DAILY REPORT
A SMART READ FOR SMART READERS

Thursday, February 12, 2009

Smarts and zingers

Lawyers laud Carnes' intelligence, but are wary of his tough questioning and sharp retorts in opinions

By Alyson M. Palmer, Staff Reporter

After a heated confirmation battle to secure his seat on the 11th U.S. Circuit Court of Appeals in 1992, Edward E. Carnes might have tread lightly in his early days on the bench.

But a story about Carnes' first sitting as a judge, recounted by 11th Circuit Judge Joel F. Dubina at a May 2007 seminar in Atlanta, suggests that Carnes began his judicial career firing on all cylinders.

Carnes was sitting on a panel with Dubina and now-Senior Judge Peter T. Fay, Dubina recalled. One lawyer, appointed by the court to handle a criminal appeal, had arrived late.

When that lawyer's turn came, Dubina recalled, "Judge Carnes just starts hammering this guy, question after question after question." After a few minutes, the lawyer turned pale, said Dubina, and fell straight over backwards.

Dubina recalled that he jumped up in concern, and paramedics took the lawyer away on a stretcher. "We dressed Judge Carnes down pretty good," Dubina remembered.

When the lawyer returned later in the day, he explained that it was his first argument and that he had been ill. Dubina said Fay told the lawyer he had eight minutes left, and Dubina passed Carnes a note: "No more questions." Carnes complied.

At 58, Carnes remains one of the court's fiercest inquisitors, but lawyers appearing before him don't seem to need medical attention as much as help rebuilding their legal arguments.

The judge is widely regarded as one of the smartest members of the court, a reliable conservative but hardly a lockstep thinker, with opinions that crackle with personality. Conversational, and often blunt, they are highlighted by biting zingers and literary or popular culture references.

Responding to two colleagues' criticism of one of his opinions on sentencing guidelines, Carnes in 2005 wrote that Judge Gerald B. Tjoflat's conclusion "requires not just a set of reading glasses but also a vivid imagination." In the same case, Carnes dismissed Judge Rosemary Barkett's views as "robbing a perfectly good word ('burden') of its plain meaning."

In 2003, Carnes wrote for a panel that favored the former boxing star Roberto Duran in a dispute over missing boxing memorabilia.

Over the course of two pages, Carnes told how Duran was born into poverty and grew up fighting on the streets where he earned the nickname "Manos de Piedra," or "Hands of Stone."

Describing how Duran's career came to end, Carnes wrote, "Even hands of stone don't last forever, and no one can out box time."

Miami federal prosecutor Robert J. Luck, who clerked for Carnes, says in an e-mail, "To read Judge Carnes' opinions is to hear his voice."

"Some judges don't put their voice in their opinions, and I think that's fine," Luck adds, "but Judge Carnes does. It's why many people find his opinions folksy and unique, because he is."

Death penalty lawyer

Following his education at the University of Alabama and Harvard Law School, the Albertville, Ala., native spent the entirety

of his career as a practicing lawyer as an assistant Alabama attorney general.

For more than a decade leading up to his nomination to the 11th Circuit by President George H. W. Bush, Carnes headed the capital punishment division of the AG's office. He also had lobbied Congress for changes in death penalty law, testifying in 1990 in favor of limiting federal habeas corpus jurisdiction.

At the time, even his death penalty foes described Carnes as brilliant. And Morris S. Dees Jr., co-founder of the Southern Poverty Law Center and a longtime civil rights champion, vocally supported Carnes' nomination, saying he was impressed with Carnes' prosecution of Ku Klux Klan members and racist judges.

But some expressed bitter disappointment over Dees' stance, and several Georgia lawyers spoke out against the nomination to replace Judge Frank M. Johnson Jr., considered a civil rights hero for his rulings to desegregate Montgomery's bus system and to ensure blacks' rights to vote.

Carnes' opponents expressed concern over his vigorous defense of the death penalty. They complained that Carnes had defended prosecutors' systematically striking blacks from juries. But the Senate, controlled by Democrats at the time, voted 62-36 to confirm him.

More than 16 years later, Carnes maintains his chambers in Montgomery, Ala. He has been married for 36 years and has a 28-year-old daughter who is a businesswoman. He declined an interview for this story, saying in an e-mail, "Society and the law are better served if judges are judged by their judicial work, which is in the public domain."

Interestingly, several of those who vocally opposed Carnes' nomination—including former Georgia Public Defender Standards Council lawyer Gary Parker, Summerville trial lawyer Bobby Lee Cook and former Hofstra University School of Law dean Monroe H. Freedman—say today they haven't followed Carnes' judicial career.

'Incredibly smart'

Decatur lawyer Ralph S. Goldberg says he doesn't remember the letter he signed opposing Carnes' confirmation. But Goldberg's assessment of Carnes now is essentially positive, perhaps because the lawyer has won a victory or two before the judge.

"He's very smart. He's incredibly smart," says Goldberg. "He's still fairly conservative, but I think he can be swayed by a good legal argument."

Goldberg notes that the 11th Circuit is a very conservative court. From the perspective of a plaintiffs' attorney, says Goldberg, "There are one or two people on the 11th Circuit that you consider a vote for your side when you go up, and a number you consider votes against you."

But Carnes is neither, says Goldberg.

Death penalty defense attorney Stephen B. Bright, who had vigorously opposed Carnes' confirmation, is less nuanced when discussing Carnes' jurisprudence. Bright, president of the Southern Center for Human Rights, says Carnes has "continued to be an advocate from the bench" and is one of the judges who transformed the 11th Circuit into a court that is hostile to criminal defendants and civil rights plaintiffs.

Bright cites a 1995 death penalty case, Waters v. Thomas, 46 F.3d 1506, in which Carnes co-wrote with Judge R. Lanier Anderson III for an en banc majority that rejected arguments that an inmate's lawyer had been ineffective even though he put his client on the stand and had him describe the gruesome details of the murders.

Another example, Bright says, is Carnes' 1999 decision, Williams v. Head, 185 F.3d 1223, in which Carnes wrote for a divided panel that signed off on the execution of a young man who was 17 at the time of the crime and had spent a week in a mental hospital less than a year before the crime

But Carnes isn't a sure thing for prosecutors.

In 1996, Carnes dissented from the panel majority's decision in Watts v. Singletary, 87 F.3d 1282, to deny habeas relief to a man convicted of murder after he slept through much of his trial. Carnes scoffed at the majority's reasoning that competence of the defendant was less important than it was centuries ago because of the development of a right to counsel: "This is the first time I have heard it suggested that our standards have progressed in such a way that

contemporary understanding would deny an American citizen the full benefit of an important trial right guaranteed Englishmen at least as early as the seventeenth century. Some understanding. Some progress."

In a 2001 death case, Romine v. Head, 253 F.3d 1349, Carnes wrote for the panel that reversed in part the denial of habeas relief to a man convicted in a Pickens County trial during which the prosecutor essentially told jurors that they should follow a vengeful version of biblical law.

Bright brushes off instances where Carnes has favored defendants: "You don't expect any judge to rule one way 100 percent of the time."

No 'grand vision'

One of Carnes' former law clerks, University of Alabama law professor Paul Horwitz, suggests that Carnes' nomination was controversial because he had been called to replace the civil rights hero Johnson on the court.

"Some people, I think, took the view that anyone who replaced Johnson has to be as equally associated with a grand vision of civil rights," says Horwitz, who clerked for Carnes from 1998 to 1999. "I suspect that Judge Carnes doesn't see himself as having a grand vision in this or other areas. Rather, he sees himself as doing his duty as the cases come before him. To that extent, the critics were right that this was not somebody who was going to be associated with a particular vision of law other than a rather commonplace vision of judicial duty. But to the extent that they feared that he would spearhead some kind of conservative judicial activism, I think that they missed the mark."

As a key example, Horwitz cites what is perhaps Carnes' most famous opinion, the court's 2003 decision in Glassroth v. Moore, 335 F.3d 1282, that found the Alabama chief justice's installation of a two-and-one-half ton monument to the Ten Commandments in the rotunda of the state's judicial building violated the U.S. Constitution.

The opinion shows Carnes' trademark wit. When defenders of the monument complained that the district judge shouldn't have made findings of fact based on his own visit to the judicial building, Carnes noted that the chief justice's attorney had offered the judge help in securing a parking spot for his visit. "Any conceivable error was not just invited error," wrote Carnes, "but invited error with a parking space."

Luck, the former Carnes clerk who's now with the U.S. attorney's office in Miami, points to Carnes' opinions in the case of Terri Schiavo, in which Carnes wrote for a 2-1 panel that rejected claims by Schiavo's parents that a feeding tube be reinserted into their severely brain-damaged daughter. In that politically-charged and emotional case, Carnes rejected the very public position taken by the Republican president whose father had appointed Carnes. The full court twice denied rehearing of the panel's rulings, with Carnes and Judge Frank M. Hull writing a joint concurrence to that denial.

Luck, who was Carnes' law clerk while the Schiavo case was before the 11th Circuit, says Carnes' opinions in the Schiavo case are just some examples of Carnes applying the law without regard to personal beliefs, ideologies or agendas.

"That's the kind of judge he said he was going to be," writes Luck, "and that's the kind of judge he has been and continues to be. That shouldn't confound anybody."

Conversational cadence

Whatever lawyers think of the result of Carnes' decisions, the opinions themselves are notable for their conversational cadence, literary allusions and refusal to mince words—with the parties, the lawyers or the author's colleagues. Just last week, Carnes issued a lengthy opinion favoring officials who removed a controversial book from school libraries in Miami, that begins by quoting Franz Kafka and includes the phrase "hunky dory." The case is ACLU of Florida v. