became effective immediately upon its issuance, the A.G. solicited public comments and the NAFD joined a long list of interested organizations opposed to it. NAFD's response specifically incorporated the excellent Comments submitted by the Federal Public and Community Defenders and the National Association of Criminal Defense Lawyers.

The purported intent of the regulation is to prevent acts of violence and terrorism. However, it makes no showing that attorney-client communications have been used to further terrorist acts, necessitating the regulation. There is also no showing that existing law,

including the crime-fraud exception and the probable cause standard, is inadequate to address such a scenario. Moreover, the regulation only targets persons in federal custody, without advancing a penalogical interest to support it. And no showing is made that inmates are more likely to use communications with counsel to further violence or terrorism than persons at liberty would. It appears self-evident that these extraordinary measures could never pass muster in the world beyond a federal lock-up.

What The Regulation Provides: The regulation amends 28 C.F.R. Parts 500 and 501 and permits the D.O.J. to monitor all communications between designated federal inmates and their counsel, whether in person, by telephone, or in writing. It requires only that the Attorney General unilaterally find Reasonable sus-

(Continued on page 3)

OUTSTANDING ASSISTANT FEDERAL DEFENDER NOMINATION

The National Association of Federal Defenders seeks nominations for its "Outstanding Assistant Federal Defender Award" which will be presented at the National Seminar for Federal Defenders. Please base your nomination on the following criteria:

- 1. A substantial number of years of service in a defender program;**
- 2. Extensive trial and/or appellate advocacy, including projects involving complex and novel legal issues;**
- 3. Well respected by fellow assistants and support staff;**
- 4. Regularly volunteers to assist colleagues;**
- 5. Always treats clients with dignity and respect;**
- 6. Excellent reputation in the criminal defense community;**
- 7. Devotes time to defense related issues or service to the poor outside of regular work schedule.**

Please send your nomination to *Leigh Skipper, AFD, Philadelphia Federal Defender's Office, Curtis Center*

(Continued from page 2)

picion@to believe that a federal inmate Amay@use communications with attorneys or their agents Ato further or facilitate acts of terrorism.@ The discretion to strip persons in federal custody of the right to communicate confidentially with an attorney is entirely without judicial oversight.

Before monitoring begins, targeted inmates and their attorneys are to receive written notice that their communications may be monitored to the extent "reasonably necessary for the purpose of deterring future acts of violence or terrorism." In an unsatisfactory effort to protect what it describes as "properly privileged materials," the regulation establishes a "privilege team" to review intercepted communications and ensure that "proper" communications are not "retained during the course of the monitoring." The privilege team must therefore be trusted to not disclose properly privileged materials to assigned prosecutors or others.

NAFD's Response: NAFD's comments make clear its position that the regulation is an unprecedented, unnecessary, and irrational assault on the integrity of its members, their clients, and the judicial system as a whole. The comments identify a long list of policies, principles, statutes, rules, cases, and constitutional provisions that are either threatened or violated by the regulation. Supporting authority for its positions is cited throughout its response.

Specifically, NAFD asserts that the regulation threatens the Constitutional right to a trial by jury, for the right is meaningful only when a defendant has counsel with whom s/he can freely and confidentially consult. The First Amendment's guarantee of free speech includes a reasonable right of access to the courts, which implies the right to seek and obtain effective assistance of counsel. A defendant who cannot

speak openly and freely with counsel cannot have that attorney's effective assistance, in violation of the Sixth Amendment.

Prisoners maintain diminished, but not extinguished, Fourth Amendment rights, and the interception of an attorney-client communication is a search. The regulation's active avoidance of judicial oversight, and its use of the "reasonable suspicion" rather than the "probable cause" standard, threatens the protections of this amendment. Moreover, key concepts are left undefined in the regulation, and it is fraught with vague, standardless language which risks arbitrary, inconsistent and discriminatory application. Coupled with the exclusion of judicial oversight, it is inconsistent with the Fifth Amendment's requirement of due process.

The regulation is also ineffective policy, unlikely to advance law enforcement or national security. This is because once given notice, it is unlikely that attorneys and their clients will plot terrorist activities knowing that their conversations are being monitored. Additionally, the regulation's chilling effect may actually hinder law enforcement's ability to prevent violent or terrorist acts, as it is often *because of* the confidential, trusting attorney-client relationship that many defendants choose to cooperate with authorities in the investigation or prosecution of others.

Aside from the innumerable policy, constitutional and other problems provoked by the regulation, is the seemingly inescapable conclusion that it is profoundly destructive to our system of justice. The NAFD's comments, along with those of the Federal Defender community, the NACDL, the ACLU, and numerous other commentators, persuasively set forth the reasons why this drastic departure from centuries of legal jurisprudence is unjustified, even in such times as these. Collectively, the NAFD and the other commentators call for the rescission of the Attorney General's Order.

OUTSTANDING DEFENDER INVESTIGATOR NOMINATION

The National Association of Federal Defenders seeks nominations for its "Outstanding Defender Investigator Award" to be presented at the upcoming Federal Defender Investigator Conference. Please base your nomination on the following criteria:

- 1. A substantial number of years of service in a defender program;**
- 2. Extensive investigative experience, including projects involving complex & novel issues;**
- 3. Well respected by fellow investigators, attorneys, and other support staff;**
- 4. Brings diverse talents to the job; stays current with developments in the field;**
- 5. Regularly volunteers to assist colleagues;**
- 6. Always treats clients with dignity and respect;**
- 7. Excellent reputation in the criminal defense community;**
- 8. Devotes time to defense related issues or service to the poor outside of regular work schedule.**

Please send your nomination to *Leigh Skipper, AFD, Philadelphia Federal Defender's Office, Curtis Center Building, Suite 540 West, 601 Walnut Street, Philadelphia, PA 19106*. Please state your reasons.

