



# THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

*Summer Edition 2003*  
*Volume II, Issue 7*

## NAFD NEWSLETTER

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## PRESIDENT'S MESSAGE

### Gratitude - Outrage - Vigilance

As we approach this year's conference, I wanted to express a few random thoughts. These last few years have been difficult for our profession. In light of that, sometimes it is easy to overlook all the things for which we should be grateful. I am speaking of each other—the great resource of friendship and comradery that surrounds each of us. Although that may sound corny, it is also true. Every day, I am thankful for the ability within my office to brainstorm with bright, creative, dedicated friends. While assisting each other on cases, we share the legal, logistical and emotional burdens of a worthy cause. We offer, and receive, a sympathetic shoulder on which to cry. I am also thankful for the larger community of defenders nationwide. We are blessed with the ability to pick up a phone or dash off an e-mail across the country to another defender, investigator, etc., who has a particular expertise in a certain area. I am so thankful for the comradery we share every day and then renew at the annual conferences. All these are things for which I am profoundly grateful, and without which, our jobs would be that much more difficult, if not impossible. I first wanted to discuss all this, before delving into all the things over the past couple of years for which I am anything but grateful. In fact, I am outraged.

These have truly been trying times for those who ardently support and protect individual freedoms and who passionately believe in the sanctity of the Constitution. In one statute, regulation or proclamation after another, the current "powers that be"

have worked to drastically diminish freedoms and constitutional rights, previously believed to be sacrosanct. The Feeney Amendment is but the most recent expression of an underlying political environment corrosive to individual rights. These measures have even more than before drastically reduced our ability to have judges see our clients as individuals worthy of independent evaluation and not just a piece of a complex formula with a foregone conclusion.

It is this environment that requires our constant vigilance. Like you all, I have been waiting for the pendulum to swing in the other direction. However, given the mood and spirit in this country, that does not appear to be on the horizon. Now, more than ever, our clients need us.

In the last two years, NAFD joined other like-minded organizations to submit various letters, comments, etc., to Congress and the press opposing these changes. We need to do more, but we cannot without the commitment and effort of our members. I urge you not only to join and/or renew your NAFD membership, but to also participate within our association. NAFD needs the efforts of its members. There is no higher calling than to devote our professional lives to the cause of justice. Our unity can only serve to strengthen our voice.

Join with me to help our incoming President, **Carol Brook**, to stem the tide and continue the fight for our clients.

*Nancy Price, President*

*In this issue . . .*

PRESIDENT’S MESSAGE . . . . . 1  
HIGHLIGHTS OF THE “FEENEY AMENDMENT” AND THE PROTECT ACT OF 2003 (Effective April 30, 2003) . . . . . 2  
FOUR ASSISTANT FEDERAL DEFENDERS APPOINTED TO STATE AND FEDERAL JUDICIAL OFFICES . . . . . 5  
LEANING ON A PRECEDENT . . . . . 10  
KUDOSKORNER . . . . . 10  
COURT INTERPRETERS . . . . . 12  
NAIL FILES, KNIVES, AND LOADED GUNS . . . . . 15  
AMICUS COMMITTEE REPORT . . . . . 17

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# HIGHLIGHTS OF THE “FEENEY AMENDMENT” AND THE PROTECT ACT OF 2003 (Effective April 30, 2003)

*by Felicia Sarner, Supervisory Assistant Federal Defender, Eastern District of Pennsylvania, Philadelphia*

## Introduction

On April 30, 2003, the president signed into law the federal “Amber Alert” statute, addressing child abductions and other offenses against minors, entitled the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ” or the “PROTECT Act.” Most of its provisions are effective immediately upon enactment.

When the initial bill first reached the House of Representatives, an amendment - - called the “Feeney Amendment” -- was attached to it, addressing “sentencing reform” issues. The first incarnation of the amendment made sweeping changes to the sentencing guidelines and restricted the court’s authority to depart *downward* (not upward) across *all* offense types. It overruled *Koon v. United States*, 518 U.S. 81 (1996) and established burdensome reporting requirements clearly intended to intimidate judges into not imposing sentences below the range without approval of the government. There was virtually no public debate (it lasted all of 20 minutes) and no notice to the federal judiciary, the U.S. Sentencing Commission, the defense bar or the legal academic community.

A frenzied attempt to defeat or at least table the amendment ensued, which included a letter from Chief Justice Rehnquist urging the Senate Judiciary Committee to allow for meaningful public debate before making such sweeping changes and reversing over 15 years of developing sentencing law under the guidelines scheme. Despite these efforts, the amendment ultimately passed, but

in a version that was somewhat less sweeping and that restricted judges’ discretion to depart downward only in the category of cases entitled “child crimes and sexual offenses.” The amendment, however, also directed the Sentencing Commission to amend the guidelines so as to “ensure that the incidence of downward departures are [sic] substantially reduced.” Therefore, it remains to be seen how the Commission will respond to this directive, and whether it will effectively restrict downward departures *across all offense types* in the current amendment cycle. What follows are the highlights of the “Feeney Amendment” and the PROTECT Act.

## “Feeney Amendment” Highlights

A. Downward departures for “child crimes and sexual offenses” are now restricted to those grounds that are “affirmatively and specifically identified as a permissible ground” in Part 5K of the sentencing guidelines. Congress directly amended § 5K2.0 to add a section specifically addressing this category of cases, and to add § 5K2.22, which sets forth certain prohibited grounds for this category of cases.

“Child crimes and sexual offenses” is defined to include kidnapping a minor (18 U.S.C. § 1201), sex trafficking of children (18 U.S.C. § 1591), obscenity (18 U.S.C. § 1460 et seq.), sexual abuse (18 U.S.C. § 2241 et seq.), sexual exploitation of minors (includes receipt or possession of child pornography) (18 U.S.C. § 2251 et seq.), and transportation for illegal sexual activity (18 U.S.C. § 2421 et seq.).

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## THE LIBERTY LEGEND

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Permissible downward departure grounds for this category of cases, specified in Part 5K of the guidelines, include age (if and to extent permitted by § 5H.1.), extraordinary physical impairment (if and to extent permitted by § 5H.4), lesser harms (§ 5K2.11), coercion and duress (§ 5K2.12), and voluntary disclosure of offense (§ 5K2.16).

Prohibited downward departure grounds for this category of cases include gambling dependence, aberrant behavior, extraordinary family circumstances, diminished capacity, over representation of offense seriousness or criminal history, and any unmentioned factors (since they are not specifically and affirmatively identified in Part 5K), such as post-offense rehabilitation, extraordinary acceptance of responsibility, etc.

Downward departures are *still presently available* for all other offense types, such that the same heartland and combination of circumstances analysis in § 5K2.0 and *Koon* applies. However, we must watch closely how the Sentencing Commission responds to the directive that it amend the guidelines to “ensure that the incidence of downward departures are [sic] substantially reduced.” Moreover, the amendment specifies that for the next 2 years, the Commission is prohibited from passing any new downward departure grounds or any amendments inconsistent with the new departure restrictions.

