THE LIBERTY LEGEND

Editors: Tony Lacy
Lori Ulrich

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Summer Edition 2007
Volume III, Issue 5

THOUGHTS FROM THE PRESIDENT

Dear NAFD members,

It is with some amazement that I find that my two-year term as NAFD president is drawing to a close: the time has flown by. But, that being the case, I am going to take advantage of my last presidential missive to thank some important people in NAFD, and then to introduce you to NAFD's new president.

First, I would be completely remiss if I did not thank our hard-working newsletter editors, Lori Ulrich and Tony Lacy. Despite busy trial practices, they somehow manage, two to three times a year, to put together a high-quality newsletter that keeps us all abreast of the important developments in our community. For this, they themselves deserve to be in the newsletter's "Kudos Korner". Since they are too modest to put themselves there, I hereby declare them Kudos'd by Executive Order.

Next, I want to thank our diligent Treasurer, Rich Moore, who graciously performs the thankless tasks of keeping track of NAFD's money and paying the bills, and Troy Schnack, who administers our Website. I also want to thank our Amicus Committee Chairs (Fran Pratt, Henry Bemporad, and Paul Rashkind), and our Awards Committee Chairs (Dennis Waks and Doris Holt), for a job well done over the past two years.

Last, but certainly not least, I want to thank our founder, President Emeritus, and all-around *mensch*, Henry Martin, for continuing to take an active role in the organization and doing much of the work that keeps NAFD going strong.

Speaking of presidents, I am delighted to announce that Carlos Williams has agreed to serve as the next president of NAFD. Carlos, already well-known to many of us, has been the Executive Director of the Federal Defender Organization for the Southern District of Alabama since 1999. He is passionate about criminal defense, and is already an inspiring and charismatic leader to the members of his office and the members of the criminal defense bar of the Southern District of Alabama.

. . . . . .continued on page 2

We are honored that he has agreed to bring these wonderful leadership qualities to bear as the next president of NAFD.

I am proud to have served as president of NAFD over the past two years, and I hope to continue to contribute meaningfully to its mission after I leave office. Even more than this, I am proud to be one of the federal defenders that make up NAFD – federal defenders who every day breathe life into the phrase "due process of law." I thank you all, from the bottom of my heart.

All best,
Tim Crooks, President

In this issue . . .

THOUGHTS FROM THE PRESIDENT. 1
AMICUS COMMITTEE REPORT. 3
By Fran Pratt, Co-Chair of Amicus Committee, Research & Writing Attorney
Eastern District of Virginia, Alexandria
MOVING PICTURES: A NEW PARADIGM FOR SENTENCING 4
By Douglas A. Passon, Assistant Federal Defender, District of Arizona
INVITATION:
SURVEY OF FEDERAL DEFENDERS AND ASSISTANT FEDERAL DEFENDERS. 10
KudosKorner. 11
EXPERTS: HOW TO IDENTIFY THEM, USE THEM,
ABUSE THEM AND KEEP THEM OFF THE STAND. 20
By Eric Vos, Assistant Federal Public Defender, District of Maine

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
DUES AND MEMBERSHIP FORM

Name: _____ District: _____ Position: _____
Address: _____
E-Mail: _____ Telephone: _____ Fax: _____
Renewal: _____ New: _____ I would be interested in working on a committee: _____

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

If you are attending the Defenders Seminar in Miami next week. We hope that you will join (or re-up your membership in) the NAFD while you are there.

The NAFD is ***the*** organization for federal defenders. We put out this publication (THE LIBERTY LEGEND) 2 to 3 times a year. We participate as an amicus in most of the Supreme Court cases dealing with criminal defense practice and many cases in the lower courts as well. The NAFD often authors its own amicus brief, with the unique perspective of federal defenders. The NAFD sponsors yearly awards of outstanding defender attorneys, paralegals, and investigators. Last, but not least, the NAFD sponsors, or helps sponsor, social events at defender gatherings. To learn more about the NAFD, please visit our Website: www.federaldefenders.org.

The membership rate for the NAFD is only $52 a year - only $1 a week. We hope that you will take the opportunity to join, or rejoin, while in Miami. Please bring with you $52 in cash or your check made out to the National Association of Federal Defenders. Of course, you can mail it too.

AMICUS COMMITTEE REPORT

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

Since the last report in the Spring 2006 issue of the Liberty Legend, the NAFD has been involved as an amicus in several cases. In the Supreme Court, we filed or joined in amicus briefs on the merits in four cases.

As mentioned last spring, NAFD was planning to provide amicus support in *Toledo-Flores v. United States*, which addressed whether certain state drug offenses qualify as felonies under the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2). Henry Bemporad (W.D. Tex.) and Michael Holley (M.D. Tenn.) did yeoman's work last June in preparing the brief filed on behalf of NAFD and Families Against Mandatory Minimums (FAMM), which urged the Supreme Court to apply the rule of lenity in resolving any ambiguity in the statute. Unfortunately for Mr. Toledo-Flores, who was represented by Tim Crooks (S.D. Tex. and the NAFD's president), the Supreme Court dismissed his cert. petition as improvidently granted after hearing argument. *See* 127 S. Ct. 638 (2006).

Also early in the 2006-07 Term, the Court considered the question of whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error in *United States v. Resendiz-Ponce*. Steve Hubachek, the chief appellate attorney for the Federal Defenders of San Diego, Inc., authored NAFD's brief, in which NAFD argued that the omission of an element from an indictment is structural error requiring automatic reversal. Unfortunately, in January, the Supreme Court held that the indictment at issue was not defective in the first instance, so never reached the issue so ably briefed by Steve. *See* 127 S. Ct. 782 (2007).

The end of 2006 saw NAFD joining with the Federal Public Defenders as a whole in filing a brief on behalf of the petitioners in *Rita v. United States*, No. 06-5754 (represented by Tom Cochran, M.D.N.C.), and *Claiborne v. United States*, No. 06-5618 (represented by Michael Dwyer, E.D.Mo.), the two cases the Supreme Court selected to address some of the many questions spawned by its decision in *United States v. Booker*. Tom Hillier, the federal defender for Western Washington, served as counsel of record on the brief. Joining him in an extraordinary effort to produce the brief and its supporting statistical documents were Amy Baron-Evans (Sentencing Resource Counsel, D. Mass.), Alan Dubois (E.D.N.C.), Steve Gordon (E.D.N.C.), Laura Mate (W.D. Wash.), and Sara Noonan (D. Mass.). The Court heard arguments on February 20 of this year; the decisions may or may not be out by the time you read this report.

The final case in the Supreme Court in which NAFD participated as an amicus is *Brendlin v. California*, presenting the question of whether a passenger in a vehicle subjected to a traffic stop is "detained" for purposes of the Fourth Amendment, such that the passenger has standing to contest the legality of the traffic stop. NAFD joined with NACDL in a brief authored by Jonathan Nuechterlein, of Wilmer Cutler Pickering Hale & Dorr. Judy Mizner (D. Mass.) and Brett Sweitzer (E.D. Pa.) provided able editing assistance. The Court heard argument on April 23, so it will likely be late June before it issues its opinion.

Finally, NAFD joined again with NACDL, this time at the circuit level, in an amicus brief at the en banc rehearing stage of *United States v. Grier*, in the Third Circuit. The brief provided support to Ronald Krauss (M.D. Pa.) and his client on the question of whether the Due Process Clause requires proof beyond a reasonable doubt of facts that increase the guideline range. David McColgin (E.D. Pa.) served "of counsel" on the brief for NAFD. The Third Circuit issued its fractured and lengthy decision in

February. 475 F.3d 556 (3d Cir. 2007).

If you know of a case that might benefit from NAFD amicus support, please contact an Amicus Committee co-chair (listed below) as early in the process as possible so that we can look at the issue, send the issue to the full committee for input and a vote, and if it is decided that the NAFD should participate, to find a writer or another organization with which to join, etc. As well, if you are interested in being involved in the work of the Amicus Committee, please contact any of the three co-chairs: Henry Bemporad in San Antonio, Texas, Paul Rashkind in Miami, Florida, or me, Fran Pratt, in Alexandria, Virginia.

MOVING PICTURES: A NEW PARADIGM FOR SENTENCING

By Douglas A. Passon, Assistant Federal Defender, District of Arizona

We were like peas and carrots, Jenny and I.
~Forrest Gump, "Forrest Gump"
(1996)

Like Forrest and Jenny, lawyers and movies go together like peas and carrots. In terms of entertainment, some of the most compelling movies and TV shows of our time are about lawyers and their causes. But can we as lawyers borrow from this medium to become better advocates? Absolutely. This is because good film makers and good lawyers share the same methods of persuasion. Like the best movies, the best court arguments are solidly constructed, have emotionally driven and universal themes, and withstand the test of time. A good film, like a good lawyer, has the power to move an audience - not just to laugh or cry, but to *act*.

Louis, I think this is the beginning of a beautiful friendship.
~Rick Blaine, "Casablanca"
(1942)

In these days of e-courtrooms and user-friendly technology, the marriage of law and film was inevitable. Thus, when a case calls for it, a lawyer should seriously consider unfolding a director's chair, picking up a megaphone, and yelling, "Action!" Let's face it, when it comes time for sentencing, letters from family members or stumbling speeches only go so far. In certain cases, true persuasion calls for much more than a well-crafted pleading or a loquacious lawyer. Now, the availability of reasonably priced cameras and muscle-bound computers gives almost any individual the power to create moving pictures. It's not an entirely simple proposition, but it is certainly one within realistic reach. This article is designed to cover some basic tips on how to create a persuasive and professional-looking moving picture to benefit your client at sentencing.

We have a pool and a pond. The pond would be good for you.
~Ty Webb, "Caddyshack"
(1980)

Obviously not every case or client warrants the use of this technique. In fact, it is better used sparingly. Using this technique too often or creating a poor "product" could diminish its effectiveness and prompt a backlash from judges or prosecutors. Thus, we should first discuss some situations where it might be worthwhile to create a moving picture for your case or client. This article focuses on the production of moving pictures for use at sentencing only, where wide-open rules for presenting mitigation materials make it a natural fit. That is not to say moving pictures have no place at other stages of the proceedings. The use of this technique is limited only by your imagination, your good judgment, and the

rules of evidence.

What characters? There's a bunch of little kids dressed up in animal costumes.
~Royal Tenenbaum, "The Royal Tenenbaums" (2001)

You will notice the liberal use of the term "moving pictures" in this article. To be sure, we are not just talking about creating pictures that have motion. That, of course, is the technical essence of film. The true goal of this process is to create pictures that have *emotion*. You will literally be using this as a tool to move your audience into action. In order for your picture to be *moving*, you must find the truth in your subject and portray it in such a way that has emotional resonance - all in an effort to persuade.

The most basic measure of when a moving picture may be appropriate is when you believe that some aspect of your client's circumstances are far better *shown*, than simply told. Moreover, the necessary ingredients to a good sentencing film are exactly the same as those that are essential to the creation of any good movie: **a good story**, **compelling characters**, and **powerful images**. If you do not have all three of these things, this technique is better saved for another case. Consider these examples:

I had a client in his mid-20s who was one of several defendants in a federal check forging conspiracy. His actions were driven by a terrible and long-standing drug addiction - among the worst I had ever seen. Over a year had passed since his initial arrest and in that time, he put himself through a six-month in-patient rehabilitation program. At the time of sentencing, not only was he drug-free for more than a year, but he was mentoring other addicts and speaking to large crowds about the horrors of drug addiction.