KATHY WILLIAMS NEXT CHAIR OF DEFENDER SERVICES ADVISORY GROUP (DSAG)

by Jan Erickson

Paralegal, District of Arizona, Phoenix

On April 1, 2002, Kathy Williams, Federal Defender for the Southern District of Florida, will begin her term as Chair of the Defender Services Advisory Group (DSAG), after her anticipated confirmation by Director Mecham, Administrative Office of the U.S. Courts (AO). Roland Dahlin, Federal Defender for the Southern District of Texas and current DSAG Chair, is completing two back-to-back, two-year terms. This was Mr. Dahlin's second time in this leadership position, having been first elected Chair of the group in the early 1980s.



Kathy Williams, Federal Defender for the Southern District of Florida (second from left), begins her term as Chair of DSAG April 1.

Kathy Williams has been the Federal Defender for the Southern District of Florida since February, 1995. Prior to that, she had been the Chief Assistant since 1990.

What is DSAG?

Ms. Williams describes DSAG's role as an advisory group established to be a mechanism through which defenders can communicate to the Judicial Conference and the AO on issues of common interest and concern. Due to the large number of offices across the country, it is difficult for the AO to communicate effectively with individual offices. As Chair of DSAG, Ms. Williams will be responsible for meeting with the subcommittee of the Judicial Conference, along with representatives from the Defender Services Division

(DSD), to discuss a variety of issues, such as budget needs, and to answer questions from committee members. There are times that the AO will solicit proposals from the defender community. DSAG is the mechanism for filtering those requests and responses on behalf of defender offices nationally.

DSAG's History

Roland Dahlin offered a useful history of the advisory group, for those unfamiliar with it. The AO, through its previous Director, Bill Foley, formed the Federal Defender Advisory Committee during the infancy of the Federal Defender program, prior to the existence of DSD and the sentencing guidelines, to provide a means of communication between the defenders and the AO. Members of the

(Continued on page 5)

(Continued from page 4)

Committee were selected from the original federal defender offices. As the defender program grew, so did the need for additional representation on the committee. Regions were formed by the defenders, using geographic and circuit boundaries to determine each region's composition, and one defender was selected to represent each region on the committee. About this same time, DSD was formed.

Initially, the advisory group was made up of training and legislative subcommittees. As time went on, more committees were formed, and there are now 12 committees, working groups and expert panels. In addition, DSAG has representatives or liaisons on 14 additional committees, councils, task forces and projects. The only committee set up by statute is the Sentencing Guidelines Committee. The first committees were composed of defenders. As the programs grew, the advisory group sought out talent from within the offices and the committee members are now comprised of a variety of individuals representing various positions from within defender offices.

When L. Ralph Mecham became the AO Director, the advisory group was renamed DSAG to fit into the advisory group structure established at the AO.

The seven regional representatives are selected by defenders from that region and serve two-year staggered terms. The individuals selected have expressed an interest in being involved and have committed to spending time on a weekly basis to matters related to DSAG. The regions are occasionally realigned so that each representative has approximately the same number of offices. As of 2002, there are 58 FPD organizations and 15 CDOs. The DSAG Chair is elected by all defenders at their annual conference in December or January with the two year term beginning the following April.

Ms. Williams hopes to converse with individuals via the e-mail system and seeks to develop a more divergent way to communicate with the defender community. After attending the most recent Defender Conference, she believes that the principal challenge facing DSAG in the coming year will concern issues arising from the aftermath of September 11. In addition to such issues as the representation of suspects, materials witnesses and those detained on immigration holds, DSAG will also address budget issues for the daily operations in federal capital litigation.

**DEFENDER ADVISORY GROUP
REGIONAL REPRESENTATIVES**

Northern - Christopher Yates - Western District of Michigan
 South Atlantic - Louis Allen - Middle District of North Carolina
 Southern - Stephen Shankman - Western District of Tennessee
 Middle - Nick Drees - Northern and Southern Districts of Iowa
 Western - Barry Portman - Northern District of California
 Northern CDOs - Tony Gallagher - District of Montana
 Southern CDOs - William Marsh - Southern District of Indiana

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Mail completed form and check in the amount of \$30.00 to:
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 P.O. Box 22223
 Nashville, Tennessee 37202

REPORT OF THE AMICUS COMMITTEE

*by David Porter, AFD, Eastern District of California, Sacramento
and David McColgin, AFD, Eastern District of Pennsylvania, Philadelphia*

The National Association of Federal Defenders has participated as amicus in the following cases:

In the Supreme Court of the United States:

UNITED STATES v. VONN, No. 00-973: The Ninth Circuit held that the failure, during acceptance of defendant's guilty plea, to advise defendant that he would have the right to counsel at trial, was not harmless error, and the Court of Appeals could not consider government's claim that defendant learned of his constitutional right to counsel during earlier court proceedings. (211 F.3d 1109) Petition for certiorari was granted on the question of whether, when a district court fails to inform defendant of his right to trial counsel before taking a guilty plea, the Rule 11 violation is subject to plain error review on appeal if the defendant failed to object, and whether the appellate court is limited to the transcript of the plea colloquy in determining if there was prejudice. The brief amici curiae of the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders in support of Mr. Vonn was authored by Saul M. Pilchen, Obiamaka P. Okwumabua, and Jeffrey A. Goldberg of Skadden, Arps, Slate, Meagher & Flom.