**B.** The amendment directs the Commission to amend the guidelines within 180 days of enactment to add a new 4-level downward departure in illegal reentry cases *only* for border districts with “fast track” or “early disposition programs authorized by the Attorney General” and *only* pursuant to a government motion. This will impact districts that have a “fast track” program in place, because the downward departures, pursuant to government motions, were typically far in excess of 4 levels.

**C.** The third acceptance of responsibility point under § 3E1.1 will only be available pursuant to a government motion based on timely acceptance that allows the government to spare its resources by not preparing for trial. The alternative third-point ground, that of timely disclosing the defendant’s offense conduct (the “*mea culpa*” ground!), has been repealed. The amendment prohibits the Commission from ever altering this change.

**D.** The amendment directly amends the pornography guidelines by adding a broader definition to the

enhancement for “pattern of activity involving prohibited sexual conduct” in § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), and it enhances penalties for the number of visual depictions and sadistic or masochistic depictions in § 2G2.4 (Child Pornography Guideline). The amendment prohibits the Commission from ever altering these changes.

**E.** The amendment seeks to chill departures generally by imposing burdensome reporting requirements on judges who depart. In the “Reasons For Imposing Sentence” section of the judgment and commitment order, the judge must set forth factually specific written reasons for departing (except in cooperation cases), and the Chief Judge of each district must ensure that the reasons for departing are forwarded to the Sentencing Commission within 30 days of imposition. It further chills departures generally by giving Congress and the DOJ full access to Sentencing Commission data identifying each judge’s departure practices. It also requires the Commission to report annually to Congress about national departure trends, including identifying uncooperative districts (and judges?) who are not forwarding written reasons for departures.

**F.** The amendment seeks to chill downward departures specifically by requiring the DOJ to establish written procedures, and to forward those procedures to Congress within 90 days of enactment, to ensure that downward departure motions are formally opposed by line assistants, that prosecutors make sufficient records for appeal, and that appeals are filed when judges depart downward based on the nature or magnitude of the sentencing error, its prevalence in the district, or its “prevalence with respect to a particular judge.”

If DOJ fails to submit the above written procedures to Congress within 90 days of enactment, then beginning on the 91<sup>st</sup> day, the Attorney General must report *every* downward departure (other than cooperation or “fast track” motions filed by the government) within 15 days of imposition of sentence, including the identity of the judge, the facts of the case, the reasons for downward departure, whether the prosecutor opposed the departure, and whether the government is appealing the departure.

**G.** The amendment establishes a changed standard of review of departures on appeal, such that departures are to be reviewed *de novo*. This overrules the longstanding abuse of discretion standard in which due deference is given to the sentencing judge, and it means that the

appellate court must exercise *de novo* discretion without the benefit of seeing the defendant and the live witnesses.

The amendment also restricts sentences upon remand, such that at the resentencing hearing, judges can only depart on those grounds that were raised at the original sentencing hearing that were “specifically and affirmatively included in the written statement of reasons” and found permissible by the appellate court.

**H.** *Changed Composition of Sentencing Commission:* The amendment changes the enabling legislation to provide that “not more than 3” voting members can be judges. Previously, it provided that “at least 3” had to be judges. This change means that federal judges will no longer be able to have a majority among the 7 voting members of the U.S. Sentencing Commission.

**I.** *Effective Date and Ex Post Facto Concerns:* Most provisions of the Feeney Amendment became effective immediately upon enactment, April 30, 2003, which raises a multitude of *ex post facto* issues. Remember to always compare the law in effect at the time of commission of the offense with the law in effect at the time of sentencing. A reduction in the extent of sentencing discretion should be deemed a substantive change for *ex post facto* purposes. *Lindsey v. Washington*, 301 U.S. 397 (1937) (new law imposing mandatory sentence, restricting court’s sentencing discretion, violated *ex post facto* principles). Therefore, the new restrictions on departing downward do not apply unless the offense conduct occurred on or after April 30, 2003, the effective date of the statute.

It is less clear how *ex post facto* principles apply to the appellate changes made by the Feeney Amendment. Do the changes apply only to departures imposed after April 30, 2003, or to pending appeals as well? The changed standard of review on appeal (*de novo*) is arguably substantive because it reduces the burden the government has when it appeals a downward departure. The language in *Carmell v. Texas*, 529 U.S. 513 (2000), may be helpful in this regard. That case found that a changed rule of evidence, which eliminated the need for corroboration of a witness’ testimony, violated *ex post facto* principles. However, these complicated issues will have to be resolved by the courts. Nevertheless, it seems fairly clear that the restricted departure grounds applicable to resentencings after remand violate *ex post facto* principles. See *United States v. Yeaman*, 248 F.3d 223, 227-28 (3d Cir. 2001) (the prohibition on departing downward for post-sentence

rehabilitation at § 5K2.19 did not apply, because this restriction on sentencing discretion was not in effect at time of commission of offense).

It is likewise unclear how *ex post facto* principles apply to the burdensome reporting requirements imposed upon judges who depart. This is arguably an Article III, separation of powers violation, but does a criminal defendant have standing to raise this challenge? Perhaps so, if the record reflects that the court’s decision not to depart was because it did not have the time or inclination to comply with the reporting requirements.

## **PROTECT Act Highlights**

**A.** Aside from the “sentencing reforms” made by the Feeney Amendment, the broader statute contains numerous provisions that enhance penalties for offenses against minors. For the category of cases defined as “child crimes and sexual offenses,” many of the statutory maximums and minimums have been enhanced, and the authorized supervised release term for all such offenses is increased to “any term of years or life.”

**B.** The base offense level in § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) is increased from Level 24 to Level 32 across the board, regardless of whether the victim is a minor or an adult. The 1-level decrease for releasing the victim within 24 hours in subsection (b)(4)(C) is repealed. The 3-level enhancement for sexually assaulting the victim in subsection (b)(5) is increased to 6 levels, whether the victim is a minor or an adult.

**C.** A 20-year mandatory minimum has been added to 18 U.S.C. § 1201(g), the kidnapping statute for offenses involving minor victims. The minimum appears to apply even to first offenders, but does not apply if the defendant was a relative or legal guardian of the victim.

**D.** 18 U.S.C. § 3559 has been amended to add a new “two strikes” provision which carries a mandatory life sentence for the second conviction of a “federal sex offense” involving a minor victim.

**E.** 18 U.S.C. § 3283 has been amended to provide that no statute of limitations applies to the prosecution of an offense involving the sexual or physical abuse, or kidnapping, of a child under 18 years, for the duration of that child’s life.

**F.** The act directs the Attorney General to appoint 25 prosecutors whose “primary focus” will be the investigation and prosecution of federal child pornography and obscenity laws. The Attorney General will be required to report to the House and Senate Judiciary Committees on his enforcement actions.

**G.** The act adds § 2252B to Title 18, which prohibits using misleading domain names on the internet with intent to deceive a person into viewing obscene material or a minor into viewing material harmful to minors.