I knew I had a good story. Many of our clients go through rehab, but this young man's journey stood out from the rest. In addition, since he had achieved sobriety, the client was good-looking, up-beat, and very articulate. In other words, he was a great and persuasive "character" on film. However, in order to truly demonstrate his transformation, I needed visuals - powerful images to persuade the judge that my client's efforts at recovery were truly extraordinary.

I was able to track down all I needed with little effort. Among other things, I obtained discovery photos showing my client, ravaged by drugs, depositing his forged treasury checks into various check cashing machines. He knew the machines were taking his picture, but he was so far gone, he just didn't care - and this came through loud and clear in the images. I obtained a copy of my client's booking photo. From this photo, it appeared that my client had not slept in days. His eyes were two black holes and he was frighteningly thin. I layered these images over present-day images of my client, healthy and vital, telling the story of how when his mother visited him in jail after his arrest, she searched the visiting room and walked right past him because she no longer recognized her own son. These "before and after" images, backed up by the gut-wrenching narrative from my client, were undoubtedly the most emotionally powerful way to present the reality of my client's accomplishments to the court.

Sure, I could have simply *told* the judge what he needed to know and backed it up with paper, like a graduation certificate or letters of recommendation. However, I knew it would be much more powerful to *show* this young man's exceptional recovery - especially since "extraordinary post-offense rehabilitation" is a basis for a sentence reduction. So, I submitted a very concise sentencing memorandum setting forth the legal basis for my request. In factual support of the memorandum, I attached the sentencing video as an exhibit in DVD format. The film was roughly ten minutes in length. My client received probation.

In another example, a colleague of mine represented an Iranian client who was granted asylum in the United States after escaping intense religious persecution (to be Christian in Iran is a life-threatening endeavor). He had been in the U.S. several years when he was accused of attempting to help other Iranians illegally cross the US-Mexico

border using false visas. With the help of a dubious informant, the government attempted to paint the client as a professional alien smuggler. In addition, the political climate provided damning subtext - the black cloud of terrorism hung over the case.

In reality, the people our client was trying to help were members of his extended family and were also persecuted Christians. Because so much bad information had been disseminated about the client, his lawyer knew it was imperative to show the judge who he really was. He was not a professional smuggler, he was a master tailor. He was a devoted family man - a single father raising two articulate and accomplished children - who remained loyal to the family he had left behind in Iran. He certainly was no terrorist - he was a man of faith in the truest sense. He made a bad choice for the right reasons. Again, all of these things could have been told to the judge, but the case begged for a moving picture.

Good story? Most definitely. The client's account of being jailed and tortured by Iranian Mullahs for his religious beliefs, his harrowing journey to freedom, and the amazing life he built for himself and his children in America was, quite literally, something right out of the movies. Great characters? The client was warm and sincere, his children stole the show, his pastor and friends were compelling and articulate. Dynamic visuals? Absolutely. We were able to show him, among other things, hard at work in a high end clothing store and playing organ at bible study and at church. His eleven-year old daughter, a classically trained pianist, provided the musical soundtrack. We even tracked down a photograph of the prison in Iran where he was jailed. It was undoubtedly the most moving way to tell this client's story. While one cannot be certain it was solely due to the video, this client also received probation.

Well, I have all your equipment in my locker.
You should probably come get it
'cause I can't fit my nunchakus
in there anymore.
~Napolean Dynamite, "Napolean Dynamite"
(2004)

Assuming you've found the perfect case for a moving picture, you next need to make sure you have the right gear to move the project from idea to completion. Do you have a video camera and a few bucks for tape? After that, all you really need is a decent computer and some editing software. No one is expecting you to be Steven Spielberg. As you progress, you will find yourself becoming more interested in the finer points of film making, and rightfully so. However, for starters, this is all you will need to begin making high quality moving pictures:

It's like you're dreamin'
about Gorgonzola cheese
when it's clearly Brie time, baby.
~Hitchhiker, "There's Something About Mary"
(1998)

❶ *Video Camera and Tapes*: If you are still using an analog camera, or have no camcorder at all, it's time to hang up your pelt, put down your club, and come into the 21st century. In other words, get a *digital* video camera. They are easy to use and reasonably priced. I have found the best cameras for the job use mini digital video cassette format (mini-DV, also known as DVC). Although there are newer digital formats (such as those that record to mini-DVDs or built-in hard drives), the mini-DV format is still the standard bearer, and the best format for editing video on computer. In addition, tape is cheaper and holds much more data. A high-quality mini-DV tape costs about $3.

In terms of what to look for when purchasing your digital video camera, I would offer the following suggestions. First, if your budget allows, consider spending a little extra money for a 3-CCD camera. Without getting too technical , a CCD is basically the chip in the camera that captures the images. Next to high-definition cameras, which are exponentially more expensive, 3-chip cameras will ensure the very best picture quality. Second, one of the big things that distinguishes cameras of similar price and quality is the diversity of their input and output jacks. Make sure the camera has, at the very least, an input for an external microphone and a FireWire connection for transferring the video to your computer. You will find

that most of the lower-end consumer cameras will not have the jacks you need. The good news is you can get a solid 3-CCD mini-DV camera with all the right jacks for around $500.

You're about as useful
as a poopie-flavored lollipop.
~Patches O'Houlihan, "Dodgeball: A True Underdog Story"
(2004)

❷ *Microphone*: Believe it or not, sound quality is more important than picture quality. In most cases, your moving picture will include on-camera interviews. Unfortunately, the built-in microphone on most any camcorder will not work for interviews because it will pick up too much extraneous sound. Voices will be diluted and the extra background noise will distract from the emotional punch of the message. This is why, as stated above, your camera must have the capacity to connect an external mic.

The best tool for the job is called a lavaliere. This is simply that small, clip-on microphone you often see people wearing on talk shows and news programs. You can find a suitable one for approximately $25.00. Also consider purchasing an extension cable (less than $10) to get a little more distance between the camera and your subject. If you are working with a larger budget, consider investing in a wireless lavaliere. However, if you skimp on cost with this item, your sound quality will suffer. A good quality wireless setup will be in the neighborhood of $500.

No, I'm not talking about digging up dead girls,
Wyatt. I'm talking about your system,
idiot, your computer
~Garry Wallace, "Weird Science"
(1985)

❸ *Computer*: This is where the magic happens. You will eventually be loading all of your video footage into a computer and using some kind of editing software to edit out all the junk, add titles, transitions, and maybe even music to make your masterpiece. Video files can be very large and video editing programs require a fair amount of power. Thus, the general rule for computer video editing is the faster the computer, and the more memory, the better. Although most newer computers will have the specs needed for video editing, here are some general hardware guidelines:

- At the very least, you need a PC running a Pentium III and 512 MB of RAM;
- Ideally, you want to have an Intel Pentium (or compatible) processor of at least 1.3GHz and 1 gig of RAM;
- Approximately 20gb of open hard drive space;
- DVD+-R burner required for DVD creation;
- DV/i.LINK/FireWire/IEEE 1394 interface to connect your digital video camcorder;
- Video and sound cards/drivers that are compatible with Microsoft DirectX 9 or later. Video card should be at least 32mb;
- a decent color monitor; and
- a decent pair of speakers.

Consider purchasing an external hard drive to store your video footage. You will be surprised how fast your existing hard drive fills up with large video files. Hard drives are continually coming down in price. Right now you can find a good 250 gig external drive for around $150.

I ordered some spaghetti with marinara sauce,
and I got egg noodles and ketchup.
~Henry Hill, "Goodfellas"
(1990)

❹ *Video Editing Software*: You might not need to look any further than your computer's program file to find basic video editing software. Windows XP comes with a video-editing program called Windows Movie Maker. This program will allow you to do simple video edits, including adding titles, transitions, basic after-effects, and an audio

track. Although Movie Maker is a good way to begin to acquaint yourself with editing techniques, you will quickly find this program to be more like egg noodles and ketchup than spaghetti with marinara. In my opinion, Movie Maker is not capable of outputting videos of the quality and length contemplated here.

When you are ready to purchase an editing program, you can find them from under $50 to well over $1000. On the low-end are consumer-grade video editing programs such as Pinnacle, Roxio, or Ulead. High-end, professional-grade programs include Avid, Final Cut, or Adobe Premiere. A good listing of various programs can be found at the PC Magazine website: (http://www.pcmag.com/category2/0,1738,4835,00.asp).

Many software companies offer free trial downloads of their editing programs, so you can try before you buy. I edited my first sentencing movie using a free download of Adobe Premiere Pro. When my trial version expired and it came time to make a purchase decision, I settled on Adobe Premiere Elements. This is a scaled down version of Adobe Premiere Pro that has strong capabilities, from editing to DVD authoring, and costs less than $100.

You may notice I have yet to give any attention in this article to Apple computers or software. This is not a statement on their quality or usefulness, but merely a reflection of the fact that most lawyers aren't using Macs. In fact, industry professionals generally prefer Macs for use in video production. If you are a Mac user, your computer probably came with an editing program called iMovie. This is a much more capable program than its Windows counterpart. You may even be able to complete your sentencing video with iMovie alone - give it a try.

It's 106 miles to Chicago, we've got a full tank of gas, half a pack of cigarettes, it's dark, and we're wearing sunglasses – Hit it.
~Elwood and Jake Blues, "The Blues Brothers"
(1980)

Now that you know when it is appropriate to do a video and what gear you need, it's time to learn a little bit about how to pull it off. The purpose of this last section is to offer you some largely non-technical advice to help you make your movie. There is not enough room here to cover the technical aspects of film making, such as sound, lighting, shot composition, editing techniques, and so forth. However, many excellent books have been written regarding those subjects. I have found the following to be very helpful resources: Brian Michael Stoller, *Filmmaking for Dummies* (Wiley Publishing 2003) and Michael W. Dean, *$30 Film School* (Thompson 2nd ed. 2006). Of course, the Internet is a great (free) resource as well.

My friends call me Ox. I don't know if you've noticed, but I got a slight weight problem.
~Dewey Oxburger, "Stripes"
(1981)

Just as it was John Candy's motivation in *Stripes* to become "a lean, mean fighting machine," so too should it be your goal to keep your moving pictures as trim and as interesting as possible. In the world of movie-making, there is no greater sin than to bore your audience. The longer your movie, the more chance that the judge will lose interest and ignore your message. Your hard work will be wasted, the whole process could quickly earn a bad reputation and, most important, your client could suffer the consequences. Although some situations may call for longer presentations, try to limit the length of your movie to between five and fifteen minutes.

A lean and mean movie does not meander. The mark of a good movie is that it has a **central theme**, **with all aspects of the presentation revolving around that theme**. The next time you watch a truly great film, notice how virtually every scene and every line of dialogue not only moves the story forward, but serves the central theme of the picture. Look closer and notice that even subplots serve the main theme. Thus, in order to tell a good story and keep the presentation lean, a sentencing movie should be crafted in the same way. In the above example concerning the Iranian client, the theme or spine of the film was seemingly broad:

"Who is Mr. Client?" Although the film touched on many different aspects of our client's life, each part was crafted toward a very narrow purpose: to convince the judge that our client was not a professional smuggler or a terrorist, but instead had the very best intentions for doing what he did - to help his family escape persecution.