UNITED STATES v. ARVIZU, No. 00-1519: The Supreme Court has rejected the Ninth Circuit's affirmation of a district court's suppression of physical evidence in a drug prosecution. The Ninth Circuit, applying the totality-of-the-circumstances test, held that a Border Patrol agent did not have reasonable suspicion to justify the stop of a vehicle near the Mexican border. (232 F.3d 1241) The government's petition for certiorari asserted that the Court of Appeals erred in determining that the district court improperly relied on seven factors, and that the factors should not have been considered as a matter of law. Lawrence S. Lustberg and Alan Silber of Gibbons, Del Deo, Dolan, Griffinger & Vecchione authored the brief amici curiae of the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders.

NEWLAND V. SAFFOLD, No. 01-301: The Ninth Circuit held that the one-year statute of limitations in the AEDPA on the filing of ' 2254 petitions was tolled for the entire time between the filing of the state court habeas petition and the state supreme court's denial of relief, even though the supreme court denied relief both on the merits and for lack of diligence, and even though the habeas petitioner had delayed 4 2 months after the state court of appeals denied relief before applying for relief from the state supreme court. (250 F.3d 1262). The government's petition for certiorari asserted that the Court of Appeals erred because the statute of limitations should not have been tolled during petitioner's 4 2 month delay in applying to the state supreme court. Peter Goldberger of Pennsylvania and Assistant Federal Defender David Porter, Sacramento, California, authored the brief amici curiae on behalf of the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders.

In the Courts of Appeals:

UNITED STATES V. JAVIER RIVERA-SANCHEZ, No. 99-10275: In the Ninth Circuit Court of Appeals sitting en banc, the court ruled for the defendant and reversed the judgment of the district court (247 F.3d 905) in answering the question whether a conviction under California Health and Safety Code ' 11360(a), which criminalizes the transportation, importation, sale, or furnishing of marijuana, is an "aggravated felony" for purposes of the federal statute prohibiting the re-entry into the United States of an illegal alien, 8 U.S.C. ' 1326(b), and the sentencing guideline, U.S.S.G. ' 2L1.2. Assistant Federal Defenders Steven F. Hubachek and Benjamin L. Coleman authored the brief amici curiae on behalf of the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, and AFD Hubachek participated in the oral argument before the en banc court. The defendant was represented by AFD Bram Jacobson.

MEET THE (FAIRLY) NEW FPD OFFICE IN THE NORTHERN DISTRICT OF NEW YORK/DISTRICT OF VERMONT

by Heather Williams,
AFD, District of Arizona, Tucson

Federal Public Defender Alex Bunin was appointed to run the office on July 19, 1999. Because he had experience opening another FPD/CDO office in Alabama, the new office was fully staffed by October, 1999, and had moved into permanent space by the end of that year.

Locale and Staffing: The office for the Northern District of New York is located in Albany,

with a branch office in Syracuse. The Albany office has three AFPDs, a Research & Writing Specialist (RWS), a CSA, an Investigator, an Administrative Officer, an Administrative Assistant/Legal Secretary, and Receptionist. The Syracuse branch has three AFPDs, a RWS, an Investigator, and a Legal Secretary. The District of Vermont's office is in Burlington, with a branch of-

office in Brattleboro. The Burlington office has two AFPDs (and is hoping for approval for a third), a RWS, an Investigator, and a Legal Secretary. The Brattleboro branch office has not yet been staffed.

Types of Cases: Because of the large border area, there are many immigration offenses with clients from all around the world, such as Africa, Asia, and the Middle East. The U.S. Attorney is much less lenient there on these cases and there is no Fast Track. Material witnesses have to plead to the petty illegal entry and are routinely paneled out. In the tri-city Albany/Troy/Schenectady area, there are many inner city drugs cases. Vermont cases are just weird (many mental health issues and odd

frauds), but that is their only typical element.

Who Are They? Alex claims his office is full of avid runners. On May 26, 2002, they will set the record for the office with the most Defender staff in the Vermont City Marathon: five from his office, plus New Jersey FPD Richard Coughlin and another of his staff running, plus several running relays. AFPD Paul Evangelista related, while in



Alex Bunin (131), AFD Kent Sprotbery (400), and Administrative Officer Matt Landy (282), moments before running the Mohawk-Hudson Marathon. Rich Coughlin (FPD NJ) and Mickey Keller (AFPD NJ) also competed.

Austin at the Baby Defender Training recently, he rented a bicycle to keep up with his regimen (that's dedication!). Out one day, two guys passed him and invited Paul to pedal with them. Paul avows one of the gentlemen was Lance Armstrong . . . wearing his USPO jersey! After awhile, the other two left Paul in their thrice *Tour de France* winning sanctified dust. The tale aroused jealousy from many in the office.

Strange Bedfellows? One AFPD is married to a federal Magistrate Judge, wed after the office opened. Another AFPD lives with the district's First Assistant U.S. Attorney. (Come to think of it, it's not any different from my office!)

But When Can I Get a Real Lawyer? While at a sentencing for one of AFPD Lisa Peebles' clients, the AUSA waxed long and rhapsodically about the defendant's history, role and participation in the offense. The client felt this could not be said without comment, and lots of it. At one point, the client said, "Ms. Peebles did a pretty good job, but she's no Johnny Cochran." And the office is prouder of her for it!

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It is with enormous pride that **Terry McCarthy, Carol Brook** and the entire **Federal Defender Program** for the **Northern District of Illinois** announce the recent selection of **former AFD and Chief Trial Attorney Michael T. Mason** to become Federal Magistrate Judge in their district. Mike Mason had been on the Federal Defender's staff since his admission to the Illinois bar in April 1977, and he became chief trial attorney in 1986. He also taught at John Marshall and DePaul University College of Law and has participated in numerous national seminars for federal defenders. Wrote Chief Judge Marvin E. Aspen in a written statement, "Mike Mason has 23 years of invaluable experience with the Federal Defender Program, during which he has earned the trust and confidence of all the District Court Judges." His reviewing panel said that he is "praised by his adversaries for his temperament, his integrity, his effectiveness, his wisdom and his intelligence." The Federal Defender Program will miss their esteemed colleague and friend terribly, but know that he will be an outstanding addition to the bench and will continue to pursue justice with the same passion and vigor that has always inspired his work at their office. Congratulations an best of luck to you, Michael!