**H.** The act adds § 25 to Title 18, which enhances penalties for using minors in crimes of violence. For the first conviction, the statutory maximum penalty and the maximum fine is doubled. For subsequent convictions, the statutory maximum penalty and the maximum fine is tripled.

### **Feeney Fix Bill Pending**

In May, several senators introduced a Bill to repeal provisions of the PROTECT Act that do not specifically deal with the prevention of the exploitation of children. The act, known as the “Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003” also aptly called the “JUDGES Act,” seeks to repeal subsections (c) through (h), and (j) through (n). Specifically, the Bill seeks

to repeal the following provisions: (c) statement of reasons (requiring judges to factually specify what they are relying on to depart); (d) review of sentence (changed standard of review on appeal); (e) imposition of sentence upon remand (restricting grounds for downward departure on remand); (f) definitions; (g) acceptance of responsibility (requiring government motion for the third point); (h) improved data collection (giving DOJ and Congress full access to USSC data on departure practices of individual judges, districts, etc); (j) conforming amendments; (k) compliance with statute; (l) report by Attorney General (requiring AG to report every downward departure by identifying judge, within 15 days of imposition, if DOJ has not passed and forwarded to Congress new internal procedures for opposing and appealing downward departures); (m) reform of existing permissible grounds of downward departures (directing USSC to amend guidelines to ensure that incidence of downward departures is substantially reduced); and (n) composition of USSC (limiting number of judges on Commission to 3, so judges would never have a majority vote).

It is totally unclear whether this new bill will pass or not. Given that Democrats are not in the majority, efforts to persuade Republican legislators to change their views will be critical. In this regard, NAFD will continue to work closely with others around the country to make our views known.

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## **FOUR ASSISTANT FEDERAL DEFENDERS APPOINTED TO STATE AND FEDERAL JUDICIAL OFFICES**

### **THE HONORABLE MARY BARZEE**

Mary Barzee, formerly a Supervisory Assistant Federal Public Defender for the Southern District of Florida, took office in January 2003 following her election, without opposition, as a Circuit Court Judge in Florida’s 11th Judicial Circuit (Miami-Dade County). The circuit court is Florida’s highest-level trial court, and Mary is presently handling the full range of cases on a busy criminal docket in Miami. Mary’s thirteen years of trial and appellate practice as a supervisory assistant federal public defender for the Southern District of Florida included numerous acquittals in cases ranging from complex frauds to tax evasion to major drug offenses to sexual assault and other violent crimes.

Judge Barzee is an honors graduate of the University of Miami Law School and of that university’s music school, where her degree is in flute performance. She is a board member of several professional associations, has an AV rating in Martindale-Hubbell, and has exclusively practiced criminal defense law since her 1988 law school graduation.

Judge Barzee was on the National Association of Federal Defender’s steering committee

that developed the plan for the association and was the first treasurer of the association. A dedicated criminal defense lawyer, Mary will bring a sense of justice and fair play that will long be appreciated in Miami courts.

### **THE HONORABLE TONIANNE J. BONGIOVANNI**

Tonianne J. Bongiovanni, formerly the First Assistant Federal Public Defender in the District of New Jersey, was administered a public oath of office to become a United States Magistrate Judge on May 30, 2003. Her chambers are in Trenton, New Jersey.

Judge Bongiovanni joined the New Jersey Federal Public Defender's Office in 1985 as an investigator and while an investigator, went to evening classes at the Seton Hall University, School of Law where she graduated in 1988. She became an Assistant Federal Public Defender in 1988 and in 1997, she was named the First Assistant Federal Public Defender. For the past five years, she has been an adjunct professor for Seton Hall University, School of Law, where in 2000 she was named Alumna of the Year by The Peter W. Rodino Jr. Law Society and in 2002-2003, was named Adjunct Professor of the Year.

Judge Bongiovanni is a former member of several organizations including the Association of Criminal Defense Lawyers in New Jersey, People to People Ambassador Programs, Criminal Justice Delegation to the People's Republic of Cuba, the Lawyers' Advisory Committee, and the Civil Pro Bono Litigation Committee for the United States District Court, District of New Jersey. Also noteworthy is the fact that she was also a member of our organization, the National Association of Federal Defenders. She is a current member of the Historical Society for the District of New Jersey. She has written an article entitled, "RECLAIMING THE HEARTLAND: Equitable Sentencing in Federal Court through Downward Departures which was published in 1993-94 in the newsletter for the Association of Criminal Defense Lawyers. She has also lectured at seminars on multiple occasions.

In 2003, Judge Bongiovanni received the Honorable Lawrence Whipple award for her commitment to public service. Notably, this award, named after the Honorable Lawrence Whipple, a former Chief Judge of the New Jersey District Court, has been in existence for 10 years with the first recipient being the Honorable John J. Hughes, a current United States Magistrate Judge presiding in Trenton, New Jersey, and a former Federal Public Defender. This award has also been given to John F. McMahon, a former Federal Public Defender. Judge Bongiovanni was a committed advocate who continues to give her time to the community. She was a great asset to the Federal Public Defenders office.

### **THE HONORABLE DENNIS LANDIN**

Dennis Landin, formerly Chief Deputy Federal Public Defender in the Los Angeles Office, Central District of California, was recently appointed to the Los Angeles County Superior Court by Governor Gray Davis. This position was tailor made for his legal acumen, easygoing temperament, and zest for public service.

Judge Landin is the first sitting public defender to be appointed to the bench by this governor - quite a feat in these days of public distrust and dislike of the defense bar and the Sixth Amendment right to counsel.

After graduating from UCLA Law School in 1981, Judge Landin made a short stop at San Fernando Valley Legal Services before he joined the Office of the Federal Public Defender on November 8, 1982. Coincidentally, his last day on the payroll was November 8, 2002 -- 20 years to the day. His 20 year tenure means that he was with the office for two-thirds of the office's short 30 year history. He was an institution there.

Starting as a deputy federal public defender, Judge Landin quickly rose through the ranks

to become a supervising deputy and then the Chief Deputy. He probably tried more different types of cases than anyone in the system - - from petty offenses on local military installations to multi-million dollar fraud cases. In addition to his impressive trial experience, as Chief Deputy, Judge Landin took it upon himself to try a case with each new lawyer who joined the office. He sent many very able trial lawyers out into the courtrooms all across California - trained to be as effective in their advocacy as he was. In gaining his wide experience, Judge Landin appeared in the loneliest and smallest courts in the Central District of California and in the United States Supreme Court. He represented those who would never be wealthy or rich and those who were rich and famous in their former lives before they hit the Federal Public Defender's Office. His dedication to clients was legendary. Most important, he has worked with, opposed, and trained probably every kind of lawyer there is.

Just as important, Judge Landin was on the organizing committee of the National Association of Federal Defenders and was the primary mover behind the awards program. On the personality scale, he has seen it all! Yet, through it all, Judge Landin remained the calm eye of the hurricane with his unique ability to find a suitable solution to every confrontation. This experience and these qualities will serve him well and it is probably why such an unusual and special coalition of people across the state of California joined together to support Dennis Landin's application to the bench.