A major benefit of using this medium is that it gives you total control to trim away the fat often present in traditional sentencing presentations. As we all know, our clients and those who speak on their behalf (including their lawyers) often lack the ability to be brief and to the point. In addition, there is the concern that, when the time comes, a person will not able to properly articulate themselves, especially when so much is riding on their words. With this process, people can say what needs to be said in a much more relaxed setting, with however many takes they need to get it right. Then, with simple editing, all the extraneous stuff can be cut away to create the "leanest and meanest" message possible. Not only does this process make for a more powerful sentencing presentation, but it can also shorten the length of sentencing hearings - something judges will undoubtedly appreciate.

It should be noted, however, that even a short sentencing video can seem long if it is not visually dynamic. In other words, as mentioned earlier, your movie should contain compelling images, as opposed to just a parade of "talking heads." Although you will undoubtedly need people to speak on camera, your challenge is to be creative about how you convey that information in the final form.

One of the best ways to spruce up "talking head" footage is to make sure your moving picture contains plenty of "B-roll." B-roll consists of images you cut to while a person is talking, typically to supplement their message in some fashion. For example, you may have footage of your client talking about what he does at work. The B-roll would be footage of the client actually *at* work engaged in some (hopefully interesting) activity. Later, in the editing process, you can easily combine the two clips so that you hear the character talking, but you see the character in *action*. Still photographs are another great way to spice up the visual mix. If your client is talking about his childhood, cut away to a photo of him as a kid. Remember, to the extent possible, this process is about *showing*, not just telling. If there's not much action, and nothing much interesting to look at, then no matter what the length of your final presentation, it will move at a snail's pace.

Pay no attention to that man behind the curtain!
~The Wizard of Oz, "The Wizard of Oz"
(1939)

As a film maker, you become the Wizard. Arguably any attempt at persuasion involves a modicum of manipulation. You are trying to tap into emotions to deliver your message and achieve a result. However, all film audiences have stink-detectors. They know when the story doesn't hold up, they know when they are being manipulated, and they won't put up with it for long.

In order to make the viewer forget the man behind the curtain, you need to be subtle in your methods of persuasion. You simply cannot afford to be cheesy, overtly manipulative, or over the top. For example, including the song "Born Free" on your soundtrack would be a nice example of all three. Nor would I recommend including gratuitous scenes of crying loved ones, in the absence of any other purpose other than to tug on heart strings. Avoid including goofy effects or transitions in the editing process. It will only make your film appear amateurish and distract from your message. And, although it goes without saying, I'll say it anyway: never use the editing process to portray statements out of context or to otherwise abuse the truth. Keep in mind, especially when filming your client, a contentious prosecutor (more than likely one who becomes suspicious of your editing choices) could request and likely receive an order for disclosure of your unedited footage.

When you have finally assembled all the pieces into something resembling a movie, you need to test whether you have properly fulfilled your role as Wizard. In the same way you would ask your colleague, your assistant, or your spouse to proofread

an important brief, so too should you be asking those people to watch your movie. You need fresh eyes and ears to tell you what works and what doesn't. A test audience will tell you what parts of your movie can be trimmed and can give other suggestions about how to improve your final product. So, make sure you finish your movie far enough in advance of sentencing so that you have time to screen it and make any necessary adjustments.

My country send me to United States to make movie-film. Please, come and see my film. If it not success, I will be execute.
~Borat Sagdiyev, "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan"
(2006)

It is no secret that well-crafted movies have enormous power not just to entertain, but to inform and persuade. Adapting this medium for use in court proceedings is not an entirely new concept. However, it is one that is gaining momentum as it becomes easier and cheaper for an attorney to produce their own professional-looking product. Having the right tools for the job is just the beginning. After that, you need to fill your movie with compelling stories, dynamic characters, and powerful visuals. When done properly and in the right case, an emotionally charged moving picture can be the most effective way to accomplish your client's sentencing goals.

~The End ~

INVITATION: SURVEY OF FEDERAL DEFENDERS AND ASSISTANT FEDERAL DEFENDERS

Interviewer: *"Any friends among the USAO?"*
Federal Defender: *"Yup, got some friends."*
Interviewer: *"Ever drink beer with them?"*
FD: *"Absolutely."*
FD: (in another district): *"I think if any one of our lawyers made it a practice of having beers with prosecutors after work they would not last here too long. Cats and dogs is a more apt description."*

These two quotes from among the more than forty Federal Public Defenders we interviewed several years ago illustrate just one of the many differences we found in how the Federal Criminal Justice System (FCJS) operates in seven districts. The three principal investigators are now embarking on a second NSF funded study drawing on these interviews. To do this, they are conducting a nationwide survey, and they are inviting your participation in it.

Earlier in 2006, they sent out individual invitations to take the survey, and got about 150 responses from Federal Defenders, and about 160 responses from CJA Panel Attorneys. To get more responses, they are publicizing this general invitation. This study will be the most extensive research ever conducted on the Federal Criminal Justice System. The feedback they have gotten from Federal Defenders and others who have taken the survey and contacted them about it indicate that participants enjoyed answering the questions and found their survey unique and thought provoking. Furthermore, they believe that the results of their survey, and their larger project, will shed light on many issues of interest to Federal Defenders nationwide. For example, the survey asks questions related to interdistrict variation in: sentencing disparity; relations and potential conflicts between Federal Defenders Offices and Federal Probation, the nexus between state and federal prosecution and whether there has been a federalizing of criminal justice, and relations between the defense bar, federal bench, and

US Attorneys Office. In order for these survey results to be valuable, however, they need to obtain as many responses as possible. However, if you already took this survey when it was sent out earlier, please do not take it now.

The survey is available on the web at: https://online.survey.psu.edu/pd/. This web site explains the research in more detail, and describes how the information obtained will be used and the academic publications that will result. Because they are interested in general patterns, and the differences and similarities in how the FCJS operates from district to district, districts will not be identified by name, and all responses will remain anonymous. The survey does not ask for names, though they do need to know the district in which you practice. Penn State University's Survey Research Center (SRC), which is administering the survey, conducts many surveys such as this, and has established procedures for insuring the confidentiality of responses.

If you choose to complete the survey on-line, go to: https://online.survey.psu.edu/pd/. (Please use Microsoft Internet Explorer 5.x or Netscape Communicator 5.x or higher). Javascript and cookies must also be enabled. They can make no guarantees, however, regarding the interception of data sent via the Internet. If you have trouble accessing the survey, E-mail: websurvey@ssri.psu.edu.

If you have any questions about the mechanics of the survey, including provisions to insure confidentiality, you may contact Penn State's Survey Research Center at 800-648-3617. If you have general questions about the research, please feel free to call one of the three principal investigators (Jeffery Ulmer, 814-865-6429, James Eisenstein, 814-863-0577, or John Kramer, 814-865-3394). If you prefer not to take the survey on the web, you may call Penn State"s Survey Research Center at 800-648-3617 and request a paper version.

Thank you very much for considering this request. *Jeffery Ulmer, Ph.D., Associate Professor of Sociology and Crime Law and Justice.*

KUDOSKORNER

Congratulations are in order for **AFD Fred Tiemann** and **Mitigation Specialist Jackie Page**, **Southern District of Alabama**, for the superb job that they did in the sentencing of a bank robbery client. Jackie produced the mitigation for a sentencing memorandum that was filed on the client's behalf prior to sentencing. Among other troubling facts in this client's history included the fact that he was forced to sell crack cocaine at age 16 by his own father. This was the impetus for the client's own drug addiction and criminal activity. At the sentencing hearing, a packed courtroom of friends and family were present, and many personally addressed the court. Because of Fred and Jackie's hard work, in addition to the district court's belief that the client was worth rehabilitating, the court departed from a calculated sentence of around 93 months and sentenced him to 46 months instead.

Congratulations to **Peter Madden, AFD, Southern District of Alabama**, for two recent district court victories. First, he had a client who was charged with multiple counts

of identity theft, and who also was being threatened by the government with a superseding indictment that would bring in more counts. This client was passing through Mobile, Alabama, when he was stopped by local police for a traffic infraction. Peter convinced the government to allow his client to plead guilty to one count; the others would be dismissed, and there would be no superseding indictment. On top of that, the district judge sentenced the client to time served.

Second, Peter recently had another client who was charged with possession of destructive devices. He tried the case with **AFD Chris Knight**, and in a "battle of the experts", the government characterized the devices as dangerous grenade-like objects, while the defense expert countered that they were no more than weak firecrackers. The client had maintained throughout that he never meant to use the devices to harm anyone; rather, he just liked to periodically throw them into the water for his and his girlfriend's personal amusement. In any event, after the district court threw out one of the counts at the close of the government's case as being duplicative, the jury deadlocked and a mistrial resulted. Just prior to the second trial, the government allowed the client to plead guilty to a misdemeanor involving the improper storage of the devices. So from a felony with a 10 year statutory maximum and about a 5 year advisory guidelines range, the client ended up with a misdemeanor that put him in the 0-6 months range where a probationary sentence is likely. Congratulations on jobs well done for both clients!

Check out all the victories in the **District of Arizona**. . . .

Peter Raptis, AFD - felony aggravated assault on a federal officer. 3 defendants charged under 3 separate cases. The defendants - the Broughams- are father, son, and cousin/nephew. They raise buffalo and live on 20-acres out in the middle of nowhere in Hereford, Arizona, minding their own business and going about their ways and looking like your all time country boys whose entire families live together in three trailers and a bus (sisters, husbands, ma's, cousins, the dogs and the buffalo). One rainy day, here comes the Border Patrol and get stuck in the mud; the Broughams shout across to each other on their own property that the "f - - -'n border patrol agents are stuck in the mud." The Broughams get arrested because the agents were in fear of their lives because Jr. threw a rock at their vehicle. The "Buffalo Boys" had been at a horse auction and after a long day and having just come home were having a couple of beers. There was no way that "Pa" was going to drop his beer as they approached the agents. The three went to the area to see if the could help the "f - - -'n border patrol" when things got out of hand. Jr. threw a rock and all hell broke loose, back-up was called, guns were pulled, the helicopter came, an innocent bystander on his way home was pulled into the melee and beaten and handcuffed. All told there were eight or nine agents called out, as well as the Cochise Co. Sheriff and other law

enforcement. Peter's effort to go to trial in September failed and he continued his fight with the government who didn't want to provide photos, never produced the rock or even gave a description of same, and was questioning "Pa's" mental health. Through persistence and getting the facts straight, Client was offered a misdemeanor simple assault.

Chris Kilburn, AFD - Numerous and persistent discovery requests sought to get the Gov't to commit they had a snitch obviously not being disclosed or LEOs had committed major 4th Amendment violations. Rather than own up to either one, the Gov't dismissed. Charge: poss w/int to distr. marij ; Use and carrying a firearm during a Drug trafficking offense. 21:841 and 18:924 (A five year mandatory minimum). When agents searched home they found 18 guns and tons of ammunition besides the marij. (It took four complete pages to list everything).

Yendi Castillo-Reina, AFD - Also a dismissal in an alien smuggling case after Yendi doggedly pursued discovery motions.

Eric Rau, AFD - Dismissal after showing through hearings and testimony defendant was actually a juvenile.

