

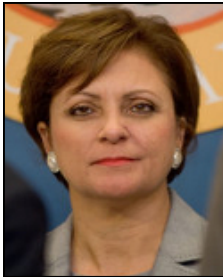
THE DEFENSE *NEVER* RESTS

Vol. 13
Number 4
October 2011



Published by
the Federal Public
Defender’s Office for the
Eastern District of Louisiana

TWO NEW SITTING FEDERAL DISTRICT COURT JUDGES CONFIRMED



On October 3, 2011, the United States Senate confirmed Nannette Jolivette Brown as United States District Judge for the United States District Court for the Eastern District of Louisiana. Before her appointment, Judge Brown was City Attorney for the city of New Orleans and practiced corporate and environmental litigation at several private law firms. She also taught at Tulane, Southern and Loyola law schools. Judge Brown received a B.A. degree from the University of Southwestern Louisiana in 1985, and then attended Tulane Law School, where she received a J.D. in 1988 and a Master of Laws in Energy and Environment in 1998.

On October 11, 2011, Jane Margaret Triche-Milazzo was confirmed to serve as a United States District Judge for the United States District Court for the Eastern District of Louisiana. She has been a judge in the Twenty-third Judicial District since 2008. Before that she worked at Risley Triche, LLC, first as a paralegal, then as a law clerk, then as an associate, and finally as a partner. Before law school, Judge Triche-Milazzo was an elementary school teacher. She received her J.D. in 1992 from the Louisiana State University Paul M. Hebert Law Center and her B.A., magna cum laude, in 1977 from Nicholls State University.



REMINDER
OUR ANNUAL TRAINING WILL TAKE PLACE LATER THIS WEEK.
SEE PAGE 6 FOR DETAILS.

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SELECTED SUPREME COURT ORAL ARGUMENTS: 2011 FALL TERM

Due Process

Perry v. New Hampshire, Docket No. 10-8974 (oral argument Nov. 2, 2011): Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

Evidence

Williams v. Illinois, Docket No. 10-8505 (oral argument Dec. 6, 2011): Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

Habeas Corpus

Maples v. Thomas, Interim Commissioner, AL DOC, Docket No. 10-63 (oral argument Oct. 4, 2011): Whether the Eleventh Circuit properly held - in conflict with the decisions of this Court and other courts - that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default. In this capital case, the divided Eleventh Circuit held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender - Left Firm" written on an envelope.

Lafler v. Cooper, Docket No. 10-209 (oral argument date Oct. 3, 2011): Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial? Anthony Cooper faced assault with intent to murder charges. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial. On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on Michigan reoffering the plea agreement. The Court also asked the parties to also address the question of: what remedy, if any should be provided for ineffective assistance of counsel during plea negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

Gonzalez v. Thaler, Docket No. 10-895 (oral argument Nov. 2, 2011): The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title I, 110 Stat. 1217, establishes a one-year statute of limitations for a state prisoner to file a federal habeas corpus petition. As relevant here, that limitation period runs from "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The Court granted cert to resolve the limited questions of: (1) whether there was jurisdiction to issue a certification of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal and (2) was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of the direct review or the expiration of the time for seeking such review?"

Smith v. Cain, Warden, Docket No. 10-8145 (oral argument Nov. 8, 2011): In this Louisiana criminal case, the state trial court, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, without making any factual findings, or providing any reasons for their rulings, denied Petitioner Juan Smith post-conviction relief. Smith contends that the Louisiana state courts reached this result only by disregarding firmly-established precedents of this Court regarding suppression of material evidence favorable to a defendant and presentation of false or misleading evidence by a prosecutor. The questions presented are: (1) is there a reasonable probability that, given the cumulative effect of the Brady and Napue/Giglio violations in Smith's case, the outcome of the trial would have been different and (2) did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith's Brady and Napue/Giglio claims?

SELECTED SUPREME COURT ORAL ARGUMENTS: 2011 FALL TERM (continued)

Fifth Amendment

Howes, Warden v. Fields, Docket No. 10-680 (oral argument Oct. 4, 2011): Whether the Court's clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always "in custody" for purposes of Miranda any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances.

Search and Seizure

Messerschmidt v. Millender, Docket No. 10-704 (oral argument Dec. 5, 2011): The Court has held that police officers who procure and execute warrants later determined invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986). The questions presented are: (1) under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search and (2) should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

United States v. Jones, Docket No. 10-1259 (oral argument Nov. 8, 2011): Whether the warrantless use of a tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment. Additionally, the Court directed the parties to address whether the government violated Jones' Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent?

Sentencing

Setser v. United States, Docket No. 10-7387 (oral argument Nov. 30, 2011): The Court granted cert to answer the questions of: (1) does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence and (2) is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?



MICHAEL F. ESCUDIER - IN MEMORIAM



It is with great sadness that we report Michael Escudier passed away on October 19, 2011. Mike joined the panel in 1998. He was an experienced public defender in St. Bernard Parish. After Hurricane Katrina, Mike took a position with the Jefferson Parish District Attorney's office where he remained until his death. While on the panel, Mike accepted CJA appointments without hesitation and provided excellent representation. He was especially proud of his membership on our Criminal Justice Act panel.

RETROACTIVITY DID NOT AFFECT RECIDIVISM

Three years after the first crack cocaine offenders were released pursuant to retroactive application of the 2007 Crack Cocaine Amendment, a study shows no statistically significant difference in recidivism rates between those whose sentences were reduced and those serving their full prison terms. The amendment, which became effective November 1, 2007, lowered the base offense level for crack cocaine by two levels. The complete study is available on the Sentencing Commission's webpage (www.ussc.gov, Materials on Federal Cocaine Offenses).

The U.S. Sentencing Commission analyzed the impact on recidivism rates of sentence reductions after courts were authorized to modify the sentence of offenders incarcerated on or after March 3, 2008. Of the 25,515 motions for retroactive application of the 2007 amendment received, 16,433, or 64.4 percent, were granted and 9,082 denied. Most applicants, 7,665 of the 9,082, were legally ineligible. The average decrease in sentences among those crack cocaine offenders was 26 months. Some offenders were released almost immediately or in the first few months after the effective date.

Of the group who benefited from the 2007 Crack Cocaine Amendment group, 30.4 percent of the crack cocaine offenders re-offended within two years. In the comparison group of crack cocaine offenders who were released too early to benefit from the retroactive application of the amendment, 32.6 percent of the offenders re-offended within two years.

Offenders in the two groups re-offended at similar rates and in similar ways. Offenders in both groups were re-arrested for the same crime types, with roughly 20 percent of re-arrests in both groups for drug possession. Recidivism rates for both groups also climbed steadily throughout the two-year period.

For the study, recidivism was defined as, within a two-year period following release, a reconviction for a new offense, a re-arrest with no case disposition information available, or a revocation of an offender's supervised release.

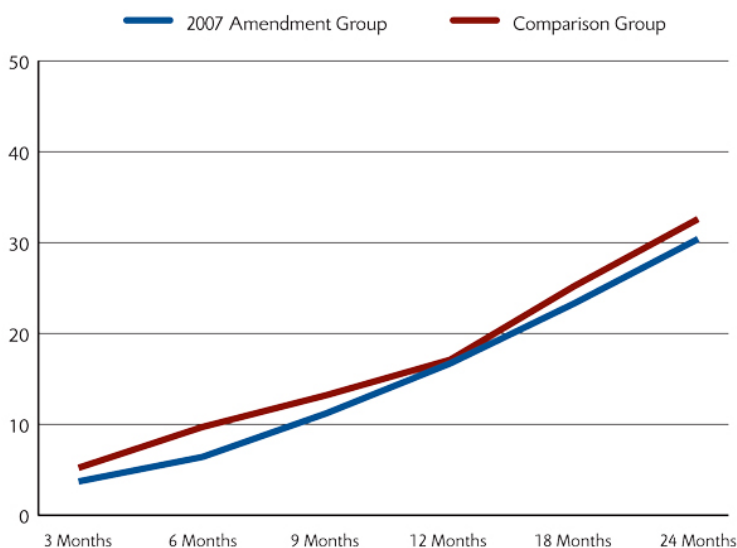
In the 2007 Crack Cocaine Amendment group, new arrests occurred in 23.2 percent of the cases, and revocations only were recorded in 7.2 percent. In the comparison group, new arrests occurred in 25 percent of cases, and revocations were recorded in 7.6 percent.

The two crack cocaine offender groups also have a comparable mix of criminal histories. The Sentencing Commission ranks Criminal History from Category I to Category VI, with Category VI the most substantial prior criminal record. In each group, approximately 30 percent of the crack cocaine offenders are in CHC IV through VI, which indicates that many crack cocaine offenders had substantial criminal records. Recidivism rates are strongly influenced by criminal history. Offenders with more past crimes, and more serious crimes, are more likely to re-offend.

The average length of the original sentence imposed on crack cocaine offenders in the 2007 Crack Cocaine Amendment group was 107.4 months, and comparable to the average length of the sentences imposed on the comparison group, 97 months. After sentence modification, the 2007 amendment group served 80 percent of the original sentence less earned credits, and the comparison group served 100 percent of the original sentence less earned credits.

This article originally appeared in the August 2011 issue of *The Third Branch* and is used with permission.

Recidivism Rate Over Time by 2007 Crack Cocaine Amendment and Comparison Groups



Mentoring Program Adds Diversity to CJA Panel

An innovative mentoring program in the Southern District of New York is giving local practitioners federal court experience and in the process giving more minorities and women the skills to serve on the district's Criminal Justice Act (CJA) panel.

The district's Criminal Justice Act Mentoring Program pairs experienced attorneys from its CJA panel as mentors to attorneys who have an interest in applying to the panel but who lack knowledge of the federal system. The mentees learn by assignment to a case of sufficient complexity to warrant the services of two attorneys.

"They're sitting at their mentor's elbow," said Judge John G. Koeltl, chair of the district's Defender Services Committee, "but it's very proactive. They're there to observe, but also to do substantive work. They make contributions to cases, in terms of writing and court appearances."

A typical "teaching" case would be one where the mentor received a regular CJA appointment that presented many of the representation issues an attorney might encounter in a federal case, including bail and release, discovery review, guidelines calculation and sentencing factors, plea negotiation, client interviewing and conferences, legal research and writing, and possible evidentiary hearing or trial. In addition, the mentees work with their mentors on other CJA cases.

Mentees are required to provide the first 15 hours of service free of charge. After that, they bill for their hours at a rate that is substantially lower than the hourly rate for court-appointed attorneys. There's also an educational requirement. Mentees must complete a minimum of six continuing legal education credits that focus on federal criminal practice skills and attend seminars and workshops.

Completing the program is no guarantee of being appointed to the CJA panel, which is a highly selective and competitive process. But the results are encouraging. Over the last two years, four of the program's "graduates" have been selected to serve on the CJA panel, adding to the panel's diversity.

Koeltl works with co-directors Peter Quijano and Anthony Ricco, two experienced CJA attorneys who developed the program and who are responsible for overseeing the recruitment of mentors and mentees. They designed the program to prepare attorneys for the challenges of federal practice and eventual CJA panel representation. The Southern District of New York's Board of Judges adopted the mentoring program in 2008.

"There are different substantive law and different procedures in federal practice," said Koeltl, "and many state court practitioners do not qualify for the panel because they lack federal experience."

"But we're not here to train someone for trial," adds Quijano. "The program concept is to find experienced state practitioners and help transition them to federal practice. Without background, without knowledge of the resources, protocols and procedures, and rules of federal practice, an attorney could be making critical mistakes and not even be aware."

In fact, mentees need to learn so much, the program length has expanded from 12 months to 18 months. The number of mentors per class also has increased. Other changes have been made as mentors and judges see what works best. The district's judges are supportive, and there has been interest from other districts in beginning their own mentoring programs.

"Our effort is always to get the best lawyer for a defendant," said Koeltl. "The program entails a lot of work, but the quality of applicants has been sterling."

"We're very excited and optimistic about the program," said Quijano. "This is what we tell applicants: if we place you on the panel, in three to four years, you will be one of the outstanding practitioners in federal court—not just an outstanding CJA attorney."

This article originally appeared in the September 2011 issue of *The Third Branch* and is used with permission.

THE DEFENSE NEVER RESTS 2011 CLE

F. Edward Hebert Building - 600 S. Maestri, Room 448, New Orleans
OCTOBER 27 - 28, 2011

Thursday, October 27th

8:00 am to 9:00 am - Sign In

9:00 am to 10:00 am

U.S. Pretrial Services's Role in the Federal Court System - 60 minutes

Diane Serpas, Supervisor, U.S. Pretrial Services for the Eastern District of Louisiana, will address the agency's role, including providing a historical synopsis, Pretrial's introduction and role with defendants, and interfacing of Pretrial Services and FPD/Panel Attorneys. Practical topics to be discussed are how the client becomes Pretrial's client, initial interviews, detention hearings, reconsideration hearings, and other court-related interaction as well as best practices and nuances of Magistrate Court proceedings.

10:00 am to 10:15 am - Break

10:15 am to 11:45 am

Sentencing Guideline Primer and Fair Sentencing Act Update

Alan Dorhoffer, Deputy Director, Office of Education and Sentencing Practice, United States Sentencing Commission, will discuss basic guideline applications and the changes in the Federal Sentencing Guidelines resulting from the passage of the Fair Sentencing Act and the implications in federal criminal practice.

11:45 am to 1:00 pm - Lunch

1:00 pm to 2:30 pm

Use of Technology in the Courtroom

Lamont Lewis, Computer Systems Administrator and George Chaney, Assistant Federal Public Defender, Eastern District of Louisiana, will demonstrate the compelling power of trial presentation software in defending a federal criminal trial.

2:30 pm to 2:45 pm - Break

2:45 pm to 3:45 pm

Preserving the Record, Framing the Issues, and Artfully Telling the Story on Appeal

Rebecca Hudsmith, Federal Public Defender for the Middle and Western Districts of Louisiana, will address techniques and practices to insure that you can collect and review information necessary to develop your appeal.

3:45 pm to 4:00 pm - Break

4:00 pm to 5:00 pm

Professionalism on Appeal - The Seven Deadly Sins

Thomas Flanagan, Flanagan Partners, LLP, will use the seven deadly sins as a framework for discussing professionalism in appellate practice. Examples will be used from actual appellate cases to demonstrate how unprofessional conduct in submissions to the court and dealing with opposing counsel lead to sanctions.

Friday, October 28th

8:00 am to 8:30 am - Sign In

8:30 am to 9:00 am

Probation Updates

Kito Bess, Chief Probation Officer for the Eastern District of Louisiana, will present the changes that have been instituted in the Probation Office, including the formatting and preparation of presentence reports.

9:00 am to 10:00 am

If You Don't Know Your Client's Alienage, Are you *Padilla* Effective Counsel?

Maurice Hew, Associate Professor at Thurgood Marshall School of Law, will address the importance of correctly determining a client's alienage or citizenship, the issues which bear on that ultimate determination, and the immigration consequences which follow a criminal charge.

10:00 am to 10:15 am - Break

10:15 am to 11:45 pm

Offensive Use of the Rules of Evidence

Omodare Jupiter, Assistant Federal Public Defender in the Southern District of Mississippi, will explore various evidence rules available for defense counsel to employ to prosecute their case.

11:45 pm to 12:45 pm - Lunch

12:45 pm to 2:15 pm

Significant Recent U.S. Supreme Court and Fifth Circuit Cases

Tim Crooks, Assistant Federal Public Defender in the Southern District of Texas, keeps us updated on recent cases that have emerged from the Supreme Court and Fifth Circuit over the last twelve months.

2:15 pm to 2:30 pm - Break

2:30 pm to 3:30 pm

Sentencing Commission Update

Alan Dorhoffer, Deputy Director, Office of Education and Sentencing Practice, United States Sentencing Commission, will address the changes instituted by the Federal Sentencing Commission including the guideline changes that will become effective in November 2011.

3:30 pm to 4:30 pm

Rethinking Ethics

David Katner, Professor of Clinical Law at Tulane University Law School, will present hypotheticals and suggest strategies to balance ethical responsibilities to the client vs. responsibilities to inform and communicate with family members, including the criminal lawyer's ethical responsibilities as an officer of the court. Respecting privilege but enlisting the aid of family members is often an ethical dilemma. existing ethical standards governing lawyers.

RECOMMENDED TRAINING PROGRAMS FOR CJA PANEL ATTORNEYS

WINNING STRATEGIES SEMINAR

FEBRUARY 2 - 4, 2012 - SANTA FE, NEW MEXICO

Contact: Jenna_Shepard@ao.uscourts.gov

The Winning Strategies Seminar brings together a dynamic group of attorneys, professionals and judges, speaking on a wide variety of topics, all specifically designed to keep Panel Attorneys abreast of the most recent and important developments in federal criminal defense. This two-and-a-half day program provides attendees with the opportunity to delve into a host of topics which most often confront federal criminal defense attorneys. Sessions include both large plenary lectures as well as smaller "break-out" lectures that meet the specific needs of the advanced practitioner and the less experienced attorney alike. Sessions will include such topics as new sentencing strategies in a post-Booker world, neutralizing and using experts, immigration-related defenses and the new Padilla requirements, understanding and defending computer crimes, persuading judges to move away from over-dependence on the Guidelines, how to attack notices pursuant to 18 U.S.C. Section 851, defending gun cases, recurring issues in drug cases, how to best take advantage of proffers and cooperation, Supreme Court updates, and ethics.

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE

FEBRUARY 2, 2012 - SANTA FE, NEW MEXICO

Contact: Jenna_Shepard@ao.uscourts.gov

The Fundamentals of Federal Criminal Defense Program (The Fundamentals Track) is a one-day program specifically designed with the new practitioner in mind. Despite your years of practice in other areas of law, if you are new to the world of federal criminal defense this program will introduce you to a number of vital areas which are essential when providing effective representation in federal criminal court. Unlike more advanced programs, attendees will have the luxury of learning, asking questions and working with other attendees who are likewise new to this difficult area of practice. The Fundamentals Track is a rare opportunity for new CJA panel attorneys, and those seeking to join the Panel, to hear a dynamic group of attorneys, professionals and judges, speak on a wide variety of topics most vital to providing robust and effective representation. Best of all, the Fundamentals Track is offered on the first day of our Winning Strategies Seminar. This allows attendees of the Fundamentals Track to join in with Winning Strategies attendees for one-and-a-half days after the Fundamentals Track is concluded. Since both programs are offered at the same location attendance in both programs is easy and encouraged. A perfect mix for the new federal criminal defense attorney wishing to get a day of basics and a great look at more complex areas during later sessions.

THE DEFENSE NEVER RESTS 2011 CLE

F. Edward Hebert Building - 600 S. Maestri, Room 448, New Orleans

OCTOBER 27 - 28, 2011

Name: _____ Bar Roll No. _____

Address: _____

Telephone: _____ Fax: _____

E-Mail: _____

Registration Fee of \$60.00 includes 2 days of CLE, materials, continental breakfast and catered lunch.

Return Remittance With This Form with Cash or Checks Payable to

Barbara Daigle

Return Remittance With This Form To:

Barbara Daigle
Federal Public Defender's Office
500 Poydras Street, Suite 318
Hale Boggs Federal Building
New Orleans, Louisiana 70130

MESSAGE BOARD

- Due to the overall budget outlook, Defender Services did not ask for a FY 2012 or a FY 2013 panel rate increase. There is sufficient funding to continue panel attorney payments through the end of this fiscal year. Based on current projections, both the House and the Senate earmarks would fully fund the panel in FY 2012.
- If you have a CJA appointed case and anticipate that your costs will approach \$30,000, you **must** submit a full budget. Further, if you foresee your case proceeding to trial, notify Barbara Daigle or Heather Davis at least 30 days before the scheduled trial date. If a budget is not submitted and your costs exceed \$30,000, reimbursement for all compensation and expenses may be difficult to obtain. CJA Form 28A is the *Attorney Services Detailed Budget Worksheet for Non-capital Representations*. It is available on our website at www.federaldefender.net.
- The United States Marshals Service has announced the following security policy for the United States Court House /Hale Boggs Federal Building located at 500 Poydras Street, New Orleans, Louisiana. The amount of liquids, gels, creams, and aerosol products brought into the US Courthouse/Hale Boggs Federal Building shall be limited to five- 3 ounce containers. This amount restriction includes, but is not limited to: water, soda, coffee, and other beverages as well as hand creams, lotions, perfume, incense, toothpaste, deodorant, liquid soap, etc. Visitors possessing liquids should inform Court Security Officers of this fact, prior to screening.
- Due to the popularity and interest of the FDO and CJA community, LexisNexis has agreed to offer the CaseMap/TimeMap/DocPreviewer and TextMap products at a special reduced price through November 15, 2011. LexisNexis is offering FDOs and CJA panel attorneys the following additional price reductions: CaseMap/TimeMap/DocPreviewer license for \$290.50 and \$97.00 for TextMap license. After November 15, LexisNexis will still offer reduced pricing to FDOs and CJA panel attorneys: CaseMap/TimeMap/DocPreviewer for \$387.50 per license set (normally \$775.00) and TextMap for \$161.00 per license (normally \$322.00). For CJA panel attorney inquires: contact Carolyn Winiarz at 904-373-2201 or carolyn.winiarz@lexisnexis.com for assistance and questions.

FEDERAL PUBLIC DEFENDER'S OFFICE

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New Orleans, LA 70130

www.federaldefender.net