### THE HONORABLE JEFFREY A. NEARY

Jeffrey A. Neary, from Sioux City, Iowa was recently appointed to the Third Judicial District Court for the State of Iowa. Governor Tom Vilsack announced the appointment on November 22, 2002 and Judge Neary took the state court bench on January 6, 2003.

Judge Neary has a bachelor's degree from Westmar College in LeMars, and received his law degree from the University of South Dakota at Vermillion. He began his law career as an Assistant Woodbury County Attorney, and worked in private practice with a focus on criminal defense, personal injury, workers' compensation, family law, municipal law, and plaintiff's practice. In January 2000, Judge Neary began working as an Assistant Federal Public Defender for the Northern and Southern Districts of Iowa. He has been an active member of the Westmar University Alumni Association, the Chairperson of the Siouxland International Trade Council, a member of the LeMars Area Chamber of Commerce, and an adjunct professor of Criminal Justice and Political Science at the LeMars Campus of Buena Vista University.

In announcing the appointment, Governor Vilsack stated as follows, "Mr. Neary shows an impressive knowledge of the law, and has extensive experience as both a prosecutor and a defense attorney. I believe he will be a fair and effective judge who will serve the third district well."

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## PROVIDING DRUGS TO INMATES: THE VAGARIES OF THE SENTENCING GUIDELINES

*by Jane McClellan Assistant Federal Defender, District of Arizona, Phoenix*

### I. The Problem

The prevalence of illicit drugs in federal prisons is high. A recent press release from the Department of Justice stated that an average of 3,080 inmates tested

positive for drugs each year from 1997 through 2001, which was about 2% of the federal prison population. At high-security prisons, there was a higher rate of positive drug tests. Since 1997, fifty federal inmates have died of drug overdoses. There were 34 prison staff

arrests on drugs cases from 1997 to 2001, and 93 drug-related employee misconduct cases. See “Prison Smuggling a Problem,” Justice Department press release, January 22, 2003.

Providing contraband to an inmate in a federal prison is a crime punishable by up to 20 years in prison, if the contraband is a narcotic drug or methamphetamine. 18 U.S.C. § 1791(a) and (b)(1). The punishment is less for other drugs, such as marijuana, or other contraband. This article will focus on the possible punishments for the introduction of drugs into prisons and how to help your client get the least amount of time.

## **II. How Drugs Are Introduced**

In most cases, drugs are introduced in the visitation areas. Visitors are not searched when they enter federal prisons, although they may have to pass through a “drug sniffer.” These machines allegedly can “smell” trace amounts of drugs. However, they don’t work very well and not all prisons have them. Visitors must sign a form stating that they are not in possession of any contraband, including drugs. Not surprisingly, this is not much of a deterrent factor either. Visitors bring drugs into prisons for various reasons. Girlfriends and wives want to please their boyfriends and husbands. No doubt inmates exert much pressure on their loved ones. The sentences meted out to inmates are relatively light, and there may be little disincentive to engage in this risky conduct for an inmate serving a very long sentence. Also, there are complex conspiracies of drug smuggling where visitors are paid by outside sources to bring the drugs into prison. The potential visitors are provided the drugs for free and receive money for bringing in the drugs. The inmates who receive the drugs may not be the ultimate consumer of the drugs. Once inside, the drugs are distributed to other inmates.

Visitors provide drugs by kissing the inmate and transferring the drugs through their mouths or in food provided by the visitor. Most visitation areas have vending machines, and the visitor may put the drugs inside food and hand it to the prisoner who swallows the drugs. The drugs are packaged inside balloons. The

inmate swallows the drugs and then must wait for a bowel movement to retrieve the drugs. If the guards notice suspicious behavior or they have received a tip that a drug transfer may take place, the inmate will be taken from the visitation area after the visit, and the guards may find the drugs on his or her person, or they will take the inmate to a “dry cell.” A dry cell has no plumbing. The guards will collect all bowel movements and wait until the drugs are passed, which can take up to about three days. Drugs are also introduced into prisons through the mail and by prison employees.

## **III. The Punishment**

### **A. The Inmate**

Because the drugs are found directly on the inmate’s person, the “inmate in possession of contraband” cases are extremely difficult to defend. Moreover, the inmate in these cases is oftentimes not punished as harshly as the person who brings in the drugs, although a sentence for an inmate being in possession of contraband must run consecutive to the sentence that he or she is currently serving. 18 U.S.C. § 1791 (c). If there is no evidence of distribution, then the base offense level for possession of LSD, PCP, methamphetamine, or narcotic drugs is a level 13. U.S.S.G. § 2P1.2(a)(2). However, in most cases there will be evidence of distribution. If so, then there is a cross-reference in the guideline, and the applicable offense level from the drug guideline is applied. See U.S.S.G. § 2P1.2(c)(1) (apply offense level from § 2D1.1). The drug amounts are usually small, so the guidelines are usually low. In these cases, two levels will always be added because the object of the offense was the distribution of a controlled substance in a prison. U.S.S.G. § 2D1.1(b)(3).

### **B. The “Provider”**

Things get more complicated and much worse for the persons who provide the contraband. Under the cross-reference in the guideline, “if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level is less than level 26, increase to

level 26.” U.S.S.G. § 2P1.2(c)(1). Section 1791(a)(1) applies to persons who provide the contraband. A person who provides contraband is punishable under § 1791(b)(1) if the contraband provided is a narcotic drug or methamphetamine. Therefore, if a defendant pleads guilty to providing narcotics or methamphetamine to an inmate, the offense level will not be less than 26. This is a situation to be avoided.

There are a few creative ways to get around this draconian guideline. If the defendant pleads guilty to aiding and abetting a violation of 18 U.S.C. § 1791(a)(2) (inmate in possession of contraband), then the offense level in most cases will be substantially lower because the drug guideline will be applied with no automatic increase to a level 26. The following is an example of a guideline calculation applying the drug guideline, U.S.S.G. § 2D1.1, as specified under the cross-reference in § 2P1.2(c)(1):

Base Offense Level =	16	(10 to 20 grams of heroin)
Distribution in Prison	+2	
Safety Valve eligible	<u>-2</u>	(USSG§ 5C1.1)
Total =	16	
Acceptance of Responsibility	<u>-3</u>	
Adjusted Offense Level =	13	

A good aspect of applying the drug guideline is the potential application of the safety valve adjustment. The safety valve adjustment does apply even in cases not involving a mandatory minimum, and it does apply in prison contraband cases if the cross-reference is being applied. See Application Note 21 to U.S.S.G. § 2D1.1. In comparison, if the same defendant in the above guideline scenario pleaded guilty to a violation of 18 U.S.C. § 1791(a)(1), the offense level would be 26, and there would be a three-level downward adjustment for acceptance of responsibility. The safety valve adjustment would not apply, because the drug guideline is not being applied. Therefore, the adjusted offense level would be 23, which is 10 levels higher than the calculation above using the drug guideline.