Jeanette Alvarado, AFD - Got a 14-level downward departure to probation for a telemarketer with a criminal history level V and $5 million loss.

Tracy Friddle, AFD - won a reversal in US v. Gonzalez-Perez. The issue was incorrect application of the 16 level adjustment for a "crime of violence" that the 9th said wasn't a "crime of violence."

David Shannon, AFD - He does not announce the many unpublished reversals and remands he gets from the 9th Circuit, but had 2 significant remanded sentencings worth bragging on:

Ismael Gomez-Alvarez : §1326(b)(?) - Gov't asserted it was a (b)(2) - court gave 70 months in straight up plea. Issues were (a) was Ismael's false imprisonment conviction a crime of violence (no force - fraud or deceit used instead) & (b) plain error - too much time -- overbroad statute. Reversed & remanded. Sentenced to 30 months.

David Rojas-Sandoval: §1326(b)(?) - Gov't asserted it was a (b)(2) [sounds familiar] - court gave 57 months in straight up plea. Issues: (a) was David's burglary conviction a crime of violence when (i) statute of conviction does not identify generic burglar and (ii) not judicially noticeable documents showing conviction is a generic burglary & (b) plain error - too much time -- overbroad statute. Reversed & remanded. Sentenced to 21 months.

Chris Kilburn, AFD for the dismissal in Naeem N. Ullah's case. Mr. Ullah is Pakistani, had permission to be here for many years, owned and operated a trucking business. While pending deportation proceedings, Mr. Ullah was out of custody, working. When the Immigration Judge issued the order of deportation and he should have self-removed, Mr. Ullah never received the Order so never left and believed a decision was still pending. As

part of his trucking business, he drove into Mexico to pick-up some goods and, when he returned - lo and behold! - order of deportation. Being Pakistani, he was considered a terrorist possibility. After showing the Government the failure to serve the removal order, dismissal before before grand jury presentation.

Yendi Castillo-Reina, AFD - Not guilty for a juvenile charged with throwing a bottle at the CBP agent who could not accurately ID the house involved, but was positive the nighttime bottle thrower in the Rez was Joshua. Forget the other person who confessed and the statements of eye-witnesses who supported that confession.

Doug Passon, AFD - In a gun case, Doug files motion to suppress; AUSA decides to dismiss case.

Grant Bashore and Vicki Brambl, AFD's, - charges were dismissed for Saoud Kouyate, charged with conspiracy and aiding and abetting the smuggling of goods into the United States, specifically alleged "blood" diamonds in violation of Kimberly certifications. Saoud is of the Mandingo tribe in Guinea in Africa. Members of his tribe have long been respected for their honesty and loyalty, especially trusted with the guarding and transportation of valuables, from people to money to gems. He and a business associate (codefendant - rep'ed by **Rosemary Marquez**) were in Tucson for the Gem and Mineral Show. An anonymous caller contacted TPD saying there were 2 well-dress black men selling what must be stolen gems (implication the gems must be stolen because the men who had them were black and well-dressed). Customs set up 2 undercover agents - male and female - who talked to Saoud and codefendant about gems. Still on tape and in their car, the agents discussed how they would have gotten better results if the female would have performed oral sex on the suspects. Saoud and codefendant were eventually pulled over for a supposed traffic violation - Charlie found TPD records that ICE contacted TPD 45 minutes before the stop to find uniformed officers to conduct the stop.

Add to this a material witness (rep'ed by **Andrea Matheson**, called by the defense and video deposed) who negated much of what ICE thought was said, diamonds which (a) may not have satisfied the international industry definition of diamonds and (b) may have been industrial quality, rather than gem stone quality and (c) which probably were not "blood" diamonds at all.

19 pretrial motions later (filed astoundingly within 15 days [thanks to Aileen, Toni and Lourdes, and weekends and nights in the office] and pushing for speedy trial, charges were dismissed against Saoud (who has now returned to Paris, France [where he had been living] and he was able to see his newborn son who was born days after his arrest) and he will get all his gems returned to him, and the codefendant will plead to a misdemeanor, no time and no supervision. Bravo to you all!!!

Kudos to **Rita Chastang, AFD** and **Todd Shanker**, **RWS**, **Eastern District of Michigan**, in a Project Safe Neighborhoods case. Jackson police officers were investigating a call which reported a fight on a residential street in Jackson, Michigan, in the early morning hours of July 16, 2005. Mr. Knight was in a parked van on the street, in the front passenger seat. Also in the van were two women in the back seat and a third in the driver's seat. Officer Mills parked his patrol car across the street, opposite the van, and exited. As he exited, he reported that Mr. Knight also exited the van and made a gesture. At this time, he claimed to have heard a clinking sound, like metal hitting the pavement. He walked over to the van, searched, and found a firearm underneath it, on the rear passenger side. Mr. Knight was arrested and questioned. After being advised of his rights, he refused to make a statement and requested an attorney. He was charged in state court and obtained counsel. State charges were dismissed and the case referred for federal prosecution under the Project Safe Neighborhoods program. After dismissal of the state charge, Mr. Knight was transported to Detroit, in custody, by Gary Schuette, a Jackson police officer who was also a federal task-force agent, for his appearance on an indictment charging him with the offense of Felon In Possession of a Firearm in violation of 18 U.S.C. § 922(g). While being transported, the agent again advised Mr. Knight of his **Miranda** rights and initiated questioning. Mr. Knight then stated that he had touched the gun, and that it belonged to one of the women in the van.

Prior to trial, counsel filed a Motion To Suppress Statement arguing that because Mr. Knight had obtained counsel to address the state charges, which were substantively the same as the federal charges, his right to counsel during questioning by the federal task force agent had attached; that after his right to counsel attached, "government efforts to elicit information from the accused, including interrogation, represent 'critical stages' at which the Sixth Amendment applies", **Michigan v. Jackson**, 475 U.S. 625, 636 (1986); and that after Sixth Amendment rights attach, any waiver of a defendant's right to counsel is invalid; **Edward v. Arizona**, 451 U.S. 477, 484 (1981). The government answered that the state and federal offenses were distinct and separate, each requiring proof of different elements and thus, the doctrine of dual sovereignty permitted additional questioning of Knight by the agent. In response, defendant argued that the federal and state firearms charges were substantively identical. Further, an agency relationship existed between the federal and state under Project Safe Neighborhoods and that this relationship was inexorably intertwined. Thus, the doctrine of dual sovereignty was not applicable. **Bartcus v. Illinois**, 359 U.S. 121, 123-124 (1959). In her written opinion granting defendant's motion, Judge Nancy Edmunds found that "Officer Schuette was instrumental in both the state and federal criminal cases. He is both an employee of the Jackson Police Department and a

member of a federal task force. Prior to his interrogation of Defendant, Officer Schuette had spoken with his fellow Jackson officers about Defendant's case and had reviewed the relevant police reports which clearly indicated that Defendant had previously asserted his right to counsel". Judge Edmunds concluded that, as in United States v. Bowlson, 240 F.Supp.2d 678, 684 (E.D. Mich. 2003), "'[t]he dual nature of the investigation . . .invites abuse' and requires application of a rule that does not permit abuses that 'would offend the spirit of the constitutional rights at issue'". United States v. Otis Knight, at No. 05-81155, 2006 WL 1722199, at * 3 (E.D. Mich. June 22, 2006).

Mr. Knight proceeded to trial on the theory that one of the women in the rear passenger seat threw the gun. The defense introduced an on-the-scene video tape of Mr. Knight, as he was being led to the scout car by Officer Mills, in which he says "That's not my gun". Officer Mills yells back, "It is now". The defense also introduced evidence proving that the women made false statements to the officers about their names, birth dates and residences which made it very difficult for either party to locate them. One of the women was never located either by the defense or the government. The defense argued that the officers, having made an assumption that Mr. Knight possessed the firearm, made little or no effort to insure that they obtained accurate identification information from these important witnesses. After a three day trial in November, 2006, Mr. Knight was acquitted of the charges based upon the lack of evidence.

Kudos to **Rita Chastang**, **AFD**, and **Loren Khogali**, **RWS**, **Eastern District of Michigan,** and ***CJA Counsel*, Karen Roberts** and ***Craig Daley.*** Thanks to their efforts, three individuals were acquitted in a drug conspiracy case. On April 13, 2005, a joint operation of state and federal law enforcement officers followed a semi trailer truck from Illinois to Ohio, and finally to Michigan, after the truck had been stopped and found to be carrying 1000 pounds of marijuana on board. The driver of the truck agreed to cooperate. In it's effort to find a drop-off point for the marijuana, the driver took a circuitous route from Illinois to Michigan. Once in Michigan, the truck stopped at a truck yard in Brownstown Township. Ronnie Glenn Stockton owned a business operating out of the yard, Dearborn Fleet Trucking Company. He leased two of the bays on the property. Agents had no idea where the truck would off-load until they entered the property of Dearborn Fleet. As agents entered the yard, four men were seen unloading the semi and placing the marijuana into a van. All began running. Three were arrested after a short chase, the fourth, Robert Vinson, after an extended chase. The marijuana was packed in large green, opaque suitcases. As these events were unfolding, three people were standing in the truck yard by a car near one of the bays. They were Rodney Lambert, his wife and another male. Each

of these persons were employees of Dearborn Fleet. Ronnie Stockton was arrested based on agents claims that he was observed acting as a look-out. After all defendants were arrested and their pictures had been taken and the evidence seized, one of the agents, George Tsouroullis, asked the DEA group supervisor, Nick Brooke, if he needed anything else done. Brooke said that three people, Mr. Lambert, his wife and a third man, had not yet been spoken to or identified and that he should speak with them for identification purposes. Agent Tsouroullis approached the three individuals and began questioning them. In response to questioning, Lambert told the agent that he was an employee of Dearborn Fleet and that, at his boss's instruction, he had opened and closed the gate to the yard to allow the truck to enter. After obtaining Mr. Lambert's identification, Agent Tsouroullis asked Mr. Lambert if he knew what had happened at the yard. Lambert answered that "It must involve drugs because you guys are here". Mr. Lambert was arrested after Agent Tsouroullis relayed his conversation to Agent Brooke.

Six persons were indicted, including Mr. Lambert, and charged with Conspiracy to Possess With Intent To Distribute Marijuana. Three proceeded to trial, Ronnie Stockton represented by Attorney Craig Dailey, Robert Vinson represented by Attorney Karen Roberts, and Rodney Lambert. The remaining defendants pled guilty.

On September 15, 2005, five months after the seizure and arrest of defendants, Agent Tsouroullis prepared a DEA 6 report in which he said that Mr. Lambert made an additional statement at the truck yard in response to a final question asking if there was anything else he would like to say. Allegedly, Mr. Lambert responded that "I made a bad mistake in judgment today". On April 14, 2005, one day after the seizure and arrests, the case agent, Shawn Jennings, prepared a master DEA 6 based upon the notes and oral reports of all of the agents in the yard. He did not include the "mistake in judgment" statement in this master report. At a hearing on a motion to suppress Mr. Lambert's statements, and at trial, Agent Jennings admitted that, on the date of the incident, he had received Agent Tsouroullis' notes of his conversation with Mr. Lambert, but had destroyed them. He did not destroy any other notes. Apart from Agent Tsouroullis' DEA 6, prepared five months later, no other agents prepared reports of the events on the date of the arrests.

