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Criminal Defense Newsletter

A JOINT PUBLICATION OF THE SAN DIEGO CRIMINAL DEFENSE BAR ASSOCIATION AND THE CRIMINAL DEFENSE LAWYER'S CLUB

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CDBA/MCLE SEPTEMBER MONTHLY MEETING

September 23 Meeting:

Athens Market
First and F Downtown

5:00–5:30 p.m.
Social Hour

5:30–6:30 p.m.
Program

Graham McGruer

on
CDCR

Please Note:
This month's meeting has been moved up one week due to the Rosh Hashanah holiday on September 30th.

PRESIDENT'S COLUMN BY MICHAEL L. CROWLEY

There is a watershed change occurring before our very eyes in federal court sentencing. For more than twenty years federal defendants and practitioners have labored under the strained and fallacious notion of national uniformity in sentencing, which was and still is represented by the Sentencing Guidelines. This wasn't a good idea to begin with. What it really amounted to was the establishment of numerous sentencing rules to eschew taking into account the particular defendant and also to exclude personal predilections of the judge making the decision.

It was a bad idea because a couple kilos of pot discovered through a border bust in San Diego by the lowest person on the drug distribution trail should not be subject to the same sentence as a person in rural Idaho with the same amount who may be the largest dealer in three counties. It also lacked an acceptable rationale because people commit crimes for many reasons and each individual's punishment allowing for potential rehabilitation should be tailored to that person.

Moreover, under the Guidelines, a sentence could vary by as much as decades of imprisonment based on determinations by "bureaucratically prepared, hearsay-riddled presentence reports", as Justice Scalia put it in *Booker, infra*, and often without evidentiary hearings or the benefit of a jury determining the facts. Eventually, the Supreme Court decided this was a violation of the Sixth Amendment right to trial causing this change.

I have been practicing long enough to remember, barely, the days before the Guidelines. I remember our esteemed colleague, Judy Clarke, then head of the local Federal Defender's office saying very presciently, the bad news is the sentences in these Guidelines are draconian in nature, raising the sentences on nearly all offenses, but the good news is that this book of Guidelines will be litigated in every facet for decades to come. So true, and the amount of time of the courts have been occupied parsing the words of the at least annually amended Guidelines has been incalculable.

A quick history of what led to this coming change is in order. The Guidelines came into effect in 1987 and the district court judges immediately recognized the defenestration of their powers.[1] They welcomed a Constitutional challenge and locally arranged an unprecedented *en banc* panel of themselves. They found the Guidelines unconstitutional as a violation of separation of powers (i.e., the argument in essence was that the Guidelines Commission who propagated the Guidelines consisted of executive, legislative, and judicial appointments blurring the lines of the branches as established by the Constitution). Judge Lawrence Irving, to his everlasting credit, refused to be part of a system that used charts to determine a sentence, barely taking into account the person, and he resigned from the bench.

But the U.S. Supreme Court said that federal sentencing "never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government," and upheld their Constitutionality. *United States v. Mistretta*, 488 U.S. 361, 364 (1989). Only Justice Scalia dissented.

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[1] I remember being in the late Judge Judith Keep's courtroom when a class of students came in to observe. The teacher proudly told Judge Keep that he had been a member of the Parole Commission prior to teaching and they were the first to have sentencing guidelines. Judge Keep retorted sharply, "we don't like the Guidelines around here."

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The sedulous journey leading to the demise of the Guidelines gives an interesting view of Supreme Court politics. Beginning with the so-called liberals of the court breathing life into the Sixth Amendment's right to trial by jury in the cases of *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the cudgel was then carried by the most conservative members of the court in *Blakely v. Washington*, 542 U.S. 296 (2004), who were also joined by part of the liberal wing stating essentially facts that raise sentences above discretionary levels must be decided by juries. On its face, *Blakely* seemed to signal a death knell for the Guidelines, although the challenge didn't directly concern the federal Guidelines, but rather the State of Washington's similar sentencing scheme.

Not so fast said Justice Breyer, who was the lone liberal holdout, attributable to his obeisance to the Guidelines. This seemingly came from his having first been a lawyer for the Senate Judiciary Committee in the late 1970s when the Guidelines legislation was moving and then as a member of the Sentencing Commission from 1985 to 1989. In fact, before Justice Breyer wrote the Guidelines resurrection in *United States v. Booker*, 543 U.S. 220 (2005), it was reported that he consulted counsel as to whether it was an ethical conflict for him to sit on the case. He received the advice that since he was no longer on the Commission, there was no longer any reasonable basis to question his impartiality on the issue of the validity of the Guidelines. Justice Breyer proceeded to write *Booker*, making the Guidelines *advisory* and, therefore, Constitutional, but adding that appellate courts would review the sentences for reasonableness. There was little or no advice on what was reasonable.