The same result would occur if the defendant were charged with conspiracy to commit a violation of § 1791(a)(2) (inmate in possession), which is one way that some prosecutors have charged this offense. Also, the defendant can be charged under the drug statute, 21 U.S.C. § 841. If your client has been charged with a violation of § 1791(a)(1), then you can advocate for a plea to a charge of aiding and abetting a violation of § 1791(a)(2) by stating that this is a fair resolution of the case, because the characteristics of the offense are still taken into consideration under the drug guideline, which adjusts for the amount of drugs involved and the fact that the drugs were smuggled into a prison.

There are some other guidelines that may come into play for defendants who provide contraband. If the person who provides the contraband is an employee of the prison, which is another common scenario, then there may be an upward adjustment for abuse of a position of trust. See U.S.S.G. § 3B1.3. It also seems plausible that an aggressive probation officer or prosecutor might suggest that an upward departure would be warranted where there was proof that an inmate died as a result of a drug overdose from the drugs provided by the defendant or was injured from taking the drugs. See U.S.S.G. §§ 5K2.1 (death) and 5K2.2 (physical injury).

#### **IV. Conclusion**

Visitors who provide drugs to their loved ones in prison are usually the victim of a coercive and selfish inmate. Often, the inmate has little to lose, and the desire for drugs eclipses the fear of a few more years in prison. However, for the visitor, who may have no criminal history, the consequences are serious. It is important to be aware of the statutory provisions and the guidelines when advising your client how to plead. A creative plea agreement can save a defendant years in prison.

## LEANING ON A PRECEDENT

(Sing to the tune of "Leaving on a Jet Plane")

*By Jon M. Sands, Assistant Federal Defender, District of Arizona, Phoenix*

All my briefs are filed, I'm ready to argue  
I'm standing here outside the court  
I hope the 9th doesn't say its harmless

Now the time has come, its 10 minutes  
The panel's waiting, hope they're not bored  
Already I'm falling behind in time

So nod to me and smile to me  
Tell me that the 9th'll rule for me  
Hold for me and never let it be "no"

'Cause I'm leaning on a precedent  
I don't know when it'll be cited again  
Oh, 9th, just don't say "no"

There's so many times I've fallen down  
So many times I've danced around  
I'll tell you know, my prior arguments didn't mean a thing

Every slip I read, I read for you  
Every case I cite, I cite for you  
When I open the mail, let it be reversed

So nod to me and smile to me  
Tell me that you'll rule for me  
Hold for me, and never let it be "no"

'Cause I'm leaning on a precedent  
I don't know when it'll be cited again  
Oh, 9th, just don't say "no"

Rebuttal's over and time to leave you  
One more time, let me parry  
See my point and I'll be on my way  
I'll dream about the slips to come  
When I won't have to distinguish  
About the times I won't have to say...

So nod to me and smile to me  
Tell me that the 9th'll rule for me  
Hold for me and never let it be "no"

'Cause I'm leaning on a precedent  
I don't know when it'll be cited again  
Oh, 9th, just don't say "no"

Leaning on a precedent  
Leaning on a precedent

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## **KUDOSKORNER**

**Carol A. Brook, Deputy Director of the Federal Defender Program in the Northern District of Illinois, was honored by the Illinois Association of Criminal**

Defense Lawyers on October 18, 2002. At a well attended dinner at the Palmer House Hotel, Carol was recognized for her outstanding contributions to the criminal defense bar. Jack Rimland, the president of the Association, presented this year's award to Carol. Terry MacCarthy introduced six distinguished members of the bar, who, although expected to "roast" Carol, by and large found themselves singing her praises. The speakers were: Edward M. Genson, Esq., William H. Hooks, Esq., Professor Andrea Lyon, The Honorable Nan R. Nolan, The Honorable Milton I. Shadur, and Standish E. Willis, Esq. Congratulations Carol!

**AFD Juan Matos** of the **District of Puerto Rico**, with the collaboration of **Research and Writing Specialist Patricia Garrity**, who arduously worked on the brief, recently successfully argued a Mandamus Order, precedent setting in the First Circuit, against an Order of a U.S. District Court Judge in that District. In re: Sterling-Suarez, No. 02-1907. The case which was a Death Penalty eligible prosecution was decided within hours of the argument. The Court concluded that the appointment of learned counsel must be done "promptly" and attaches upon indictment and not upon certification by the Attorney General's Death Penalty Committee, as the District Court had decided. Congratulations to Juan Matos and Patricia Garrity.

Congratulations to **AFD Chris Curtis** and **AFD Dan Wannamaker** from the **Northern District of Texas** for winning a case that was described as "defenseless" on a hearsay objection. Chris Curtis and Dan Wannamaker tried a case involving bank fraud (one count) and theft of mail (two counts) and pulled it out with outright acquittals.

The bank fraud case was won on an astute objection to hearsay evidence. The AUSA tried to prove that the bank was FDIC insured by asking a witness, "Is the bank federally insured." The hearsay objection was sustained, and the rule 29 motion was granted! (The follow up question was less slick: "Don't you have a sign on your desk that says, FDIC..."; objection sustained; and the third: "Don't you advertise to your customer's that you are FDIC insured"; objection sustained).

The second two cases resulted in a Rule 29 because the government tried to prove that mail was stolen from a P.O. Box, and the defendant had a key to the box, given to him by the girlfriend who had rented it. The judge asked the AUSA, "Do you mean if my wife takes the mail from our mailbox and it has mail addressed to someone else, she has stolen it?" The judge then granted the Rule 29 motion.

This is the second Rule 29 victory for Chris Curtis in two months. The month before, in front of the same judge and AUSA, Chris got a judgment of acquittal. The client was at FMC/Carswell, which is a female unit and houses mentally ill inmates. His client wanted to be moved from Carswell so she wrote a threatening letter to the warden. The issue at trial was whether anyone would really feel threatened by such a letter at an institution housing the mentally ill. But, in fighting that battle, the government failed to prove that the letter was in retaliation for or on account of the recipient's official duties. (See 18 U.S.C. 115) Chris called them on it, and the court granted the motion.

Dan Wannamaker also won another case recently. The case involved multiple defendants and multiple counts of wire fraud (phone co., cramming and slamming; his client was a marketer). After a week long trial, all defendants were found not guilty of all charges.

**AFD Mike Lieberman**, of the **Eastern District of Virginia** has a death case in which he and his co-counsel convinced the DOJ's death penalty review committee not to seek the death penalty. At a time when Ashcroft regularly overrides U.S. Attorney Offices' recommendations against death, that's quite a feat. Congratulations to Mike Lieberman and his co-counsel.

# COURT INTERPRETERS: Who, What, Where, When, Why and How

by Heather E. Williams, Assistant Federal Defender, District of Arizona, Tucson

## I. WHO

### A. Federal testing and certification.

1. Spanish, Haitian Creole, Navajo - federal certification. 28 U.S.C. §1827(b)(2). Testing occurs twice a year, has a written and oral portion and tests the person's proficiency in both English and the foreign language.
2. American Sign Language - accepts national certifications. Other resources: Gallaudet University Interpreting Services Home Page <<http://ab.gallaudet.edu/gis/gis.html>> and Registry for Interpreters for the Deaf <<http://www.rid.org>>.
3. Other languages - otherwise qualified. 28 U.S.C. §1827(b)(2). As it is up to the Court Interpreter's Office to arrange for interpreters, time may be needed to obtain an interpreter. Other resources include AT&T Language Line Service™ for telephonic or televideo interpretations (see Llewellyn Grabau & Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 New England L.Rev. 227, 322 (1996)); National Association of Judicial Interpreters and Translators (NAJIT) <<http://www.najit.org/directory.html>>; The Translators' Home Companion <<http://www.rahul.net/lai/companion.html>>.

B. Interpret for/of defendants and witnesses. Occasionally for family in audience.

C. Who should NOT interpret in court: attorneys,

family members or friends. Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M.L.Rev. 1 (1990).

## II. WHY

A. *U.S. Constitution: United States ex rel. Negron v. State of New York*, 434 F.2d 386, 389-91 (2d Cir. 1970) no interpreter violates rights to confront witnesses and of due process. See also United States v. Mayans, 17 F.3d 1174, 1181 (9<sup>th</sup> Cir. 1994) denial of interpreter equals 5<sup>th</sup> Amendment right to testify on own behalf; United States v. Carrion, 488 F.2d 12, 14 (1<sup>st</sup> Cir. 1973) (per curiam) interpreter affects rights to testify and to confront witnesses; United States v. Lim, 794 F.2d 469, 470 (9<sup>th</sup> Cir. 1986), *cert. denied* 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367; and Keeney v. Tamayo-Reyes, 504 U.S. 1,5 (1992) holding inadequate interpretation can make a plea involuntary.

B. *Court Interpreter's Act*, 28 U.S.C. §1827.

C. *Ethics*. Code of Professional Responsibility of the Official Interpreters of the United States Courts (1979).

1. What the court interpreter must follow.
2. What the defense attorney can do: Attorney-Interpreter-Client privilege to communications by client to attorney for purposes of obtaining legal advice or assistance. United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995); United States v. White, 617 F.2d 1131, 1135 (5<sup>th</sup> Cir. 1980).

### III. WHAT

“Interpreting” is different from “translating.” Connell & Valladares, *Cultural Issues in Criminal Defense*, §2.1[b]. Interpreting is oral; translation is written. Different skills are needed for each and a person adept at one may not necessarily be adept at the other.

#### A. Court hearings - all.

1. One interpreter for 2 defendants is appropriate. United States v. Yee Soon Shin, 953 F.2d 559 (9<sup>th</sup> Cir. 1992), *denial of post-conviction relief aff'd* 988 F.2d 120, *cert. denied* 508 U.S. 961, 113 S.Ct. 2933, 124 L.Ed.2d 683.
2. Defense counsel’s ability to communicate with client during trial not impaired when court “borrowed” interpreter to interpret for prosecution witness. United States v. Lim, 794 F.2d 469 (9<sup>th</sup> Cir. 1986), *cert. denied* 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367.

B. *Depositions - video and oral.* For video depositions requested by the U.S. Attorney, the U.S. Attorney arranges for the court interpreter.

C. *Letters and records for court-appointed counsel.*

1. Personal letters.
2. Medical records and letters: summarize.
3. Other records: birth, death, marriage, lack of police record. If multiple, will summarize.

D. *Tapes and documents to be admitted as evidence, e.g. wire tap, body bug, handwritten notes.*

E. *Expert testimony.* Fed.R.Evid. Rule 604; State

v. Santiago, 556 N.W.2d 687, 695, n.21 (Wis. 1996).

F. *Advise people as to possible translations in every day practice.*

G. *Assist attorneys in talking to clients and families before and after hearings on a limited basis.*

H. *Does not include interview tapes of defendants or material witnesses, nor interviews with Probation or Pretrial Services.*

### IV. WHERE and WHEN

A. *The court has discretion when to appoint an interpreter.* United States v. Bennett, 848 F.2d 1134, 1141 (11<sup>th</sup> Cir. 1988); United States v. Tapia, 631F.2d 1207, 1208 (5<sup>th</sup> Cir. 1980). Mere fact that English is not the client’s primary language does not require a court interpreter be appointed. United States v. Gonzalez, 33 F.3d 1047, 1051(9<sup>th</sup> Cir. 1994).

B. *Court interpretation is required whenever there is testimony (hearings, trial, grand jury, etc.).*

C. *Court interpretation is required for an exhibit to be admitted as evidence unless other translation stipulated to by the parties.* E.g. body bugs tapes, wiretap tapes.

D. *If a transcript is desired of material witness video depositions where the witness spoke another language and a court interpreter was present for the deposition, a regular court reporter should transcribe.*

E. *Letters and records for sentencings do not require an official court interpretation.*

F. *Expert witness as to varying ways to interpret word or phrase - hire outside expert.* Fed.R.Evid. Rule 604; State v. Santiago, 556 N.W.2d 687, 695, n.21 (Wis. 1996).

G. *If a hearing lasts more than a half hour, more than one interpreter is required as fatigue affects the quality of interpretation.*

H. *Defendant, and only the defendant, can waive interpreter in whole or in part.* 28 U.S.C. §1287(f)(1); United States v. Tapia, 631F.2d 1207, 1208 (5<sup>th</sup> Cir. 1980).

4. Object to particular interpretation or ask for clarification or reconsideration by interpreter of interpretation.

5. Challenge interpreter bias.

6. Jury Instruction re: Court Interpreter. See e.g. 9<sup>th</sup> Cir.Crim.Jury Instr. 1.13 (2000).

## V. HOW

### A. *Types of interpretation.*

1. Depends upon
  - a. hearing;
  - b. group vs. individual;
  - c. positioning and logistics.
2. Simultaneous vs. consecutive. Though defendants have no “right” to flawless, word for word translation, interpreters should strive to translate exactly what was said and are discouraged from “embellishing” or “summarizing” testimony. United States v. Gomez, 908 F.2d 809, 811(11<sup>th</sup> Cir. 1990), *cert. denied* 498 U.S. 1035, 111 S.Ct. 699, 112 L.Ed.2d 689 (1991).

### B. *Interpreter error to protect the record.*

1. Tape interpretations to preserve issues of interpreter error for appeal.
2. Have another interpreter present who might testify as an expert witness.
3. Failure to object to the competence of an interpreter waives the appeal issue. United States v. Yee Soon Shin, 953 F.2d 559 (9<sup>th</sup> Cir. 1992), *denial of post-conviction relief aff'd* 988 F.2d 120, *cert. denied* 508 U.S. 961, 113 S.Ct. 2933, 124 L.Ed.2d 683; United States v. Villegas, 899 F.2d 1324, 1348 (2d Cir. 1990); United States v. Joshi, 896 F.2d 1303, 1310 (11<sup>th</sup> Cir. 1990).

### C. *Prepare the interpreter*

1. If witness or defendant is from particular area where idioms may be different.
2. Provide the interpreter the complaint or indictment and jury instructions.
3. If scientific, medical or expert testimony, provide transcripts, reports or articles.
4. The interpreter cannot ask for particular items of the defense attorney or the prosecutor to avoid the appearance of impropriety.

### D. *Team approach*

1. When going from group to individual interpretation -
  - a. Indicate which client.
  - b. Wait for interpreter to get there.
  - c. Don't rush.
2. Position the interpreter where s/he can see the face of the person(s) whose words are being interpreted. Try not to speak when your back is to the interpreter (or to the jury or judge, for that matter).
3. Attorney can interrupt at any time for the client; the interpreter cannot.
4. Way to speak or ask questions:
  - a. Do not use 3<sup>rd</sup> party address: “Tell him . . .” “Ask her . . .”

- b. Speak slowly, especially when reading directly from something.
- c. Short questions.
- d. No passive voice.
- e. No double negatives.
- f. Tell client to wait after each sentence for the interpreter to interpret.
- g. If the client understands some

English, tell him/her to listen only to the interpreter and wait before answering until the interpreter is done.

*Other references:*

Connell & Valladares, *Cultural Issues in Criminal Defense*, Chapter 2 - Using Interpreters (Juris Publishing, 2000).

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## NAIL FILES, KNIVES, AND LOADED GUNS: JUST WHAT IS A DANGEROUS WEAPON?

*by Karen M. Wilkinson, Assistant Federal Defender, District of Arizona, Phoenix*

**O**n my first flight after 9/11, I diligently took my nail file out of my carry-on luggage. At the airport, I was searched at the check point, and then again at the gate. They found nothing and let me board. When I got to my destination, I took out my toothbrush, and, to my astonishment, found a second nail file. Had I joined the ever increasing ranks of soon-to-be-convicted felons for attempting to take a dangerous weapon onto a plane?

Section 46505 of Title 49 of the United States Code makes it a felony to board or attempt to board an aircraft with a concealed dangerous weapon that would be accessible in flight. But, just what is a dangerous weapon? Section 46505 does not define “dangerous weapon.” Attempts to have the statute declared unconstitutionally vague for lack of a definition have failed. *See, e.g., United States v. Hedrick*, 207 F.Supp.2d 710, 713-15 (S.D. Ohio 2002). A few cases from the 1970s and 1980s (when the crime was classified as a misdemeanor), provide some definitions. In 1973, the Ninth Circuit in *United States v. Dishman*, stated that an object could be a dangerous weapon if it fell into one of two categories. 486 F.2d 727, 730 (9<sup>th</sup> Cir. 1973). The first category is obvious: An object used as a weapon to inflict injury is a dangerous weapon. The second category is more elusive and applies to objects that are not used as weapons: An object not used as a weapon can still be dangerous if it is “per se or inherently [dangerous] through its

construction.” *Id.* at 730-31. At issue in *Dishman* was a starter pistol. The court, back in 1973, ruled that it was not a dangerous weapon.

The *Dishman* court expressly refused to broadly interpret the statute to proscribe the “carrying of any object which has the capacity to be used in furtherance of a crime aboard an aircraft. *Id.* at 732. Thus, a razor (usable as a knife), a letter opener or scissors (usable as a dagger), and a fountain pen or realistic-looking toy gun (usable to mimic a gun), are not prohibited by the statute as *per se* dangerous weapons. *Id.* at 732, 732 n.4. Of course, once these objects are used as a weapon, they become dangerous weapons.

Besides the obvious “loaded gun,” what other objects are “per se or inherently dangerous through their construction”? The *Dishman* court gave some guidance, stating that an object would be dangerous if its “intended use or readily adaptable use was likely or readily made likely to produce death or great bodily harm.” *Id.* at 732. Thirteen years later, another Ninth Circuit court added that an object would be dangerous if it was “designed for the purpose of producing death or great bodily harm.” *United States v. Wallace*, 800 F.2d 1509, 1512 (9<sup>th</sup> Cir. 1986) (holding that a stun gun is a dangerous weapon).

These definitions focus on the intended use, readily adaptable use, and designed purpose of an object. But,

whose intent? Whose design? The manufacturer's intent or design? A subsequent marketer's intent? The defendant's intended use is not relevant, as the courts have repeatedly held that a defendant need not intend to use the object on the plane to be guilty. *See, e.g., United States v. Margraf*, 483 F.2d 708, 710 (9<sup>th</sup> Cir. 1973), *remanded at request of gov't for dismissal*, 493 F.2d 1206 (1974). And, if "readily adaptable use" does not mean the capacity to commit a crime, what does it mean?

Since *Dishman* and *Wallace*, the statute has been renumbered and changed from a misdemeanor to a felony, but there have been no changes to the definition of a dangerous weapon. Nevertheless, it is questionable whether the courts addressing this issue after 9/11 will follow these definitions. One court grappling with a jury instruction on the definition of "dangerous weapon" after 9/11 refused to limit the definition to that provided by *Dishman* and *Wallace*, and gave the following expanded definition:

A dangerous weapon is an object that is designed for the purpose of producing death or great bodily harm. You may consider the surrounding circumstances when determining whether an object is a dangerous weapon. An object's capability of being used as a dangerous weapon is an appropriate factor for your consideration.

This definition opens the door, for better and worse, to all kinds of interpretations. So, where do we look for a definition? The Transportation Safety Administration (TSA), previously the FAA, issues security directives to airport personnel to assist them with safety matters. Attached to the directives is a list of prohibited items. These directives are not available to the public without a subpoena.

The list of prohibited items has changed throughout the years (even though the law has not changed). Since 9/11, it has undergone a flurry of activity. According to one Director of Federal Airport Security for a major

airline, the prohibited items list changed over 60 times in the first nine months after 9/11. For example, before 9/11, a traveler could take a knife on board so long as the blade was four inches or less. Today, absolutely no knives are allowed. Similarly, before 9/11, no one thought twice about allowing nail files on board. After 9/11, they were prohibited. Today, it's okay to take a nail file on board.

This list of prohibited items is not a binding list of "dangerous weapons," but it does provide guidance to a fact-finder. The government took this position in *United States v. Magraf*, 493 F.2d at 1207. In *Magraf*, a Magistrate Judge convicted the defendant when he was found attempting to board an airplane with a folding knife that had a 3 1/4 inch blade. The Court of Appeals affirmed the conviction. *Magraf*, 483 F.2d at 708. After winning the appeal, the government surprisingly sought certiorari and remand so it could dismiss the case on the ground that the FAA guidelines "represent an informed judgment," and its prosecution was inconsistent with the FAA guidelines that did not prohibit the folding knife in the case. *Id.* at 1207.