At trial, Agent Tsouroullis admitted that prior to speaking with Mr. Lambert in the truck yard, there was no evidence of criminal activity on his part. He only spoke with him as a routine matter, to identify everyone on the scene as a possible witness. The government's theory as to Mr. Lambert, was that he locked the main gate after the truck entered the yard to prevent law enforcement from entering and to shield the transfer of the marijuana from public view. As part of its defense, counsel for Lambert presented the

testimony of Roderick Bethea. Mr. Bethea told the jury that he worked for a car repossession company; that the company operated from a facility on the truck yard property; that their repossessed cars were stored there; and that the company had requested that the main gate to the property be kept locked at all times to prevent theft of the cars. Counsel for Stockton presented evidence that he did not have sole control over activities in the truck yard and that other companies had operated in the yard. Counsel for Vinson presented evidence that her client ran out of fear and because everyone else around him ran. Trial began on November 27, 2006. On December 1, 2006, the jury returned a not guilty verdict as to all defendants. United States v. Rodney Lambert, Cr. No. 05-80358

A tip of the ole' hat to **AFD Randy Baumann** and former **AFD Lisa McCalmont, Capital Habeas Unit, Western District of Oklahoma** for the reversal of the death sentence of an Oklahoma inmate based upon penalty phase IAC because trial counsel focused almost exclusively on the first-stage of the trial and failed to uncover mitigating evidence in the form of family history, mental health history, and drug usage. The Tenth Circuit stated: "the absence of this readily available mitigation evidence left the jury with no explanation for the murders other than the prosecution's assertion Anderson was 'evil.' Although the case against Anderson was strong and the murders in this case were horrific, courts have not hesitated to grant relief in similar circumstances where the absence of available mitigation evidence left the jury with a "pitifully incomplete" picture of the defendant. Had the jury been presented a complete picture of Anderson's background and history, there is a reasonable probability at least one juror would have struck a different balance between the mitigating and aggravating factors." Anderson v. Sirmons, No. 04-6397 (10th Cir., February 21, 2007).

Lisa Freeland, FPD and **Appellate lawyers Karen Gerlach,** and **Renee Pietropaolo, Western District of Pennsylvania, Pittsburgh** had a superb string (6 reversals in 8 months) of appellate victories (with kudos also to the Assistants who ably prepared and litigated the issues at trial):

William Haas, No. 05-1191 (3d Cir. 6/14/06) (unpublished) (retrial ordered when evidence of robbery was improperly admitted in ACCA prosecution; on remand, the government agreed to substitute the robbery (career offender) for the ACCA charge, which reduced Mr. Haas's sentence from 288 to 151 months).

David Hull, 456 F.3d 133 (ed Cir. 7/28/06) (mere possession of a pipe bomb is not a "Federal crime of violence" for purposes of 18 USC 842(p)(2)(A) - teaching how to make an explosive with the intent that it be used in furtherance of a federal crime of violence)

Craig Brownlee, 454 F.3d 131 (3d Cir. 7/18/06, amended 9/18/06) (reversible error to forbid expert testimony on some of the factors undermining reliability of identifications, and reversible error to admit inculpatory statements elicited by friendly questions and conversation with police officer who had known Mr. Brownlee for a long time -- the encounter was the functional equivalent of interrogation).

Aimee Jones, 471 F.3d 478 (3d Cir. 12/28/06) (no violation of health care fraud statute, 18 U.S.C. 1347(2), occurred when defendant stole cash receipts from methadone clinic since no misrepresentation was proved, and the statutory criterion of "in connection with the delivery of or payment for health care benefits, items, or services" was unmet because the defendant's theft did not affect the delivery of or payment for health care benefits).

Jason Korey, 472 F.3d 89 (3d Cir. 1/4/07) (retrial ordered when jury instruction said that killing someone to avenge a drug theft, or killing someone in exchange for cocaine, was a drug trafficking conspiracy; instruction violated due process because it failed to require a finding of unity of purpose and thus operated as a mandatory presumption).

Valerie Manzella, 475 F.3d 152 (3d Cir. 2/2/07) (it is unlawful to increase a sentence for the purpose of permitting sufficient time to undergo the Bureau of Prisons 500 hour intensive drug treatment program).

Good news coming from the **District of Puerto Rico**. **Rafael Andrade** and **Vivianne Marrero, AFD's, District of Puerto Rico** obtained a well-deserved win over the government in a case where Customs and Border Protection agents got charged with transporting, concealing and harboring an alien by prevailing on a Rule 29 motion on two counts and obtaining a dismissal of the remaining count.

Francisco "Paco" Valcarcel and **Hector "Tito" Ramos, AFD's, District of Puerto Rico** obtained a reversal and acquittal of a machine gun conviction before the First Circuit and presented, as an issue of first impression in that Circuit, an argument that the statute criminalizing possession of a firearm within a 1000 feet of a school zone was unconstitutional for not specifying a method of measurement.

Patricia Garrity, AFD, and **Appellate Litigator, District of Puerto Rico,** got a money laundering conviction reversed and remanded where the government tried to slap on the sentencing enhancement for knowledge of drug proceeds with nothing more than the jury verdict.

EXPERTS: HOW TO IDENTIFY THEM, USE THEM, ABUSE THEM AND KEEP THEM OFF THE STAND

By Eric Vos, Assistant Federal Public Defender, District of Maine

1. Why Use an Expert?

a. For the Jury's Sake!

Why? In a word(s) "BECAUSE THEY WIN CASES!"[1] Logically, given the rules which dictate attorney presentations to jurors, lawyers will not be allowed to give long-winded explanations/theories outside of opening and closing arguments. Even if an attorney could miraculously take the witness stand, this would be a rather poor substitute for expert testimony. Hence, most of the heavy lifting is best done by someone other than the least liked person in the courtroom - which is of course the defense attorney. Let us be logical - an opening statement, a blistering cross and summation are the sum total of how most defense attorneys set forth theory. Yet, when an expert is employed, aggressively, a theory can be presented impressively.

While the Criminal Justice Act (CJA) panel attorneys only used experts in fewer than 2.5% of their 2004 cases, the government used experts in 100% of their cases. This, of course, starts with the Case Agent who is sitting next to the prosecutor during the entire matter. Moreover, anytime a firearm is tested, drugs are analyzed, or financial documents are evaluated an "expert" is being employed by the government. And this set of examples does not even start to address the seemingly endless list of "soft experts" the government now employs. Nor does this mean the "expert" will eventually take the stand, even though many do. It merely means the government is constantly using experts, either as consultants or witnesses, while defense attorneys are rolling poorly loaded dice.[2]

With the new liberalized approach to expert testimony, adopted in the Federal Rules of Evidence, attorneys are using experts in all kinds of cases. For example, let us say an African-American client has been positively identified by a Japanese-American teller, in a photo-lineup, as the individual who rather rudely used a gun to withdraw funds from a federally insured institution. In this scenario, which is played out daily in federal courts, there is fertile ground for the employment of an expert. In fact, one could easily employ three experts in this factual scenario. First, there is the area of cross-racial identification. An attorney can certainly appeal to the jury's experience, and intelligence, and talk about the difficulty anyone may encounter when being called upon to identify someone of different racial background. Yet, when and how is the attorney going to do this? I have done this, *sans* expert, and it is painful. Additionally, the jury will have no "scientific" backing to trust the attorney and, importantly, counsel runs the risk of angering a jury who may easily see this argument as inappropriately offensive. In the alternative, by presenting this notion with an expert, and employing a vocabulary which is inoffensive, the attorney goes from being a possible bigot to a compelling advocate who has been able to explain a logical phenomenon which may easily be used by sympathetic jurors during deliberation. I invite any attorney to read about cross-racial identification and then entertain the notion of presenting such a defense without employing an expert.

Secondly, if the teller is informed, or it is

[1] Joseph L Petersen et al., *The Use and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. Forensic Sci. 1730, 1748 (1987) (emphasis added)

[2] Your have a 2.7% chance of rolling "snake eyes" when shooting dice. Thus, you have a better chance of such a roll than seeing a CJA attorney using an expert.

suggested, the suspect is in the line-up the validity of the line-up may be questioned. In keeping with the notion of proper line-up methodology, what if the photo line-up consists of eight photographs laid out in two neat rows of four photographs on one sheet of paper? In this scenario, an expert may be called upon to explain that such presentations, when the victim knows the suspected "doer" is in the lineup, creates a likelihood of misidentification which is alarmingly high. It is for this reason many law enforcement bodies have set guidelines for photographic line ups which do not allow for the victim to be told the suspect is present in the line-up. Moreover, photographs, as the FBI now requires, are not to be put on the same sheet, but rather are to be shown to the victim individually, almost like a deck of cards, with the order of presentation to be randomized and for that order to be "reshuffled" each time the victim wishes to see the photographs anew.

Lastly, there are entire areas of study which speak directly to our inability to recall important identifying characteristics after seeing a suspect for a short period of time, during a traumatic event, hours or days previously.[3] This natural inability must be addressed, and presented, by an expert. Again, an attorney's argument is no substitution.

In contrast to the feelings a jury may have about an attorney, an expert, despite being paid, if well-qualified and properly prepared/presented, will almost always command a level of credibility most attorneys will only be able to attain in their wildest dreams. When presented properly, an expert may become a trusted and respected teacher who bases theories on logic and well-accepted field(s) of study. Under these circumstances, experts stand in stark contrast to an impassioned and adversarial advocate. Most attorneys will certainly agree that the best tool a defense attorney has is effective cross examination. Despite this, only a foolish advocate would ever attempt to substitute expert testimony for blistering cross examination of a hostile witness.

At the very least, an expert's role is to simplify the case so a jury may easily comprehend the litigant's position/theory. Given the primacy one should place on simplification, attorneys should look to all issues and consider using an expert. Attorneys must not limit the use of experts to arcane and technical issues. An expert may lend an aura of expertise to almost all cases when called upon to testify. The expert can easily take the attorney's theory and simplify the salient issues in a manner and mode not afforded to the attorney given the constructs of trial presentations. Once theories are simplified, important allies, the few jurors who have taken the defendant's side, will have important, easily used/applied, tools which allow them to advocate the attorney's position(s) during deliberations. Attorneys would love to believe they have convinced the jury in its entirety and grabbed victory from the jaws of defeat. Yet, this is most likely not how it transpires. Rather, there will be some articulate and forceful juror(s) who advocate the victor's position despite the attorney's inability to reach all twelve peers at once.[4] Thus, an attorney presenting, or attacking, expert witnesses, should keep a keen eye on the role of an expert *vis-á-vis* potential jury advocates. If the expert is to be used as a "tool" for the advocate jurors, the presentation and associated theory(s) must be simple, or simplified, as to be easily used by allies during deliberation. Even the most arcane subjects can be simplified, and to take an expert's elevated understanding of the issue(s), without an eye on simplification will result in poor utilization of a most important resource.

b. For the Attorney's Sake

[3] For some remarkable information to get you jump started on the pitfalls of eyewitness testimony go, to http://www.psychology.iastate.edu/faculty/gwells/homepage.htm

[4] Recent studies in Biological Psychiatry have further supported the importance of convincing "some" jurors to convince the rest of the stragglers. As reported in *the New York Times* article, *What Other People Say May Change Your Mind*, (June 28, 2005) incorrect conclusions, which even a 5-year-old could identify as wrong, may be adopted by a person based not on "peer pressure" but rather, based on biological effects which take place when a person is exposed to the incorrect conclusions of others.