Heartfelt congratulations to **Carmen Hernandez**, trainer extraordinaire, who has played a major, tireless role in recent years helping to organize substantive, superior training programs for defenders and panel attorneys throughout the country. Last August, she received the **NACDL's** top award, the prestigious **Robert C. Heeney Award**, at its annual meeting in Minneapolis! It is a recognition that is richly deserved.

Philadelphia's Capital Habeas Unit has had remarkable success this past year. Relief was granted in no less than 16 of their cases in 2001, which is a testament to the staff's exceptional expertise and commitment, as well as to the enormous problems plaguing imposition of the death penalty in Pennsylvania. The unit won *six new trials*, based upon *Brady* and *Batson* violations, erroneous jury instructions, and counsel's ineffectiveness. And new sentencing hearings were granted in ten cases, on such grounds as improper exclusion of a juror and denial of expert assistance, erroneous instructions and verdict sheet, and counsel's ineffectiveness in investigating and presenting mitigation. Congratulations to all for their exceptional work!

Congratulations to **AFD Christine Dahl, Investigator Karen Bates** and **Secretary Suzanne Manning** in the **District of Oregon** for their sweet habeas victory in December. In 1986, their 25-year-old, mentally retarded client was arrested for borrowing a car without permission and taking a rifle. He first said he would hire counsel, but then wrote the judge saying he wanted to plead guilty for six months. He was unrepresented when the DA proposed a plea "bargain" to burglary in exchange for dismissal of several far less serious charges and told the judge he as going to seek "dangerous offender" treatment B signaling that he would seek a 30-year sentence under a special statute. When the client requested a lawyer, the judge reviewed the "benefits" of the offer,



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which was based on waiving counsel, and suggested that "one out of five [charges] isn't a bad deal." The judge told the client to think

about it and let him know if he really wanted a lawyer, and the client went forward unrepresented. A sheriff filled out the client's form pleading guilty to burglary, and the prosecutor told the judge to be thorough in the colloquy because the client was illiterate. In the colloquy, the client admitted to taking the rifle. Later, a psychiatrist who met with the client to determine if he qualified as a "dangerous offender" concluded that he was incompetent, but since no one asked him this question, that never came out. At sentencing before a different judge, the client said he hadn't broken into anyone's house, but the judge glossed that over and imposed the 30-year maximum. The state courts found nothing wrong with sentencing the client to 30 years for a crime he did not commit while he was unrepresented and incompetent.

Fast forward to 2000, when the client filed a federal habeas petition, not complaining about his conviction (he didn't know any better) but because he had never seen the psychiatrist's 1987 report and wanted a copy. After extensive investigation disclosing the above, Chris amended the complaint to allege a Sixth Amendment deprivation of counsel claim challenging the conviction itself. After getting the state trial judge (who conceded he'd never take a plea under such circumstances now) and the psychiatrist on board as defense witnesses, the state agreed to settle the petition. Just before Christmas, at age 40, the client walked out of prison a free man!

There is a lot of good news coming out of the Southwest. Congratulations to **District of Arizona AFDs Saul Huerta and Roxanne Johnson**, who hung the jury after a 5-day trial in which their female client, only 5'2" tall, was charged with assault on a Border Patrol Agent. The jury hung despite the agent's testimony that the client socked him with a closed fist across the jaw! As observing **AFD Jason Hannan** commented, "Sounds like she was just exercising her constitutional rights!" **AFD Jon Sands** won big in *USA V. Spencer* (CA 01-10309) [9th Cir. unpublished]. The government breached the plea agreement by failing to recommend the low end of the applicable range. The Circuit: [1] vacated and remanded for resentencing, [2] before a different judge, [3] ordered client released pending resentencing, and [4] ordered the mandate issue forthwith. Great work Jon! An outstanding job by **AFD Vicki Brambl**, aided and abetted by **AFD Brian Rademacher** (per eye-witness **Fred Kay**). On November 27, Vicki argued the Ralph Arvizu case before the Supreme Court. She deftly fielded weird comments from the court such as Scalia saying they would be more sympathetic to her 4th Amendment argument if Arvizu had not been guilty; O'Conner expressing concern that we are in a more dangerous age than before; and Rehnquist saying we need to defer to judgment of the Border Patrol and local judges. Kennedy said cops are trained so we should give them some deference. Ginsburg seemed to give more weight to the original 9th Circuit opinion than the amended one. Thomas was mum as usual. Despite Vicki's stellar advocacy, the Justices rejected the Ninth Circuit's decision seemingly adopting an almost-anything-goes policy in analyzing the totality of the circumstances. When **AFD Vicki Brambl** wasn't arguing in Washington, she had an excellent victory on her home turf. Her client had walked out of a 20-year state prison sentence for possession of a rock of cocaine (drug offense while on probation or parole)! It took 4 years on a habeas petition, winning at the district court, being reversed at the circuit, and finally, after the state court judge and the state prosecutor saw the

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light as Vicki saw it. **AFD Chris Kilburn** helped his client, charged with illegal reentry trying to board a plane bound for Mexico, to get back the \$12,366 Customs tried to forfeit. Next battle: to fight the \$5000 fine now that the client is so wealthy! **AFD Jane McClellan** and **Investigator Lacey DeSanta** appeared for a pretrial conference on an assault case. Primed and ready to go, they disclosed to the government that two of the prosecution witnesses were now deceased. This critical fact was unknown to the prosecutor. Case dismissed! And, Jane earns more kudos for a great result in *US v. Echevarria-Valenzuela* (CA 00-10253) [9th Cir. unpublished]. The 9th, in a memorandum, found that Arizona's DUI was the same scheme as California's, and so, under precedent, it was a '1326(b)(1) offense and not a b(2).