The changing TSA lists are useful also to show that even the people charged with airport security can't make up their minds about what items should be prohibited. Similarly, the warning signs at the airports vary from one day to the next, and from one location to the next. At one end of the spectrum is a nail file, which clearly is not a dangerous weapon (at least not today), at the other end is a loaded gun. But, what about the numerous objects that fall in the gray area between a nail file and gun? A jury recently hung on whether a plastic throwing dart, used in martial arts sporting events, but also marketed by survival-type magazines, was a dangerous weapon. As one juror stated, "if this dart is a dangerous weapon, so is my pen." The definition for a dangerous weapon under 49 U.S.C. § 46505 was never clear. After 9/11, the definition has become a rapidly moving target.

# AMICUS COMMITTEE REPORT

by David McColgin, Co-Chair of Amicus Committee, Assistant Federal Defender, Eastern District of Pennsylvania, Philadelphia

The NAFD participated as amicus in the following four cases over the last six months:

***Overton v. Bazzetta*, No. 02-94 (S. Ct.).**

The NAFD joined with the NACDL and a number of other defender and prisoners rights organizations in an amicus brief before the Supreme Court addressing the rights of prisoners to visit with family members. The Michigan Department of Corrections issued regulations imposing across-the-board bans on non-contact visits with certain categories of family members, including minor children (except for the children, stepchildren and grandchildren of the prisoner), minor siblings, nieces, nephews and cousins. In addition, the regulations require that an immediate family member or legal guardian must accompany any child on a visit. This latter regulation is particularly difficult for imprisoned parents since there may be no eligible adult who can accompany their children, and thus such parents might never see their children during their incarceration.

The prisoners in this § 1983 action won in the district court and court of appeals. The Supreme Court granted certiorari on the questions of whether there is a right under the First and Fourteenth Amendments to non-contact visits, whether the restrictions on non-contact visits are reasonably related to valid penological interests, and whether the restrictions impose cruel and unusual punishment in violation of the Eighth Amendment.

The amicus brief in which the NAFD joined was written by Giovanna Shay, an attorney with the Public Defender Service for the District of Columbia. The brief argues that the regulations violate the First Amendment right of association with family members, that they do not further any valid penological interests, but instead are counter to efforts to reduce recidivism, and that the restrictions constitute cruel and unusual punishment. The case was argued on March 26, 2003.

***Massaro v. United States*, 123 S. Ct. 1690 (2003).**

This case involved a challenge to the Second Circuit's view that ineffective assistance of counsel claims could be waived if not raised on direct appeal in cases where the defendant has new counsel on appeal. The NAFD joined with the NACDL in an amicus brief written by NAFD member David Lewis, AFD with New York Legal Aid Society, arguing that the Court should adopt the rule that the failure to present an ineffectiveness claim on direct appeal does not violate any procedural rule and does not amount to a procedural default. Amici argued that ineffective assistance of counsel claims should be adjudicated on a full record, which should include trial counsel's account of the basis for his or her actions. By permitting ineffectiveness claims to be raised for the first time in a § 2255 motion, such a record can be developed.

The Supreme Court ruled in favor of the petitioner, agreeing with amicus and petitioner that a defendant can raise ineffective assistance of counsel claims for the first time in collateral proceedings, even if they could have been raised on direct appeal. The Court did not hold, however, that ineffectiveness claims must be reserved for collateral review, noting that there may be cases where the ineffectiveness is so apparent from the record that counsel will wish to raise it on the direct appeal, or the court may wish to address the issue *sua sponte*.

***In Re Olabode*, 325 F.3d 166 (3d Cir. 2003).**

This was a federal habeas matter addressing the question of when a § 2255 motion is "second or successive" for purposes of the AEDPA. Olabode filed a first § 2255 motion alleging ineffective assistance of counsel on the ground that his trial attorney, despite a request, did not file notice of appeal. The district court granted the motion and resentenced Olabode, thereby restoring his appellate rights. After pursuing his direct appeal, Olabode filed

another § 2255 motion alleging that his trial attorney was ineffective in other ways as well. The district court deemed this subsequent motion to be “second or successive” and therefore subject to the strict limitations on such motions in the AEDPA, including the requirement that the defendant obtain permission from the Court of Appeals before filing the motion.

In view of a circuit split on the issue, the Court of Appeals directed Olabode’s counsel to brief the issue of whether such a motion is in fact “second or successive.” The NAFD joined with the federal defender offices in the Third Circuit to file an amicus brief, arguing that if a first § 2255 motion is used to restore appellate rights, a later § 2255 motion filed after the appeal does not count as “second or successive.” The amicus brief was written by NAFD member David McColgin, AFD in the Philadelphia Federal Defender Office.

The Court of Appeals, which granted counsel for amicus ten minutes of oral argument time, agreed with the position of Olabode’s counsel and amicus, and ruled that since the purpose of the first § 2255 motion was just to restore the defendant to the position he would have been in if counsel had been effective and had filed notice of appeal, the subsequent § 2255 motion should not count as “second or successive.”

***In Re Sterling-Suarez, 323 F.3d 1 (1<sup>st</sup> Cir. 2003).***

This matter started when District Judge Perez-Gimenez in Puerto Rico denied AFD Juan Matos’ request under 18 U.S.C. § 3005 for appointment of “learned counsel” as co-counsel in a capital case. The judge’s view was that there was no need for learned counsel until the defendant was actually exposed to getting the death penalty – that is until DOJ certified the case as a death case. Matos’ position was that he needed learned counsel right from the start, to avoid having the defendant certified. Matos went to the First Circuit, requesting, via mandamus, an order to

the district to appoint learned counsel. The First Circuit granted the mandamus, 306 F.3d 1170 (1<sup>st</sup> Cir. 2002), ruling that by statute learned counsel should be appointed reasonably soon after indictment and **prior to** the time that submissions are to be made to persuade the Attorney General not to seek the death penalty.

The District Judge then un-appointed the federal defender office as regular counsel, appointed a local attorney as local counsel, and re-appointed Federal Defender Joseph Laws personally as “learned counsel.” The office filed a motion with the First Circuit to enforce the prior mandamus, arguing that Laws was not qualified, under either the statute or the local rules, to be learned counsel since his only prior experience was as co-counsel in a death penalty case that never went to trial.

The NAFD, in an amicus brief written by NAFD member Henry Martin, Federal Defender for the Middle District of Tennessee, argued that the appointment by the court of any individual attorney inside the federal defender office, rather than an appointment of the office itself, was an improper intromission by the Court into FPD administration. It placed in jeopardy the independence, both in appearance and reality, of the office. The First Circuit ducked the issue, ruling that the issue in the original mandamus was only the timing of the appointment, not the qualifications of the attorney, and that if Laws wanted to contest the second issue he would have to file a separate mandamus.

***Note to all NAFD members:*** We need representatives on the Amicus Committee from the following unrepresented circuits: First, Second, Fourth, Sixth Seventh. Please contact one of the co-chairs (David McColgin and Robert Epstein, both in Philadelphia) if you would like to join.

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The Liberty Legend thanks all of those who have contributed to this publication. The NAFD and the editors encourage your contributions of articles for publication as well as suggestions for articles. Additionally, If you know an individual or team deserving a KUDO, e-mail your suggestion anytime to the editors.