While there may simply not be a human, expert or not, to provide a counter-argument concerning opinions offered by government experts, there may be terrific areas which allow for effective cross examination of the government's experts - areas which may have never occurred to the attorney but for the help of an expert as a non-witness consultant. All experts, in conducting their evaluations, use a methodology - a methodology which is not random but based on accepted science and/or academic practices. If the methodology is flawed, one must certainly attack the opposing expert's conclusion. Even a broken clock is right twice daily and yet, one stands a much better chance of questioning the otherwise correct clock once it is pointed out it lacks batteries. In this regard, an expert is used to clarify, as a consultant, the field of study, the methodology and the weaknesses in the government's presentation. Thus, while the above-mentioned Japanese-American teller was correct, the client did use a weapon to withdraw funds, one must show the line-up was suggestive, flawed and counter to all accepted practices of witness identification and thus, a correct identification may now be untrustworthy.

2. What Kind of Experts Are There?

Given the multitude of areas which an attorney may be litigating, coupled with the almost infinite possible fact patterns, it would be absurd to ask anyone to come up with an exhaustive list of "the types of experts available." There seems to be an endless supply of "experts" who will help with everything from fingerprints to forensic accounting and back to anthropological studies showing the reasons cross-racial identification is so hard.

The best way of addressing whether or not there is an expert out there is to break down, into discrete parts, the theories which will be asserted by both the defense or the government. As with the above bank robber, the attorney is going to ponder "how is it the teller was able to get a good look at a man's face when there was a gun being pointed at her?" In this regard, the attorney merely needs to take a step back and reduce the question to a basic Internet search. When going to one of the many search engines on the Internet, one needs merely to type in "identification expert witness criminal trial" and there will be ample information allowing an attorney to become well versed in the applied sciences concerning identification and additionally, introduce the attorney to a host of possible candidates suitable for expert testimony. Or simply go to www.google.com and type in "expert witness testimony cross racial identification criminal trial." Again, there is simply no shortage of experts in this area and one will immediately find a multitude of articles and papers which aid the attorney in understanding the subject matter in question. At the very least, an excellent starting point will begin with the experts the government has given notice of pursuant to Rule 16.

It would be lovely if one could provide attorneys with a comprehensive list of experts. Not only would this be impossible but, maybe most important, this limited and static listing would serve to restrict the new and fascinating approaches attorneys may take when employing experts. In the alternative, an attorney simply needs to break down theories and do an Internet search. Strip out the verbiage, connectors and superfluous words when doing your search but make sure to include words such as "expert", "witness", "criminal", "trial" and "testimony."

3. First Line of Defense - Offense

Presently, unlike defendants, the government is far more apt to employ expert testimony. With this, the defendant, as usual, will be playing defense and thus needs to think long and hard how to take some of the wind out of the opposing expert's sails. As discussed below, this may be done by excluding the testimony altogether or, in the alternative, diminishing the credibility of that testimony.

a. Keeping the Expert Off the Stand!

i. Rule 16

Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure states, in part, "[a]t the defendant's request, the government shall disclose to the defendant a written summary of the testimony that the government intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence during its case-in-chief at trial...[T]he summary under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." Thus, the defense attorney, upon first assuming representation, should put together a discovery letter. In that discovery letter there must be a formal request asking, at the very least, for "a written list of the names, addresses and qualifications of all experts the government intends to call as witnesses at trial, together with all reports made by such experts, or if reports have not been made, a brief description of the opinion and subject matter of the opinion to which each is to testify." Once done, the challenging defense attorney will not have failed to live up to Rule 16 obligations requiring the "defendant's [prior] request."

Certainly, there are varying degrees of sloppiness from person to person and from office to office. Even intelligent and conscientious Assistant United States Attorneys may, out of mistake or ignorance, fail to follow the important particulars of Rule 16. With this, attorneys must make certain the government has done exactly that which is required under Rule 16. It is certainly common, days prior to trial, or on the day of trial, upon receiving a list of government witnesses, the defense attorney will receive first formal notice of an expert. Again, this lack of adherence to the rule will vary from attorney to attorney and from office to office. Yet, it certainly happens and such a mistake may result in keeping out the government's important witness.

When the above noncompliance does take place, a formal written motion may be filed to exclude such evidence or, if time does not allow, an oral motion will suffice. In mounting such an attack, it is important to realize the most important law which governs all aspects of federal litigation. We are not talking about the Constitution either. Rather, we are speaking of the law of judicial economy. Logically, until the defendant has received the expert opinion, and opposing expert's *CV*, an attorney may not begin to attack the government's expert opinion or investigate the expert's background. Thus, if an attorney receives untimely notice, they must impress upon the judge how the defense will need days, if not weeks, to research, interview and ultimately hire a defense expert. Most critically, defendant's expert will need time to review government evidence and expert opinions and possibly test for any possible counter explanations. Lastly, a defense attorney must investigate the background of the government's offered expert. This may be rather time-consuming if the government's expert has a multi-page *CV*. In short, it would be impossible for an attorney to adequately confront possibly the most important witness for the government, without ample time to investigate all avenues and possibly offer up alternative expert opinion(s). Nor should this work be done without prior formal notice. It would seem unlikely an attorney has the luxury to prepare for experts which have yet been identified or whose opinions remain unarticulated. Many judges will not fully realize, or appreciate, the lengths to which an attorney must go in order to review and counter a government's expert. These investigative techniques will be covered below and yet, defendant's motion must clearly articulate this to the court.

With the above, the Court will have some unattractive options. First, they can simply delay the trial, by weeks, and set a new date. This will be an unattractive option for the Court if the matter will span for weeks. In the alternative, the Court can simply tell the defense no additional time will be allocated. This again is not an attractive option and leaves an avenue for appeal which the Court may not welcome. Lastly, the Court will now have the most attractive option of simply prohibiting the presentation of such evidence. This will be even more attractive for the Court should defense counsel keep front and center the extraordinary amount of time this witness, and counter witness, will need during the trial. With judicial economy being the most important rule, a savvy attorney will play this card first and

foremost.

Often the government will call agents in mid-trial to act as experts. A common example is the ATF Agent, recently deputized as an expert, who will testify as to the interstate nexus enjoyed by the firearm in question. Since the government is aware, they can reach into a bag of agents when the need arises, they may not always remember to follow the dictates of Rule 16. There is simply no excuse which may allow the government to provide notice of an expert in the middle of trial. Again, trials are fluid and confusing and call for new and different approaches midstream. This certainly is not restricted to the defense. Thus, be wary of the government as they try to present their case and fix unexpected problems with sudden experts. At the very least, when an expert is dropped in the defendant's lap mid-trial, the attorney must narrate, for the Court, the exhaustive process an attorney must engage in when reviewing experts. Moreover, explain to the Court that for an attorney to side-step such a process would pave the way for a rather compelling § 2255 motion.

Clearly, there are a host of experts which not only will the government attempt to introduce last minute but moreover, seem to be mere technicalities. Such as the expert who comes in and tells the jury the firearm was produced in a state other than the state where the gun was possessed and thus traveled in interstate commerce. Despite the fact the expert seems to be "bullet proof" and stating the obvious, the defense attorney should not relax the investigation. Even if an expert is absolutely correct, the gun was produced out of state, it is important the attorney see the expert's *CV* and opinion, pursuant to Rule 16, and vet each. If the expert's *CV* is filled with inaccuracies, fluff and outright lies, this will certainly destroy his otherwise perfectly acceptable opinion. Thus, relaxation with this type of witness is not an acceptable alternative.

Along with Rule 16 requiring a *CV*, the Rule requires "the government [] disclose to the defendant a written summary of the testimony that the government intends to use..." "[T]he summary [] shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." Both sides love to provide the absolute minimum when alerting one another of the "opinion(s)" and "bases." It is downright amusing how limited such disclosure may be. For instance the government may write "the government's expert will testify to the match between the recovered latent fingerprint and the defendant's recorded inked fingerprint. This opinion is based on the similarities between the prints." The provided information does not even come close to what is required. Instead, all opinions must be clearly stated and a detailed reasoning for such an opinion should be provided. In the case of fingerprints, the government should provide copies used and what points of similarity are being used to support the finding. Logically, unless the opinion and bases are well defined and explained a critique, by the defendant's expert, will be difficult and based on partial information. Thus, make sure you do not let the government give you abbreviated opinions and worthless reasons for such opinions. Even if the government provides you with decent discovery, out of caution, ask for more. Additionally, give the government as little as possible when meeting the reciprocal demands of Rule 16.

ii. Make Sure They Have Been Qualified As an Expert When Speaking Like an Expert

It is common for the government to slip in expert testimony from non-experts. In the Eastern District of Pennsylvania the government loves to use police officers to explain the difficulty of obtaining fingerprints from weapons. If a firearm is not tested for fingerprints, an attorney may call into question why the government did not simply test the gun. To ward off this attack, the government attempts to ask the officer "why is it you did not submit the firearm for fingerprint analysis?" The officer will then spend a good deal of time explaining to the jury how difficult, and almost impossible, it is for firearms to retain fingerprints. Yet, given the witness is most likely not an expert, this should not be allowed. Alternatively, the government would be required to

bring in an expert, most likely from one of their forensic laboratories, to testify to fingerprint and firearm surfaces. On cross, the defense attorney would be able to elicit that the lab in question had tested thousands of firearms for fingerprints and that the finding of prints on these firearms had been possible and numerous. Most importantly, this counterattack would easily be warded off by the non-expert who could simply deny such findings and repeat how difficult it was to get fingerprints from firearms. Thus, an attorney must make sure any testimony offered does not require expertise. Even if the witness could be qualified as an expert, an attorney must make sure this fix does not run afoul of the Rule 16 requirements concerning notice and written opinion.

iii. Astrology Versus Astronomy and Using *Daubert*

Just because it looks like "science" does not necessarily mean it is allowed to come into Court. *Daubert's* main concern is to make sure the science employed in a courtroom is reliable. For a wealth of information go to www.daubertontheweb.com. Some areas, like astrology, are very easy to identify. Other areas, such as fingerprint analysis, seem to be "based on good science" and yet, are now fertile ground for attack. Lastly, the government may stitch together reliable areas of expertise and create an entire new area which is "unreliable."

As to the seemingly reliable area of expertise, it would be best again to employ an Internet search engine. There are few areas of science which have not been critiqued. Yet, a legal critique, pursuant to *Daubert*, must ask specific questions. First, whether the theory and/or technique has been, or can be, tested? Second, has there been peer review of the theory and/or technique in question? Third, are there studies which point to the error rates enjoyed by the theory offered? Lastly, is the science presently accepted within the relevant scientific community? In this regard, Robert Epstein did this exact critique with fingerprints and had some amazing results.[5] Ultimately, the attack failed. Yet, it has spawned an entire reexamination of fingerprint analysis with the final word far from being delivered. Best of all, judges are well aware of possible novel attacks and may be far more willing to hear arguments concerning that which would have once been accepted without question. At the very least, a failed attack allows the defense attorney the much needed opportunity to cross examine the government's important witness(es) while the jury has yet to hear a word. This should help any attorney both during trial and with subsequent possible expert preparation. At the very least, as discussed below, the attorney should attack the reliability of the offered area of expertise, and its grounding, while the jury is listening.

As a cautionary note, in *Kumho Tire*, 119 S.Ct 1167 (1999), the Court also stated the *Daubert* factors must be applied flexibly. Thus, these factors are not a definitive test or checklist. The *Kumbo Tire* Court indicated the Trial Court must have considerable leeway in determining how to assess the reliability of an expert's testimony. Thus, the factors put forth in *Daubert* were only to be considered when a Court was determining the reliability of an offered area of expertise and the supporting science(s). Sadly, the combined punch provided by *Kumbo Tire* and *Daubert* have resulted in the government's easy introduction of "soft" experts while defendants still face the Court's standard opposition.

Very importantly, an attorney gets no less than two bites at the apple - first attack the reliability of the science with the Court and second, make that attack before the jury. Pursuant to *United States v. Velasquez*, 64 F.3rd 844 (3rd Cir. 1995) it is reversible error not to allow the defendant's presentation of expert testimony/evidence which is critical to the field in question. Explaining the deficiencies a particular field may enjoy can easily be done by using a defense expert. There is a host of academics, who need to know little about the particular field other than its

[5] Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed*, 75 S. Cal. L. Rev. 605.

history, who may be able to educate the jury as to the total lack of credibility an offered area of expertise enjoys. Naturally, the Court will be the only one privy to the above reliability question during *voir dire* and it is incumbent upon the defense team to re-present this question to the jury. In the end, despite what the Court may rule, you may argue the government, failing to have a case, rested its now desperate argument on a very questionable science.

b. Rattling the Expert's Cage

In most cases the expert, despite attempts to keep them far away from a jury, will hit the stand. Yet, experts suffer from the same disease any inflated ego suffers from - they have an overdeveloped sense of intelligence, ego and infallibility. These attributes may make for good cocktail conversation but they also make for vulnerable witnesses. When people are repeatedly put in the position of being the sage, teacher, lecturer and authority, they start to lose some of the most important characteristics which make them attractive to jurors. Best of all, these vulnerable witnesses may do poorly when attorneys shake their cages.

i. Get Personal

If one is going to be successful in shaking an opposing expert's cage the inquisitor must first know the expert better than anyone else. Luckily, one will have the expert's *curriculum vitae,* or resume. This may be, at best, merely exaggerations. It seems all too often we hear about a well-placed politician, administrator or educator who has been discovered to have improperly included some accolade on their resume. Thus, a nice starting point is to look at each and every degree the expert has obtained. A good place to begin this inquiry is www.studentclearinghouse.org. Student Clearing House is a service which verifies education and even provides grades. It may not be often, but it does happen that experts will include things in their *CV*'s which are not particularly accurate. One just needs to think of the many instances where public officials make widely inaccurate claims as to their past education and experience. Surely, we can all imagine this mouth-watering line of cross examination upon finding such "inaccuracies."

Another "must" is the expert's impressive list of professional associations. It is incumbent upon one to verify the expert's membership and find out how an expert becomes a member in any of the listed associations. Also, an attorney should find out what is the current status of the expert's membership. Many of these organizations have a number of different membership levels. Finally, in this regard, one should consult with experts to make sure the government's expert is not missing any memberships which any self-respecting expert would have already obtained. An attorney would look very silly if they took the stand without being a member of the bar and thus, the same questions should be posed, when appropriate, when an opposing expert is being qualified.

Anecdotally, in a matter presented by the United States Attorney's Office, a member of a rather large and important forensic organization was hired by the government to testify as to DNA evidence. Upon investigation, it turned out the expert, because of his lack of credentials, was stuck at the lowest level of membership in this seminal organization. This was so despite the rather impressive title the expert provided. Moreover, there were over half a dozen membership levels above this expert's status. Lastly, this expert's level of membership, unlike those above him, merely required a nominal membership fee. At such a low level of membership this expert did not even automatically receive the organization's newsletter! This of course was all found by going to the professional organization's Internet Web Site and following up with a telephone call to the organization's offices. All of this made for interesting cross-examination during the government's qualification stage.

Cross-examination along this line will certainly rattle the cage of any expert witness and possibly allow the attorney to go places otherwise not available. As one may imagine, with the advent of the

Internet, this type of investigation is fast and enlightening and may prove rather helpful. If an attorney may question the expert's academic credentials, and show impressive listings to be fluff, it will take a rather hearty witness to quickly gain composure in time for the more substantive questions. Importantly, one may do all of this by blowing up the expert's *CV* so cross-examination is rather demonstrative and painful. The simple use of a large blowup, five by seven feet, marked with heavy red marker, turns a *CV* into what looks like a student's failing paper. This certainly has an impact on both the jury and the witness. During closing, with the impressively large marked *CV* as backdrop, the attorney can pick at the government's expert and the opinion(s) offered. "Real opinions do not come from exaggerated, false and untrustworthy sources." "If you were an employer would you have serious doubts about hiring this expert if you found out these things upon reviewing his *CV*?"

Experts also have an affinity for the Internet. Thus, many of them have their own web pages specifically designed to serve as a form of advertising. As with *CV*'s, these sources of information may exaggerations and should be fully investigated. Internet pages may become a fertile area for cross-examination during the qualifying stages. Again, there is little harm, and much advantage, to blowing up this embellishment, on five by seven foot cards, and going at it with a red magic marker.

Many experts may include in their *CV* a list of "publications." At the very least get a copy of the publications - they may not exist. Secondly, find out what, if anything, the expert had to do with the particular publication. Again, anecdotally, we had the pleasure of working with a government expert who provided a rather impressive list of publications. Consistently, the publications listed by the expert were not his own. Rather, he was mentioned in the acknowledgment sections since the expert worked in the lab where these publications originated. The lab in question had more than forty people working in it and all persons who worked in the lab were listed on any publication which came from the lab. This was so despite only a handful of the employees actually doing any of the heavy lifting during the production of the scholarly articles. Interestingly enough, it is common for scientific articles to list a multitude of individuals whose involvement with the publication was scant at best. One way to determine the actual involvement of the expect is to note their sequential placement on the list of acknowledgments. Closer to the bottom means closer to having done nothing. Despite this, some experts will readily list these on their *CV*. While this area of cross examination will not necessarily question the expert's final opinion, juries understand puffing much faster than they understand complicated scientific opinions concerning arcane areas of expertise. Many experts will have a dozen or more publications listed on their *CV*. Imagine if all of them really involved no contribution worth noting. This would be an appropriate place to touch upon, with a big red magic marker, prior to getting to the substantive questions.

In addition to the above, experts will list a host of other "achievements." In closing, if it is on the *CV* look into it carefully for provided here is a roadmap with which an attorney can begin a search. At the very least, one will start to get an understanding of the origin of the expert's academic path, training and basis for taking shots at a defendant. Importantly, when the expert understands there is little the attorney does not know of both the science and the expert presented, witnesses tend to keep their opinions far more restrained and will qualify them to a degree which will later help establish reasonable doubt. Qualified opinions reek of a defense's favorite smell - reasonable doubt. If an expert is shaken, the opinions offered will certainly seem assailable. Ideally, every question posed to an expert should have them thinking "uh oh, what does my inquisitor know?" Everyone has skeletons in the closet. If one can demonstrate an uncanny understanding of the expert's background, an expert may have flashes of panic anticipating ugly questions which are potentially personal and embarrassing. Best of all, the expert will want to get off the stand quickly if apprehension looms on the horizon. To achieve the above, if posed at the opening bell, an intimate question will demonstrate an

unhealthy defense obsession concerning the expert's intimate background. For instance, one such initial question to an expert was whether or not, twenty years earlier, he had spent his Peace Corps years in coastal Tunisia or in the interior? Such specificity, by counsel, sets off alarms for most experts.

Know where, when, why and for whom the expert has testified for in the past. Likely this is listed on the expert's *CV* and/or web page. If not, one should send a letter to the prosecutor(s) requesting these specifics. Once armed with this information, find the litigant's attorneys and call them up. If the expert has testified in civil matters one may be able to talk to both sides should the rules of professional conduct permit. At the very least, one should find out how the expert did under direct and cross. If possible, one should get a transcript of the expert's past testimony. It is very likely past cases were appealed and thus, getting attorneys to share the transcripts will prove easier, and less costly, than ordering them. Even if the expert's prior testimony was related to a different area of expertise, a copy of the transcript will reveal much of the expert's personality which will aid in preparation. There is no logical reason for an attorney to be meeting an expert witness for the first time on the day of testimony. With this in mind, despite time limitations, the attorney doing the cross of the expert should be intimately involved in the investigation of the expert. Of course, given time limitations, this seems a task better left to an investigator or new attorney. Yet, if experts win cases, one should leave little room for confusion or misinterpretation of the expert's background and character.

ii. The Attorney Must Be an Expert

Like initial questions concerning the expert's intimate background, initial substantive questions should deal with the minutiae of the field which is being addressed. One must come up with ways to let the expert know, from the start, one small mistake will likely result in embarrassment. One need only imagine the damage created when experts feel they can run the gamut without any fear of the defense attorney being able to articulate compelling questions. To belabor the point, think of this as a boxing match - there is no better way to set the tone than to throw some really sharp jabs in the first seconds. The result is a fighter taking a far more defensive and safe posture. Such a posture may well translate into looking more and more like reasonable doubt.

c. Leaving the Reservation

Many experts just cannot help themselves - they have to provide opinions which they are not qualified to give. When this happens attorneys are called upon to dig deep and really notch up their performance.

When experts offer testimony outside of their area of expertise, the attorney may easily object. Yet, what may be easy may not be most effective. Sometimes it is best to let the expert testify, even at length, outside their area of expertise. Then, when crossing the expert, an attorney may go into detail as to what the area of expertise is and how the offered prior testimony is outside of the expert's area of expertise. At this point an attorney may ask the judge, in front of the jury, to strike the prior testimony and instruct the jury appropriately. If questioned why the attorney waited until cross-examination for the objection, it may simply be explained that it was only during cross-examination the area of expertise was further defined and thus, found to be lacking as it pertained to the offered testimony. Clearly, each approach has advantages and disadvantages. Yet, there is something, almost poetic, about having the government present testimony which has to be stricken. Ultimately, it may call into question all opinions of the expert - even those the expert was qualified to provide. It demonstrates a witness who will gladly offer opinions as to matters he is unqualified to give and best of all, an attorney may have this backed up by the striking judge.

d. No! Please Call Your Expert!

i. Helping Create Reasonable Doubt

There are certainly times when one may not keep experts out of the courtroom and there is no really good way of attacking their opinion without looking like a sorry ankle-biter. Anticipating this, the government's attorney will usually suggest a stipulation to facts. Many defense attorneys will go through the internal dialogue which asks "if I'm going to have to suffer a good two weeks of being thrown off every corner of that darn courtroom, why in heaven's name shouldn't I make life a little easier by stipulating to facts which are going to be proven, and well, no matter what I do?" So, besides loving the assumed role as pain in the butt, why would counsel not just merely stipulate to the obvious and redirect the attack to a more fruitful area?

The answer to the above question centers around burden. Almost all cases will not center around a client's innocence but rather, will rest on the notion of the government failing to meet their burden. Thus, when the government shows they have the ability to bring in highly qualified experts it creates a stark contrast to when their other evidence is lacking. Hopefully, the government's expert has an impressive background and was flown in from Cairo. Thus, during summation, it should be asserted, "when the government needs an expert they get one and fly them in from Cairo." Again, the defense attorney's argument usually centers around "the government's lack of evidence." Thus, the defense must show how the government can fly experts in from Cairo when necessary. Never deny yourself of a witness which shows the government's superior ability to find evidence IF it exists. The jury's understanding must be "if there was evidence out there the government would have brought it."

ii. Make the Government's Expert Do Your Lifting

An attorney, when questioning a government's expert witness, may slyly use the government's expert to advance an important defense theory. This is much easier than one would imagine given the line of questioning may never have been reviewed during the government's trial preparation with their expert. It is always nice to ask questions which have not been hammered out prior to the testimony. With that in mind, all adverse witnesses should get a question not in their play-book. The answer, and the doors which fly open, will certainly have the potential to amaze.

If, for example, the government has found 40 kilograms of cocaine base, and they attribute it to a defendant, the question of distribution versus personal use will be addressed. Certainly, the attorney will not spend too much time attacking the question of personal use. Yet, one would discuss with this expert the structure of drug dealing and how there is a massive amount of manpower employed when taking drugs from the field to the point where they are finally bagged and distributed. Hence, with so many people involved, and so much searchable data created by proffers, a defense attorney will later be poised to ask the jury "with all of this why is there no evidence concerning my client being mentioned in the data?" Thus, the above is a good example of using the government's expert to illustrate the structure and frequency of proffers and the amazing wealth of data the government receives. This will help the defense when you are able to point out there was no mention of your client's name in this expansive data base.

Additionally, let us say the client was found to have the drugs secreted away in his luggage when he arrived at customs. The attorney may need to argue the client had no knowledge the man who lent him the bag had lined it with drugs. Thus, an attorney will want the government's expert to testify as to the structure of the drug trade. In order to do this, the attorney will need to make sure the government's expert is allowed to testify as to the area of expertise now being addressed by the defendant. This expanding of the expert's area of testimony may be done during the qualifying stage. Initially, the government will ask the expert about his training and experience. During cross-examination, during the qualifications stage, it will be incumbent upon the defense attorney to lay a foundation which allows this expert to be qualified in "all areas of drug trafficking." This will include knowing about roles assumed by leaders all the way down to the corner sellers. Given

the expert will want to impress the judge and jury, he will not be shy when exaggerating his vast experience and knowledge concerning "all areas of the drug trade." A good question during the qualification stage is "so, Mr. Expert, you are in reality an expert as to all areas of the drug trade?" When the government attempts to move the expert in for purposes of "providing expert testimony on amounts and packaging of drugs which are consistent with distribution" the defense attorney will be asked by the Court if there are any objections. In response, the defense attorney should ask for the expert to be allowed to offer opinions, given his vast area of expertise, as to all areas concerning the drug trade. This of course will allow you to assert your own theory using the expert. It is likely the government will not object. If they do, remember the supreme rule - judicial economy. "Your Honor, all I'm attempting to do is move this trial along as fast as possible without having to present a line of experts when one will suffice."

Now that the expert is on the stand the defense attorney is free to draw a schematic, which would most likely look like a pyramid. At the top is the "King Pin" and at the bottom is the person who transports the drugs - the client. The expert will agree that the lower you go on the triangle the less likely the participant will have an understanding of what is going on. The final question to this particular expert will be "isn't the entire design of the enterprise to keep the lower echelon workers as much in the dark as possible?" With this, you have used the government's expert to push your theory - which is of course "the courier was in the dark as to drugs." Moreover, you did not have to worry about counter experts or previewing your exact strategy to the government. Naturally, the government has a host of objections they could make. Depending on the Court, some of these objections will be sustained; others will not. In many instances the prosecutor will not even take note until it is too late.

Obviously, there are a number of permutations this type of strategy can take. Yet, as suggested above, do not simply look at the government's expert as a resistance point. A creative attorney should always think of roles all witnesses, defendants or prosecutors, may take during a trial.

4. Presenting an Expert

The above provides a host of tactics one may use when hurting the government's expert. Almost all of these problems can easily be used when destroying a defendant's expert. Thus, it is best to keep the above presented issues in mind when preparing an expert. No question should be too hard for the expert to weather. If the expert cannot handle the hardship of the hiring attorney's questions, the expert will face certain difficulty when the government has their way with him. It never hurts to test the mettle of a witness in private.

a. Primp, Prime & Beat Up Your Own Expert

First, the expert should be factually informed about the matter as much as possible. While testifying, if an expert ever displays a lack of understanding as to the facts of the case, the jury will be immediately influenced. Ultimately, the expert should sound like an unbiased witness and less like an advocate. Quibbling over peripheral issues, losing one's temper, crossing one's arms and being combative are all great ways of flushing this witness away. The expert should be trained not to answer questions unless they are asked and to NEVER assume facts not clarified when answering hypothetical questions. When experts request clarification, it makes them look more careful and the questioning attorney more careless. Unfortunately, given the time restraints placed on attorneys, lawyers tend to get a false sense of comfort with an expert and begin to assume the expert will be an expert witness in all regards. Surely, experts will know their field. Yet, do they know the art of testifying?

Hopefully, the expert will have done some independent study as to what makes a "good" or "bad" witness. Asking an expert what their understanding of a "good" witness is may not be a bad

starting point when evaluating the expert's level of sophistication. Remember, experts are fungible and "Mom," the alibi witness, is not. If your expert is a great expert and a bad witness, use her as a consultant and get an expert who presents well before the jury.

The hiring attorney should beat up his own expert far worse than opposing counsel will. One should go over every item on the expert's *CV*, with the expert, and provide a chance to edit things out. A good place to start is to ask the expert to review his own *CV* for any corrections, outdated memberships, etc. If the attorney requests this, in an appropriate manner, prior to receiving the *CV*, the expert will have a good idea of what is being asked for and remove possible problems before having to discuss them. This does not mean the attorney should forgo a later line by line review of the *CV* with the expert. What is good for the goose is good for the gander. Attorneys should shred their expert's *CV* prior to finally sending it to the government.

A hiring attorney should additionally request, and later contact, prior clients. This will help clarify weaknesses and strengths faced when utilizing expert testimony. There is no excuse for not contacting the expert's past clients. If possible, copies of transcripts should be obtained from other attorneys and/or the expert. Remember, if an expert takes exception to any of this the attorney should be alarmed.

Dress your expert. An attorney must decide what role the expert is going to play; teacher, critic, etc. We dress our clients and their families when possible thus, one should do the same with the expert. Teachers wear tweed and physicians wear blue blazers and thus, one must decide what role an expert is going to play and select appropriate attire. If handled well, the expert may come to appreciate the attorney's comprehensive and effective approach.

b. Invite Your Expert to The Show

Unlike most witnesses, experts are not sequestered. In fact, they are allowed to base their testimony on information gleaned during the trial's presentation. Certainly, it may be foolish, and too expensive, to have an expert sit through the entire trial. But the expert should be there during all relevant testimony and evidence presentation. An attorney's expert is likely to be a far more powerful critic of another expert's conclusions if the critic can say "I was in the court when Dr. Andrews said.....and his opinion is flawed based on...."

In the inverse, keep tabs on when the government's expert is in the room. It may look a little embarrassing to the government's expert if they decide to miss key testimony which would have impacted upon their opinion. It is certainly appropriate to ask what information an expert used to come to an opinion. If an expert can be made to appear to be purposely limiting exposure to data, or ignorantly doing so, a jury should be alerted. This is especially so when the government's expert could have been privy to testimony which would have had an important bearing on stated opinion.

c. Simplicity

DESTROY the discipline's lexicon. Most areas of expertise have their very own lexicon. Whenever possible, one should use words and phraseology which are well known to the jury prior to their being selected. Surely, part of the job is to teach the jury a number of things. Yet, the more one teaches a jury the less they will understand and/or remember. It will be hard enough for them to learn a new area of expertise let alone have to conform to the arcane subject matter's new language. Remember, the attorney is providing tools to the few jurors who will be advocating the defendant's position during deliberations. Thus, the attorney should provide these individuals with easily understood and utilized ideas. Each word, as it is uttered during witness preparation, should be evaluated. Merely using words such as "methodology" may make no sense to many potential jurors. Surely, methodology may be a critical concept during presentation. Yet, one should be talking about "the correct way to do it" rather than using words such as "methodology."

Some experts have pet theories which are

rather fascinating and yet, are too complicated to present to a jury. One must be mindful of what may be culled from the expert's presentation. Government attorneys are famous for over-litigating. There is no reason for a defendant to follow suit. Obviously, this is a tricky area and every possible attack should be mounted. Yet, jurors, like many people, have a limited attention span. To add to the problem, jurors have varying retention abilities. Let them forget the government's long-winded presentation and retain the defendant's well structured, simple and concise presentation. If a juror cannot articulate a party's theory, they will have a harder time conveying it during deliberation.

Using visual aids during the expert's presentation is important. According to www.litigationgroup.com the retention rate for jurors is increased by 200% when accompanied by visual aids. Again, if experts win cases why would one not use every tool possible when increasing the likelihood of their effectiveness? Naturally, these visual aids should be simple to understand and each presentation should have as little information as possible.

d. Qualifying Your Expert

Many attorneys give the process of qualifying an expert in front of the jury too little thought. Sometimes, even the questioning attorney seems to be falling asleep while they qualify their own expert. Admittedly, this is not the highlight of the expert's testimony.

Jurors, like many people, have limited attention spans. When attention is lost, retention flat-lines. Attorneys love to begin their openings and closings with niceties, introductions and grand themes. By the time the attorney gets to the heart of the argument the jury has already entered the REM cycle. It would seem impractical, if not criminal, to spend the jury's most focused five minutes thanking them, speaking of their important duty and introducing one's self. If one was to observe attorneys, and time the span between the first words and the addressing of substantive issues, it would be obvious how many minutes had been wasted. This slow start may indicate to the jury the attorney really has nothing to say; otherwise, it would have been said.

The same idea holds true for qualifying the expert - one is chewing up vital time during the qualifying process. Unfortunately, good qualifications will be vital when one wants the jury to trust and use an expert's opinion. Thus, one walks a fine line. One way of making this process easier is to use a demonstrative piece of evidence - as in a blow up of the expert's *CV*. With this, the attorney may have the expert testify about qualifications as they point to the back drop. An added plus to this means the expert can indicate specific areas and summarize their achievements rather than provide laborious detail. Naturally, an attorney should select the really good details. Again, with a 200% increase in retention when information is visual, this may help during deliberations should a battle of the experts come into play. Finally, people seem to believe the written word more than the spoken word. With this, there seems no good reason to not present the *CV* on 5x 7 foot cards. It sounds staged and yet, one gets extra retention, a simplified presentation and the additional credibility of the written word.

If nothing else, the attorney MUST highlight the expert's hands-on experience during the qualifying stage. Jurors loathe academics who have no real world experience. Experts get far more respect when they can talk about how they muddied their hands and are not relying solely on text book knowledge.

In the end, the clock is ticking. Thus, one should get out of the qualifying area as fast as possible without short changing the important targets. At the same time, an attorney should never rush cross-examining the government's expert during the qualifying stage.