Likewise in the neighboring **District of New Mexico**, **AFD Barbara Mandel**, assisted by **Investigator Isabel Figueroa** and **Research and Writing Specialist Shari Allison**, after a six-hour hearing, won the suppression of more than 200 pounds of marijuana. The district court concluded that reasonable suspicion did not support a Border Patrol agent's open highway stop of a rental minivan from Tucson, Arizona, even though the minivan was traveling north on New Mexico Highway 26 (like all other roads in southern New Mexico, "a notorious drug and alien-smuggling route") at about 2 a.m. in August and was riding low. The judge refused to accept the government's contention that it should defer to the agent's determination of what constituted suspicious circumstances. Furthermore, the court did not believe the agent's assertion that the van was riding "low near the ground" because the agent viewed the van by flashlight as it passed him going about 65 mph and because the Government's own measurements showed that the minivan's rear section was depressed only one-and-one-half inches. What a win!

In the **District of Colorado**, they are taking gun cases to trial and winning. **Chief AFD Charlie Szekely** won an acquittal on a charge of false statement on a firearm application. The defendant had been under indictment for aggravated child abuse at the time he bought the gun, but had answered "no" to this question on the form. Meanwhile, **AFD Janine Yunker** won an acquittal on charges of felon in possession of a firearm and possession of cocaine. The gun and drugs were in the defendant's car trunk (along with his personal belongings), and a passenger in the car testified against the defendant. Janine argued successfully that the gun and drugs belonged to the government's witness. With two acquittals back to back, the government opted to dismiss (with prejudice) a third gun case and decided to avoid risk of another acquittal on a Colorado Project Exile case. The prosecutor got suspicious that **AFD Ray Moore** wanted to waive jury trial on a case involving possession of a firearm by a client who had 4 prior state domestic violence convictions. The government finally figured out Ray's defense - the state domestic violence convictions would not qualify as predicates for purposes of the federal statute given the nature of the defendant's relationship with the women in question. And finally, just days ago, **AFD Bob Pepin** just got a jury acquittal in another felon with a gun case despite, two witnesses, including a security guard, claiming to have seen the defendant throw the gun out of his car window just before cops stopped him. Way to go, Colorado.



THERE MUST BE SOME WAY OUT OF HERE: THE CONUNDRUM OF DISCUSSING COOPERATION WITH DEFENDANTS

by Sigmund G. Popko, Assistant Professor of Law, Arizona State University
Jon M. Sands, AFD, District of Arizona, Phoenix

There must be some way out of here, said the Joker to the thief
There's too much confusion, I can't get no relief –
-- Bob Dylan, All Along the Watchtower

A comment on *United States v. Fernandez*, No. 98 CR. 961 JSM, 2000 WL 534449 (S.D.N.Y. May 3, 2000), *adhered to on reconsideration*, 2000 WL 815913 (S.D.N.Y. June 22, 2000)

A defendant is arrested on federal charges. He gets appointed counsel. His counsel is scrambling to find out about the case and learns that the prosecutor is one who gives the best cooperation deals to the defendant who come to his door first. The defendant and defense counsel have only met a couple of times, and counsel is still in the dark about many facts of the case. The defendant himself is mistrustful and wary of public defenders. He has told counsel that he won't plead and won't snitch. Counsel feels that defendant may be the least culpable. She also knows that the clock is ticking. What should counsel do? Under a recent decision from the Southern District of New York, if counsel waits too long before raising the issue of cooperation, she will be found to be constitutionally ineffective.

In a decision compelled by a statutory and guideline regime giving the prosecutor the sole power to decide whether the defendant may be sentenced below a statutory minimum, a district judge for the Southern District of New York found an able lawyer of integrity constitutionally ineffective because the lawyer failed to advise the defendant early in the case of the importance of cooperation with the government as a means of reducing his sentence. The case was *United States v. Fernandez*¹. The essence of the court's ruling is aptly summarized in the court's own words:

[Since the adoption of the Sentencing Guidelines,] [c]ounsel's ability to persuade a judge or jury is now far less important than his ability to persuade the prosecutor that the defendant should be allowed to cooperate with the government and thereby obtain a 5K1.1 letter, which will enable the judge to depart from the sentence that the Guidelines [and any statutory mandatory minimum] would otherwise mandate. The Court concludes that, in the age of the Sentencing Guidelines, it is malpractice for a lawyer to fail to give his client timely advice concerning the importance of coop-

eration with the government as a means of reducing the defendant's sentence.²

Apparently, we are now less important as trial lawyers than supplicants.

What are the implications of the court's ruling, especially for court-appointed lawyers? Read narrowly, the decision is nothing more than a reminder that discussing cooperation with your client is one of the things to be done during the course of representation. Read broadly, the decision suggests that early on in the case, perhaps before any discovery and/or factual investigation are complete, and perhaps before counsel has completed any legal analysis, counsel must not only raise the option of cooperation and how cooperation works under the sentencing guidelines, but also affirmatively recommend that course of action to the client.

Fernandez was a drug case. The defendant was the least culpable of three persons arrested after some hand to hand sales to confidential informants and at least one meeting with an undercover officer. Eventually, some eight months after their arrest, all three entered into plea agreements which would have resulted in sentences of 108 to 135 months. About three months after his entered his guilty plea, Fernandez wrote to the judge and told him he was unhappy with his lawyer because the lawyer misled him as to his situation regarding cooperation with the government and that the lawyer had been retained by someone who wanted to benefit others.³ After appointing new counsel and holding a hearing, the court made the factual findings and conclusions of law described and quoted above.

The court heard evidence that the first time the lawyer spoke with Fernandez about cooperation was two days before the change of plea hearing. The prosecutor testified that this was too late in the process to be of any assistance to the government. If the court had ruled that this was sufficient to create ineffective assistance of counsel B the failure to discuss cooperation with the defendant

(Continued on page 12)

(Continued from page 11)

early enough for the defendant to take advantage of that option should he choose to do so **B**, the decision would be less troublesome. As the judge recognized, those involved in federal criminal practice know that the **A**race is to the swift when it comes to cooperation.⁴ We find from our discussions with other lawyers, particularly those defending drug cases, that the possibility of cooperation is at least mentioned to the client so that he can begin thinking about that option. In a case where a statutory mandatory minimum is alleged, the necessity of cooperation is explained as the only means of avoiding that minimum (assuming a conviction and that the safety valve does not apply).

There is language in *Fernandez* that could be read to suggest that the lawyer must not only raise cooperation as an option early in the case, but must give a professional opinion as to the wisdom of pursuing that route and advise the client to make an early and fast decision. This is a troubling but reasonable reading of the decision. First, the court cites as legal authority for its ruling several cases and ethical rules it describes as standing for the proposition that it is ineffective assistance of counsel to fail to advise a client whether to take a particular offer.⁵ Second, apparently based only on the facts alleged in the complaint, the lawyer is supposed to be placed on notice that the **A**client has little chance of prevailing at a trial and that there is **A**no defense to the charge.⁶ Based on this *prima facie* notice, the lawyer is then to do what the statutes and guidelines make necessary to obtain a lower sentence **B** strive for a cooperation agreement.⁷ Third, the court expressly states that the purpose of the lawyer's advice concerning cooperation and its role in the guideline scheme is to enable the client **A**to make a decision whether to pursue an early plea.⁸ Fourth, on reconsideration, the court found as significant the fact that *Fernandez*'s first lawyer did not make an early effort **A**to determine [from *Fernandez*] whether he would be willing to testify against his codefendants.⁹

Can this be done so early on without abandoning the adversary system? The court thinks so. As the court stressed, **A**the sentencing guidelines now makes it mandatory that every defendant be advised at an early stage that cooperate with the government may be the only course that can substantially reduce the sentence that will ultimately be imposed."¹⁰ We are not so sure.

As federal public defenders, we are skeptical of this admonishment to rush to cooperate if we know what is good for the client and ethical for us. Representation of defendants demands more than walking into lock-up, opening the guideline book, and saying, **A**We should talk about cooperation. This approach raises effectiveness and ethical problems. It is not a way, in our experience, to foster a trusting client-attorney relationship. Mistrust would be the

result.

For court-appointed lawyers, especially, having to talk early on about cooperation presents unique concerns. The client did not retain the lawyer. The same system that is trying to put him in prison gave him that **A**public defender (who from time to time is perceived as not being a **A**real lawyer). The trust that is necessary for any effective attorney-client relationship generally takes time to build under these circumstances. When the **A**public defender must, in one of the first meetings with his client, tell him that cooperation (i.e., pleading guilty, snitching, and still probably going to prison for some amount of time) is his best and only hope for a lesser sentence, any preconceptions the client may have that his lawyer is just part of the system are reinforced.

Cooperation is for most clients a sensitive subject. It may involve dangers to his safety or his family's. It certainly may involve how he feels about himself. If the cooperation would be against close personal friends or family, the emotional component runs even deeper. A lawyer should not be required to raise this most sensitive of issues too early. Raising it before the attorney-client relationship has matured to the point where it can be discussed on its merits rather than through the lense of the client's suspicions about the lawyer's motive, will almost certainly prejudice client and, perhaps, destroy the attorney-client relationship and any chance that the client will choose cooperation as his option.

The court's decision cited legal decisions, ethical rules, and a criminal defense treatise in support of its holding that a lawyer must advise the client early on whether cooperation is the best reasonable choice. Indeed, as noted, the court apparently was willing to have the lawyer make that determination based on the facts alleged in the complaint. What about defense counsel's other obligations to investigate the client's case through discovery and independent investigation?¹¹ What about defense counsel's obligation to analyze the facts and the law to develop legal defenses to guilt or challenges to the admissibility of evidence? This obligation should be satisfied or at least meaningfully addressed before giving a client advice on whether to offer cooperation? Doesn't the adversary system demand that the defense test the government's proof and legal theory or at least explore whether such a test might be fruitful. Shouldn't a client be given advice on whether there are any factual or legal defenses possible and their chances of success before he has to decide whether to cooperate?

The *Fernandez* decision recognizes and is the result of the tension between the duty to investigate and the duty to advise about a cooperation agreement. That tension is created by the current federal sentencing scheme which gives the prosecutor **B** an attorney for a litigant **B** the

(Continued on page 13)

(Continued from page 12)

sole authority to enable a defendant to be sentenced below a mandatory minimum. Because of the premium the government and guidelines place on early cooperation, a premium that does not take into account defense counsel's long-established duty to independently investigate the facts and law, defendants and their counsel frequently are being asked to decide whether to cooperate based on allegations alone. By giving so much power to a litigant, the sentencing scheme undermines the adversary system and erodes the confidence that the government can only secure a conviction based on admissible evidence sufficient to overcome a reasonable doubt of guilt.

The prosecutor also has the power to control the contours of any such agreement. The *Fernandez* court candidly recognized that *Fernandez* was a small fish and perhaps didn't really have much to offer the government.¹² Indeed, the court could not even find that the government would have offered *Fernandez* a cooperation agreement had the topic been pursued early on, but only a plea agreement more favorable than that offered to his more culpable co-defendants.¹³ Thus, the prosecutor, who is not legally obligated to plea bargain at all, can institute policies offering only the meagerest of benefits. For example, the prosecutor's standard offer can be:

A(1) IF your client's cooperation is helpful (in the government's opinion); and (2) IF your client's cooperation is complete and truthful (in the government's opinion), the government will file the 5K1.1 motion, and let the judge decide to what extent, if any, it wants to depart. (3) MAYBE, the government will recommend 2 or 3 levels downward.

No promises, no guarantees; just the legal possibility of a sentence below the mandated minimum and the hope that the judge will grant the government's motion and actually depart downward substantially. If this is the government's policy, must defense counsel still recommend it to the client simply because it carries the mere possibility of a lesser sentence?

Must defense counsel still recommend cooperation to the client if counsel believes (based on his or her experience) that any debriefing between the client and the case agents and/or prosecutor will come out badly? This may be so because the client is halfhearted about the idea of cooperation. The client may be just scared about talking to the police about his crimes or scared of what will happen to him in court and at the hands of others if and when his cooperation is revealed. He may be reduced to cooperate against family members or lovers. He may be mentally incapable or handicapped or suffering from years of drug abuse that make his recall or ability to remember shady. There is always the problem of determining when is a fast

enough. Must the discussion occur within a month? A week? The same day? Is the discussion just one, or several? *Fernandez* does not supply answers to these questions, except, here, to say that discussions two days before a plea, and eight months after arrest, is too late.

The sentencing scheme is skewed in favor of the government. The establishment of statutory mandatory minimums coupled with the prosecutor's sole authority to depart below those minimums places in the hands of the prosecutor the power to negate the adversary system. The sentencing scheme forces defense counsel, too early in the process, to promote the idea of cooperation and pleading guilty to his client at the sacrifice of a thorough independent factual and legal investigation. Now, in addition to having to deal with just the effect of the sentencing scheme, defense counsel runs the risk of committing malpractice if counsel does not promote the cooperation idea at the earliest meetings with his client.

In *Fernandez*, as a result of counsel's failure, in the court's eye, to explore cooperation as quickly as he should have, the judge rolled up his sleeves and construed the proceedings as if it was an ineffective petition. The court recognized that it could not compel the government to offer a substantial assistance departure. The court however tried to fashion what it felt would have been an appropriate plea if the defendant had cooperated as quickly as the court felt he should have. The court felt that the defendant should get the benefit of a favorable plea, and so construed it so that the defendant would plead to a charge, and certain relevant conduct facts, that would limit his exposure. Essentially the court was trying to get this least culpable member of the conspiracy whose counsel did not advise him about cooperating soon enough, a more lenient sentence under the guidelines.¹⁴

As stated above, the real problem is not so much when the defendant came forward. After all, the guidelines have no deadline for acceptance of responsibility. The safety valve, which is legislative, and is incorporated in the guidelines, cannot break at any time prior to sentencing. The decision to give acceptance, or the safety valve, is a judicial function. The problem here is that for substantial assistance, or charge bargaining, the power rests solely with the government. In this way, the guidelines can be manipulated by the government to require a rush to the prosecutor's door for cooperation, or forever be barred from a mitigated sentence. In *Fernandez*, there is a situation where everyone agrees that the defendant was the least culpable. The government stood fast by its rule that the first come would be the first served with sentencing considerations. The Court's ruling was trying to achieve a rough sentencing justice.

The lesson we can draw from *Fernandez* is not

(Continued on page 14)

(Continued from page 13)

some magical timeline by which cooperation must be discussed. All defense counsel would agree that such cooperation should and must be raised, but at an appropriate time. This will vary case by case and defendant by defendant. The real problem lies with the guidelines.

What the court really wants is a fair sentence. One way out of this conundrum is a proposal that was submitted by the Federal Public Defender to Acap@the guidelines for defendant who it is determined to have had a minor minimal role in drug offenses under '3B1.2. This ceiling or cap would recognize the lesser culpability of the defendants. It would focus on what the defendants did rather than on their frequently misleading factor of an amount. It would also be a judicial determination, arrived at through consideration of the factors and with the input of both the government and defense counsel, rather than having such a determination be the Agift@ of the prosecutor, doled out to the happenstance of which defendant is the first one to knock on the prosecutor's door.

This Acap@ would differ from both the substantial assistance departure and the safety valve. The cap is a guideline determination made by the court. The prosecutor would not continue it, as she would the substantial assistance motion. There would be no eligibility hurdles as there are with the safety valve, nor any requirement of any cooperation. The Acap@ would recognize the specific role in the offense.

This proposal for a Acap@ or Aceiling@ on minor minimal role under '3B1.2 has been considered by the Sentencing Commission. In the past, the Commission has voted in favor of such a proposal (though it lacked the votes to become an amendment). The proposal is still an appropriate way to guide court discretion. In this manner, the least culpable defendants, across the board, would be treated in a like manner. The decision would be a judicial one, not a prosecutorial one.

1. No. 98 CR. 961 JSM, 2000 WL 534449, at *2 (S.D.N.Y.

May 3, 2000), *adhered to on reconsideration*, 2000 WL 815913 (S.D.N.Y. June 22, 2000) 2000 WL 534449.

2. *Fernandez*, 2000 WL 534449, at *1.

3. *Fernandez*, 2000 WL 534449, at *1.

4. *Fernandez*, 2000 WL 534449, at *3.

5. *Fernandez*, 2000 WL 534449, at *3.

6. *Fernandez*, 2000 WL 534449, at *2.

7. *Fernandez*, 2000 WL 534449, at *2.

8. *Fernandez*, 2000 WL 534449, at *3.

9. *Fernandez*, 2000 WL 815913, at *1.

10. *Fernandez*, 2000 WL 815913, at *7.

11. Cf. Michael O'Connor and Celia Rumann, *The Death of Advocacy in Reentry After Deportation Cases*, The Champion, Nov, 1999 (the defense ethical dilemma in Afast track@ cases).

11. *Fernandez*, 2000 WL 534449, at *4.

12. *Fernandez*, 2000 WL 534449, at *4.

14. The *Fernandez* court chose not to try to use a sentencing departure as a tailored remedy. Rather, it crafted the guideline sentence that would have been available if there had been effective assistance of counsel. The Second, Fourth and Ninth Circuits have held that ineffectiveness assistance of counsel in plea negotiations or at trial cannot be used as a basis for a downward departure. See, e.g., *United States v. Basalo*, slip.op., __F.3d__ (9th Cir. Aug. 2, 2001) (No. 00-10457); *United States v. Bicaksiz*, 194 F.3d 390 (2nd Cir. 1999); *United States v. Martinez*, 136 F.3d 1972 (4th Cir. 1998); *United States v. Crippen*, 961 F.2d 882 (9th Cir. 1992). As the Second Circuit stressed in *United States v. Carmichael*: Ineffectiveness assistance is a constitutional violation of a defendant's rights and not a mitigating factor to be considered at sentencing or resentencing. Rather, a finding of ineffectiveness assistance requires a remedy specifically tailored to the constitutional error. @ 216 F.2d 224, 227 (2nd Cir. 2000). Nonetheless, such a blanket denial seems to be overbroad and to run afoul of *Koon v. United States*, 518 U.S. 81 (1996). There may be extraordinary or stressful situations where ineffectiveness at sentencing does support a departure.

OUTSTANDING RESEARCH AND WRITING SPECIALIST NOMINATION

The National Association of Federal Defenders seeks nominations for its "Outstanding Research and Writing Specialist Award". Please base your nomination on the following criteria:

- 1. A substantial number of years of service in a defender program;**
- 2. Extensive research & writing experience, including complex & novel issues;**
- 3. Well respected by fellow R&W specialists, attorneys, and other support staff;**
- 4. Stays current with developments in the law;**
- 5. Regularly volunteers to assist colleagues;**
- 6. Always treats clients with dignity and respect;**
- 7. Excellent reputation in the criminal defense community;**
- 8. Devotes time to defense related issues or service to the poor outside of regular work schedule.**

Please send your nomination to *Leigh Skipper, AFD, Philadelphia Federal Defender's Office, Curtis Center Building, Suite 540 West, 601 Walnut Street, Philadelphia, PA 19106*. Please comment on the reasons for the nomination.

ALERT!!!

FEDERAL COURT PRECLUDES FINGERPRINT IDENTIFICATION

A federal trial court in Philadelphia has just ruled, in a fifty page decision, that fingerprint experts cannot tell juries that two fingerprints are a match because the methodology that such experts rely upon does not meet the requirements of *Daubert* and Federal Rule of Evidence 702. This carefully reasoned, groundbreaking decision came in a pretrial ruling in a capital case, *United States v. Plaza*, which is currently ongoing.

The unprecedented ruling affects a prosecutorial tool that had been deemed unassailable for a nearly a century, and comes two years after Philadelphia AFD Robert Epstein initiated the first legal challenge in the nation following the standards established by the Supreme Court in *Daubert*. While the challenge in Mr. Epstein's case was rejected by a different federal judge, his arguments that the accuracy of identifications has never been scientifically tested, and that the training and standards of what constitutes a match vary widely, have been embraced by defense attorneys nationwide. In the current *Plaza* case, both sides agreed to let the judge base his ruling on the court record made in Mr. Epstein's case, *United States v. Mitchell*.

This decision is particularly noteworthy in that it is authored by Senior United States District Court Judge Louis H. Pollak, former Dean of both the Yale and the University of Pennsylvania Law Schools. Experts predict that its persuasive reasoning will make it hard for other judges to ignore. Judge Pollak did not preclude the testimony of the government fingerprint experts altogether. Rather, he held that such experts will be permitted to point out the similarities and/or differences between the latent prints found at the crime scene and the roll prints taken directly from the defendants. However, Judge Pollak ruled that the examiners will not be able to express an opinion on the ultimate issue, whether the prints are a match because of the government's failure to establish that examiners can reliably provide such opinions.

Mr. Epstein's written materials challenging the reliability of fingerprint identification have been disseminated widely and he has lectured frequently throughout the country on this subject. For copies of Judge Pollak's decision, or if you need assistance in mounting such a challenge in one of your cases, please contact Mr. Epstein's secretary, Ms. Bonnie Keller, at (215) 928-1100 or bonnie_keller@fd.org.

OUTSTANDING DEFENDER PARALEGAL NOMINATION

The National Association of Federal Defenders seeks nominations for its "Outstanding Defender Paralegal Award" to be presented at the Federal Defender Investigator Conference in Portland, Oregon. Please base your nomination on the following criteria:

- 1. A substantial number of years of service in a defender program;**
- 2. Extensive investigative experience, including projects involving complex and novel issues;**
- 3. Well respected by fellow investigators, attorneys assistants and other support staff;**
- 4. Brings diverse talents to the job; stays current with developments in the field;**
- 5. Regularly volunteers to assist colleagues;**
- 6. Always treats clients with dignity and respect;**
- 7. Excellent reputation in the criminal defense community;**
- 8. Devotes time to defense related issues or service to the poor outside of regular work schedule.**

Please send your nomination to *Leigh Skipper, AFD, Philadelphia Federal Defender's Office, Curtis Center Building, Suite 540 West, 601 Walnut Street, Philadelphia, PA 19106*. Please state reasons.