Of course, the lower court judges, for the most part as predicted by Stevens and Scalia in their dissents to Breyer's opinion, continued to follow the Guidelines as if they were mandatory. Many appellate courts found that a Guidelines' sentence was presumptively reasonable, which the Supremes in *Rita v. United States*, 127 S. Ct. 2456 (2007) said was basically acceptable. And so, it appeared that the Guidelines had survived intact. The final chapter, however, was not yet written. At the end of 2007, the top court issued *Kimbrough v. United States*, 128 S. Ct. 558 (2007) and *Gall v. United States*, 128 S. Ct. (2007), which arguably changed it all.

Kimbrough and *Gall* changed the appellate court oversight of the district courts giving essentially a strong presumption that whatever the lower court decides for a sentence is going to stand on appeal. In *Kimbrough*, the court reversed the Fourth Circuit's finding that the notorious crack/powder sentencing disparity had to be adhered to, allowing for a large deviation from the Guidelines.

The court emphasized the statutory sentencing requirements of 18 U.S.C. section 3553, which is now the rubric by which we must all live. It states:

3553. Imposition of a sentence factors:

(a) Factors to be considered in imposing a sentence. **The court shall impose a sentence sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for . . .

In *Kimbrough*, the court put particular emphasis on what has been called the "principle of parsimony"[2] or if you want to show off your sapient side to the court, tell them they are required to use *primatus parsimoniae*. That is, **impose a sentence sufficient, but not greater than necessary**. This phrase must become our mantras.

Through *Kimbrough* and *Gall*, the Supremes unshackled the sentencing judges from the mandatory nature of the Guidelines, and although they do have to consult the Guidelines (initially and correctly), the Supreme Court made it clear that the judge has the discretion pursuant to the 3553 factors to fashion an appropriate sentence. It is now our job to drive home that point.

Although those on the bench at the time decried the advent of the Guidelines, attrition has eliminated most of those jurists. Those now facing the watershed change have, frankly, had it easy for the past twenty years by just consulting their Guideline charts and occasionally having to make a legal ruling for sentencing. They were comforted by the prevalence of near rubber stamping by higher courts of whatever the Guideline commission had propagated.

The federal judges will now have to make those tough decisions about a person and the proper punishment that their

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[2] *See Brotman, From Jones to Rita, Gall and Kimbrough . . .,* 22 White-Collar Crime Litigation Reporter 8 (May 2008). *See also,* Ellis and Feldman, *The Supreme Court Finally Fulfills the Promise of Booker,* 25 Federal Sentencing and Post-Conviction News (Winter 2008); and Federal Public Defender's Office Sentencing Resource Manual (Sept. 2008). I will post these on the CDBA/CDLC website.

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state colleagues have been making for decades. No more hiding behind their charts. Some judges in the Southern District of California have embraced the change, sometimes for the betterment of the defendant and sometimes to their detriment. Others have clung to the Guidelines, unable to wean themselves from their insouciance and justifying their adherence with the notion that sentencing within the Guidelines promotes the uniformity prong of section 3553.

This is false comfort. The Supremes have specifically answered that argument in *Gall*, approving language from the earliest relief of Guidelines inflexibility, *Koon v. United States*, 518 U.S. 81, 98 (1996), stating "a more deferential abuse-of-discretion standard could successfully balance the need to 'reduce unjustified disparities' across the Nation and '*consider every convicted person as an individual*.'" *Gall*, 128 S. Ct. at 598, n.8 (emphasis added). This language should be included in all our sentencing memorandums to educate these judges.

So, federal practitioners jobs have gotten more difficult at sentencing. It has been easy to provide the court with perfunctory information about our clients because we saw it seldom had an effect on the sentence. Now is the time to spend much more time with your client and find out what that person is all about. It is your duty to separate that person from the rabble before the court and personalize that person.

We know that the probation department is not going to do it because they are stuck in a mental Guidelines dungeon. Their answer to Supreme Court ordered innovation is to add a paragraph in bold at the beginning of the recommendation section of the Presentence Report claiming the 3553 factors have been taken into account. This is a lie. I am fond of telling probation officers that some day the Committee on Criminal Law of the Judicial Conference of the United States Courts, the oligarchy to which they must pay allegiance, could change and the judges start demanding a real report.

What specifically do we do? Unfortunately, nearly all our cases end up at some point with a sentencing so you might as well start preparing immediately. You, your investigator, and your client's family have to be mobilized to provide the documentation, photographs, and testimonials to establish that the Guidelines and the government's idea of a sufficient sentence is erroneous. We need to guide this investigation. For example, in the typical illegal entry case do we want letters about how much they miss their father? No, we want letters that talk about how they are going to make a new life south of the border stating why the defendant is not going to come back again.

We need to continuously and methodically shake our court out of its benighted state and enlighten them with this new paradigm. This is new to them and it is a cultural change, but it is our job to push that change.

KUDOS, KUDOS, KUDOS!

Congratulations to **Nancy Kendall** who, after more than three years of litigation, including a writ coram norbis, was successful in convincing Judge Moskowitz to resentence her client from a twenty year sentence to an eight year sentence. This was a case where Nancy's client had admittedly committed perjury at more than one trial, had an extensive prior record (which Nancy expunged), and yet, after an evidentiary hearing, Nancy was able to secure Safety Valve relief for her client (over the government's objection). This is an incredible result, as much of the work was done pro bono, and Nancy saved her 70-plus year-old client from essentially a life sentence. Way to go Nancy!

Kudos to **Michael McCabe** who received not guilty verdicts across the board after a 3 ½ week trial in Brawley. Client is a medical doctor who was alleged to have sexually abused an adult patient. He was charged with three counts: oral copulation on an unconscious victim, sexual battery, and sexual exploitation of a patient by a physician. Another patient testified to similar misconduct, and there was a tape recording of a statement with almost an admission by the client. Nevertheless, Michael prevailed for his client, who was facing nine years in prison, loss of medical license, and deportation to the Philippines. The jury was out 4 ½ hours and came back with not guilty verdicts on all counts. Congratulations Michael.

Hat's off to **Juliana Humphrey** and **Doug Miller** who obtained a life verdict in a death case. DA wanted death on case where boyfriend beat girlfriend to death after rough sex. Juliana and Doug put on defendant's mother's divorce attorney who had filed a motion to be relieved because defendant's mother was crazy (back when defendant was a small child). Apparently, in divorce court she had said that she only wanted defendant's brother and did not care if the defendant lived or died. Jury found for life on the fact that defendant was so messed up by the divorce that he did not deserve the death penalty.

Congratulations to **Kate Thickstun** who, in the Peregrine prosecution (two trials, two hangs, case dismissed), managed to persuade a magistrate to rule that her CJA client did not have to pay the remaining monies owed for his defense.

THE FEDERAL TATLER © BY JOHN LANAHAN

No. 130: *Nunc Pro Tunc* Gem Among the Mems: *US v. Navarro*

The 1980's produced many things, among them many of our children, great music, music videos, the Sentencing Guidelines, and minimum mandatory sentences. There may be some debate over the relative merits of some of these, but no one rises to the defense of minimum mandatory sentences. After *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 128 S.Ct. 586 (2007); and *Kimbrough v. United States*, 128 S.Ct. 558 (2007), the mesh of the guideline net has been expanded, but very few things can penetrate the minium mandatory barrier. In drug cases, there is the "safety valve," set forth at 18 U.S.C. § 3553(e) and U.S.S.G. § 5C1.2 (you seasoned, and certainly jaded, federal practitioners can skip this section).

There are five requirements to getting the safety valve: (1) no violence or weapons involved; (2) no death or serious bodily injury; (3) not an organizer; (4) prior to sentencing the defendant must "truthfully" provide the prosecution with all information and evidence s/he has concerning the offense or offenses; and (5) not more than one criminal history point. The last two, telling the prosecution what the client knows about the offense (the basis for a recent victory by San Diego's own Nancy Kendall in a habeas corpus proceeding before Judge Moskowitz), and no more than one criminal history point, are the most common impediments to getting the safety valve. The last one, more than one criminal history point, is the most frustrating because it seeks to erase the moving finger of time and change history.

Most federal practitioners in this district (jaded or otherwise) have had a client who was on probation for some very minor offense, such as driving on a suspended license or reckless driving, when s/he commits or is involved in a drug offense that carries a minimum mandatory sentence of five or ten years. Under U.S.S.G. § 4A1.1(d), a person gets two criminal history points for committing the current federal offense while on federal or state probation. Therefore, someone who was driving on a suspended license, who gets three years summary probation, and is arrested for a federal drug offense one day short of the day the probation expires, faces a minimum mandatory sentence of five or ten years for certain drug offenses. If the safety valve applies, the minimum mandatory barrier disappears and with adjustments and departures a ten year sentence can get reduced to three years or less.

In one recent case I had, the client was on probation for a "wet reckless" in Victorville, fell behind in paying the fine because he lost his job, and a warrant issued that tolled his probation. He was therefore on probation when he was arrested at the border with eight kilos of cocaine and had three criminal history points and was not eligible for the safety valve. Had the state warrant not issued, his state probation would have expired five months before his arrest in the federal case and he would have been eligible for the safety valve.

One way to correct this is to collaterally attack the underlying conviction as invalid, and hence the sentence of probation and the term of probation are invalid. I succeeded doing this once because a former defense lawyer in San Diego, who became a DA in Imperial County but still had a heart, agreed not to oppose my motion to vacate my client's guilty plea to driving on a suspended license because in all likelihood (now there's a standard of review I like) the client had no counsel during a mass guilty plea in Brawley. That was very fortuitous.

Another way is to go back to state court and *nunc pro tunc* the probationary term, so that an amended state court judgment reads that the probationary term expired prior to the commission of the federal minimum mandatory offense. There is no reported Ninth Circuit case on this. There is a reported Eighth Circuit case, *United States v. Martinez-Cortez*, 354 F.3d 830 (8th Cir. 2004), that holds that a *nunc pro tunc* order does NOT reduce the criminal history because it is a modification of a prior conviction that is not related to guilt or innocence, and therefore must be counted under Application Note 10 to U.S.S.G. § 4A1.2. The Ninth Circuit has cited *Martinez-Cortez* only once, in a obliquely favorable way, where it held that it could not be shown that trial counsel was ineffective for failing to move to *nunc pro tunc* a prior criminal sentence, in an unreported decision, *United States v. De Garcia*, 159 Fed.Appx. 782 (9th Cir. 2005).

And now to the point of this article. There is, however, another memorandum decision, *United States v. Navarro*, 259 Fed.Appx. 924 (9th Cir. 2007), appealed and won by San Diego's own John Lemon, which reversed and remanded a minimum mandatory sentence, over a dissent by Judge Fernandez, where the local district court found the defendant ineligible for the safety valve despite a *nunc pro tunc* order that terminated a client's probation for driving on a suspended license to one day prior to his arrest in the federal case. 259 Fed.Appx. at 925. The Government, I'm sure fearing that Petition for Rehearing could result in a published *en banc* decision against it, did not seek rehearing, and no Petition for Writ of Certiorari was filed, so the decision is final. Under Ninth Circuit Rule 32-1(a), this memorandum opinion may be cited and so is the only Ninth Circuit decision specifically on the *nunc pro tunc* issue. So, use this gem buried among the memorandum opinions.

John Lanahan has been a lawyer for the accused for almost 30 years, first in Illinois and now in California. His practice includes cases in both state and federal court, ranging from capital trials while a Public Defender in Chicago, to handling appeals in both state and federal court as well as state and federal post-conviction petitions. He is a past-President of the San Diego Criminal Defense Lawyer's Club and lectures and teaches in areas of criminal practice, most recently as a faculty member for the Darrow Death Penalty Defense College at DePaul School of Law in Chicago.

LYNCHING, EXPLOSIONS, PATHWAYS, AND JUSTICE BY GEORGE MICHAEL NEWMAN

(The following is an edited extract from the author's manuscript/presentation, *Ganging Up: Roots & Routes; A Current of Colossal Synthesis*.)

It was the largest and longest-running court martial of World War II, and occurred in the same year as the courts martial emanating from the massive explosion at Port Chicago, near San Francisco, California. Both events would contribute to shaping what was to become the Civil Rights Movement, which is generally defined as beginning roughly a decade later. The events relate in ephemeral context along with other events which in loose emphasis fed into the formulation of today's prison gangs; in this instance, the *BGF*; Black Guerilla Family.

The U.S. Army's Ft. Lawton, in the Seattle, Washington area, in 1944 housed Italian Army prisoners of war. Disturbances between Black servicemen, who were upset at the prisoners allegedly being better treated, and the incarcerated Italians were dubbed rioting, and during the riots an Italian prisoner was found lynched.

Port of Chicago explosion aftermath

Forty-three Black servicemen were initially charged with riot offenses; three would also face manslaughter convictions, for the only known instance of Black Americans being tried for lynching. Two attorneys were assigned to represent all forty-three defendants. They were given 10 days' preparation before trial. Prosecutor Leon Jaworski, later to be assigned as Special Prosecutor during the *Watergate Affair*, denied counsel access to the government's own investigation report, which later would reveal extreme taint to the allegations. As revealed by journalist Jack Hamann, author of On American Soil, Jaworski "disingenuously, and it's clear now, illegally, and unethically" hindered representation of the defendants. Ultimately, twenty-eight were convicted of rioting related charges, and two were convicted of manslaughter, subsequently sentenced to hard labor, loss of military pay and benefits, and Dishonorable Discharge.

The Ft. Lawton incident followed by roughly one month the explosions which occurred at Port Angeles, in what was described as the worst disaster of the war on U.S. soil. Naval ships being loaded with munitions exploded, leveling buildings for miles around, wounding nearly 400 and killing 280 predominantly Black servicemen.

Surviving servicemen, soon ordered back to clean-up and continue to load munitions, refused, citing safety concerns. As a result, 50 faced court martial, charged with mutiny; a potentially capital offense during wartime. Convicted, the men were issued Dishonorable Discharges, resulting in the lifelong denial of benefits and credits.

Reportedly, the sensational national press coverage of both events spurred demand for equal and civil rights, and in some quarters gained notable support; Eleanor Roosevelt reportedly took an interest which, in part, would lead to the recognition of, and combat opportunities for, Blacks, to include the Black airmen who would become known as the respected *Tuskegee Airmen*.

In other-than-Black communities, the inequalities inflicted on the minority Black service personnel rankled a sense of fairness amongst many, particularly since the stage on which the dramas played out reflected the U.S. military and the contributions made by Black military members.

Coupled with the empowerment of the growing national-level swell emanating from the turn-of-the-century *New Negro* movement striving to leave behind the slavery identity, military service bestowed a mantle of legitimate expectation[1] for those who had served.

Such expectations would come to fruition in many ways. In 1948, the military was officially desegregated. The benchmark legislation represented in *Brown v. Board of Education* in 1954, followed by 1957's *Civil Rights Act*, the *Civil Rights Acts* of 1964 and 1968, and 1965's *Voting Rights Act*, sealed a reversal of the 1857 *Dred Scott Decision*, which had declared Blacks could never be citizens; a century-long process begun with the 1865 and 1868 reversals of the *Dred Scott Decision* by the Thirteenth and Fourteenth Constitutional Amendments.

As the mid-'50s-mid-'60s fostered the civil rights movements, the 1965 official insertion of combat troops into Vietnam signaled a new era, of militarism, as exemplars of social rifts were embodied by events akin to the *Watts Riots* of the same year.

Founded in 1930, initially as a splinter group of the *Moorish Science Temple*, the *Nation of Islam* ("NOI") had come to national recognition largely resulting from the 1957 encounter between Black New Yorkers and police resulting from the beating of a Black man; thousands strong, angry and facing off with police, the crowd was nonetheless dispersed by Malcolm X's *Black Muslim* cadre upon the Muslims having negotiated hospitalization and representation for the injured man. Muslims began organizing in prison systems. In spite of a 1959 expose

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[1] *In 1883, the Supreme Court ruled 'Indians' were "by birth" defined as "aliens", as non-citizens. The first reversal of this and numerous subsequent oppressive regulations inflicted on Native Americans over the ensuing decades came in 1919, when 17,000 who had served in WW I were granted citizenship. In 1924, Native Americans were universally granted citizenship.*

PREEMPTIVE STRIKES AGAINST PROTEST AT RNC—BY MARJORIE COHN

In the months leading up to the Republican National Convention, the FBI-led Minneapolis Joint Terrorist Task Force actively recruited people to infiltrate vegan groups and other leftist organizations and report back about their activities. On May 21, the Minneapolis City Pages ran a recruiting story called "Moles Wanted". Law enforcement sought to preempt lawful protest against the policies of the Bush administration during the convention.

The weekend before the convention, local police and sheriffs, working with the FBI, conducted preemptive searches, seizures, and arrests. Glenn Greenwald of Salon described the targeting of protestors by "teams of 25-30 officers in riot gear, with semi-automatic weapons drawn, entering homes of those suspected of planning protests, handcuffing and forcing them to lay on the floor, while law enforcement officers searched the homes, seizing computers, journals, and political pamphlets." Journalists were detained at gunpoint and lawyers representing detainees were handcuffed at the scene.

"The neighbor of one of the houses had a gun pointed in her face when she walked out on her back porch to see what was going on. There were children in all of these houses, and children were held at gunpoint."

"I was personally present and saw officers with riot gear and assault rifles, pump action shotguns," said Bruce Nestor, the President of the Minnesota chapter of the National Lawyers Guild, who is representing several of the protestors. "The neighbor of one of the houses had a gun pointed in her face when she walked out on her back porch to see what was going on. There were children in all of these houses, and children were held at gunpoint."

The raids targeted members of "Food Not Bombs", an anti-war, anti-authoritarian protest group that provides free vegetarian meals every week in hundreds of cities all over the world. They served meals to rescue workers at the World Trade Center after 9/11 and to nearly 20 communities in the Gulf region following Hurricane Katrina.

Also targeted were members of I-Witness Video, a media watchdog group that monitors the police to protect civil liberties. The group worked with the National Lawyers Guild to gain the dismissal of charges or acquittals of about 400 of the 1,800 who were arrested during the 2004 Republican National Convention in New York. Preemptive policing was used at that time as well. Police infiltrated protest groups in advance of the convention.

Nestor said that no violence or illegality had taken place to justify the preemptive arrests. "Seizing boxes of political literature shows the motive of these raids was political," he said.

Further evidence of the political nature of the police action was the boarding up of the Convergence Center, where protesters had gathered, for unspecified code violations. St. Paul City Council member David Thune said, "Normally we only board up buildings that are vacant and ramshackle." Thune and fellow City Council member Elizabeth Glidden decried "actions that appear excessive and create an atmosphere of fear and intimidation for those who wish to exercise their first amendment rights."

"So here we have a massive assault led by Federal Government law enforcement agencies on left-wing dissidents and protestors who have committed no acts of violence or illegality whatsoever, preceded by months-long espionage efforts to track what they do," Greenwald wrote on Salon.

Preventive detention violates the Fourth Amendment, which requires that warrants be supported by probable cause. Protesters were charged with "conspiracy to commit riot," a rarely-used statute that is so vague, it is probably unconstitutional. Nestor, who said it "basically criminalizes political advocacy," added that the timing of the arrests was intended to stop protest activity, "to make people fearful of the protests, but also to discourage people from protesting."

Nevertheless, 10,000 people, many opposed to the Iraq war, turned out to demonstrate on the first day of the convention. During that demonstration, law enforcement officers used pepper spray, rubber bullets, concussion grenades, and excessive force.

More than 800 people were arrested during the convention, including journalists from the Associated Press and Amy Goodman, the prominent host of Democracy Now!, as well as two of the show's producers. "St. Paul was the most militarized I have ever seen an American city to be," Greenwald wrote, "with troops of federal, state and local law enforcement agents marching around with riot gear, machine guns, and tear gas cannisters, shouting military chants and marching in military formations."

In what is apparently the first use of the 2002 Minnesota version of the federal Patriot Act, eight alleged leaders of the RNC Welcoming Committee, a left group, were charged with conspiracy to riot in furtherance of terrorism, for blocking traffic. They face up to seven and one-half years in prison. The affidavit for the search warrant contained allegations from

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confidential informants with no physical evidence to support them. The complaints don't allege that any of the defendants personally engaged in any acts of violence or property damage. Searches failed to turn up evidence to support the allegations of plans for organized attacks on law enforcement officers.

A legal team from the National Lawyers Guild has been working diligently to defend and protect the constitutional rights of protesters. The Minnesota Guild Chapter is preparing several lawsuits against the authorities in St. Paul, arguing that the protesters' First Amendment rights were violated.

The CDLC and CDBA are pleased to announce the creation of an attorney mentoring program. The program will pair interested CDBA/CDLC members with seasoned defense practitioners from both organizations. If you would like to participate as a mentor or a mentee, contact attorney Paul Rodriguez at *Paul.Rodriguez@sdcounty.ca.gov*

The San Diego Chapter of the Federal Bar Association Invites You to a Special Seminar

Criminal Pretrial Issues Panel

featuring

The Magistrate Judges of the United States District Court for the Southern District of California

Wednesday, October 15, 2008
4 P.M. to 5:30 P.M.

Reception to Follow

Federal Jury Assembly Room
(a/k/a the Jury Lounge)
880 Front Street, San Diego

There is no charge for the seminar.

MCLE credit: 1.5 hours

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of the NOI by journalist Mike Wallace, revealing contempt for the civil rights platforms of the era, in 1965 Black Muslims won Supreme Court recognition as a religion in prison.

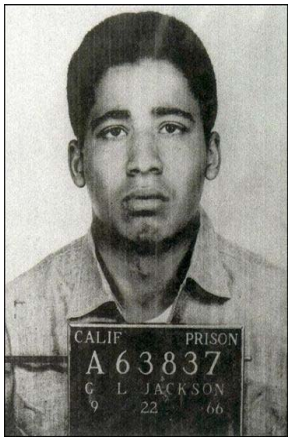
Outside the prisons, the *Black Panther Political Party*, formed in 1965, momentarily bridged the disparity between both the civil rights activists and the religion-oriented Muslims; invoking community service and militarism.

Yet neither the NOI nor the Black Panthers appeared to adequately embrace the plight of Black convicts, caught in the midst of the upheaval that was "the '60s", a time when militarism and revolution were social themes and the concepts of civil rights were being embraced.

Convict George Jackson embodied the roiling times. Enraged as a result of the indiscriminate stabbing of Blacks by *American Nazi Party* members resulting from the 1962 stabbing of Nazi Stan Owens by Black Muslims, and in the midst of the prison yard turmoil of the times, which included the constant state of racial conflict rooted in the California Training Facility at Soledad Prison and pinnacled at San Quentin State Prison; as well as to interdict the reign of dominance held by the recently formed *Mexican Mafia*, Jackson formed the *Black Family* at Soledad. In a short time, the *Black Family* evolved into the *Black Guerilla Family*, at San Quentin, initially envisioned as a prison-oriented revolutionary cadre, which would empower and protect Black inmates. As with the other fraternities which came into dominance within the California prison system throughout the 1960s, and which now dominate in even the federal prison system, the orientation of the *Black Guerilla Family* generally gave way to license and individual survival within the predatory environs of inmate populations.

Meanwhile, those in search of legitimate justice sought remedy for the wrongfully convicted military personnel involved in the Port of Chicago and Ft. Lawton incidents. In 1999, President William Clinton officially pardoned and reinstated those convicted in the Port Chicago incident. In 2008, President George W. Bush officially pardoned and reinstated those convicted as a result of the Ft. Lawton incident.

San Diego Private Investigator George Michael Newman's research into factors often not overtly associated with prison and street gangs, existing as undercurrents, resulted in the formulation of the earlier-mentioned PowerPoint presentation, which encapsulates roughly 150 years of historical events which coalesced in the mid-1960s and subsequent decades as the dominant prison and street gangs of today. Concurrent with the research was interviews of more than 1,000 individuals validated as gang members by law enforcement entities, to include many early members of alleged prison gangs.



George Jackson

MEMBER PROFILE: BRIAN WHITE
BY STACEY A. KARTCHNER

Brian White

CDBA and CDLC member Brian White hails from San Diego. He graduated from San Diego State University ("SDSU") with a Bachelor of Arts in Philosophy. Prior to graduation, he married Devon, who has been his wife for 23 years. Brian met his wife in the 9th grade, began riding his bicycle to her home at the age of 15, obtained his driver's license at the age of 16, and then began driving to her home. Brian and Devon dated on and off throughout high school, and eventually married at the age of 22. They have a daughter named Zoey, who is 12 years-old.

After graduating from SDSU, Brian had planned to attend the University of St. Louis for graduate school; however, three weeks before the semester began, they sent him a letter informing him that the job prospects for Ph.Ds in philosophy did not look too rosy. Brian describes this period in his life as follows:

> My wife came home to find me laying on the floor; I announce I'm not going. She's not happy. First major domestic quarrel. So, I start my quest to find a new direction in life. Thought of the usual jobs: cop, fireman, construction worker, etc. Wife said I hit an all-time low when she came home to find me talking to the mailman – what could be better? Exercise, low stress, lots of sunshine. Didn't go over well. Somewhere along the line someone mentioned law school. . . Wife was happy.

Brian and Devon packed up their 300 square foot apartment and headed to Malibu so Brian could start law school at Pepperdine. During his second year of law school, he obtained a job as a law clerk at Hayden & Kassel, a real estate/probate firm. Once Brian graduated and passed the bar, Hayden & Kassel made him an Associate. At that time, the firm represented an adult bookstore owner who wanted to manufacture and license a replica of the "torso and legs of a porn star, Teri Weigel - minus the torso and legs". Brian had the distinction of drafting the licensing agreement for "Teri Weigel's 'weigel'". After that, Brian surmised that he could do better on his own. So he and his wife moved back to San Diego and Brian hung up his own shingle.

In the beginning, Brian was a general practitioner. Eventually, he got retained on his first criminal case, which started as a misdemeanor petty theft—that is, until he got involved. At the settlement conference, the DDA in the case pulled his client's rap sheet, noticed a 20+ year criminal career, and bumped the case up to a felony. Brian indicated that his client "was a professional con". He further indicated that:

> She'd even been to an underground school in Chicago where you could pick the criminal skills you wanted to perfect—boosting, till tapping, pick pocketing. Judging by her rap sheet, she was a marginal student at best. She knew it was my first criminal case, refused the six year offer, and off to trial we headed. The late Scott Rand and Hank Howlett were very generous in helping me handle the case. DDA Gordon Paul Davis, on the other hand, had a lot of fun with me at trial. Client did, though, get probation.

That experience piqued his interest in criminal law. He was eventually able to dedicate his practice solely to criminal defense. Brian is "very grateful to work among a bar whose members are willing to give of their time and talents to help their colleagues." Moreover, he has "learned a great deal from some wonderful lawyers."

Although Brian's practice is very busy these days, during his downtime he enjoys playing Blues harmonica, roasting coffee beans, and making wine. You can learn more about Brian by reading the anecdotes below.

COMMUNITY INVOLVEMENT/VOLUNTEER WORK: When asked about his community involvement, Brian quipped: "My office is on the edge of North Park, on El Cajon Boulevard. The front of my office provides a real nice safe place for Johns to pick up and return the many prostitutes who

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slavishly work the streets day and night. It makes me feel like I'm really a part of the community."

LAWYER BRIAN MOST ADMIRES: "Brent Neck. He is the definition of integrity and the most solid person I know, and he's a DA."

PROUDEST CAREER MOMENT: When asked about his proudest career moment, Brian simply replied, "I'm still waiting for it."

FAVORITE LAW/OPINION: "The law that says that graffiti is illegal."

LEAST FAVORITE LAW/OPINION: "The death penalty is number one on my list of least favorite laws. I'd say sentencing enhancements and the federal sentencing guidelines come in second place. Perhaps third on my list are the immigration laws that destroy families by deporting poor people who commit crimes that are often less offensive than those of the average criminal citizen. Runners-up include: (a) the law that says prosecutors get what they want and the defense doesn't; (b) the law that says I can't use my cell phone while driving unless I have a handless thing; and (c) the law that says you have to actually come to a complete stop at a stop sign or a red light. I'm also not too fond of the law that allows motorcyclists to split lanes."

FUNNIEST THING A JUROR HAS SAID TO BRIAN: "In a shaken baby/sexual assault homicide of a nine month-old baby boy, the jurors thought I was romantically involved in a cross-racial relationship with my client because I was well groomed and didn't wear a wedding ring."

MOST OUTRAGEOUS/SILLIEST CHARGE THAT BRIAN HAS HAD TO DEFEND SOMEONE AGAINST: "My client was suffering from dementia. He believed the Cox Cable man and others were trying to break into his house. He would shoot at the intruders–usually fictitious–through the walls and floors of his house. One day he mistook his five year-old grandson, who was the joy of his life, for an intruder and shot him dead. As if my client and his family hadn't suffered enough, the DA thought it would be a good idea to charge my client with homicide. On a visit to his sister, he went upstairs to say his prayers and died of a heart attack. I think the stress killed him. I've always thought it was irresponsible for the DA to exercise its charging discretion in that case."

FAVORITE QUOTE: "If I had more time, I would have written a shorter letter", which a Google search reveals was written by either Blaise Pascal, T.S. Eliot, Mark Twain, Oscar Wilde, or Marcus Cicero.

FAVORITE KEEPSAKE: Brian still keeps a hubcap from his "MerChevy" to remind him, as he describes it, "of how capable I am of making really stupid decisions." The "MerChevy" story was relayed as follows: "During one of my harebrained moments, I found an old Mercedes Benz that had a blown engine. It was selling for only $500. I thought it'd be a good idea to put a Chevy motor in the thing. It'd look like a classic Mercedes, but drive like a Chevy—hence, the 'MerChevy'. Seemed like a good idea at the time, but wouldn't recommend it. We had been working four jobs between us, dropped about $6,000 into it, and finally sold it—for $500. I knew I wouldn't be going into business law."

BRIAN'S ADVICE TO COLLEAGUES: "Don't take sex cases in Ventura."

CDBA SCHOLARSHIPS

Each year CDBA grants a scholarship in the name of one of our founding fathers Tom Adler to pay for a deserving new attorney to go to either the **National Criminal Defense College (NCDC)** in Macon, Georgia, or the **Institute of Trial Advocacy (ITA)** at California Western School of Law. If you know of a deserving attorney dedicated to criminal defense (or you are one yourself), please send a letter or e-mail explaining why to Executive Director Stacey Kartchner.

The deadline to apply for the NCDC Scholarship is November 28, 2008.

The deadline to apply for the ITA Scholarship is February 2, 2009.

CRIMINAL DEFENSE NEWSLETTER

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CRIMINAL DEFENSE NEWSLETTER

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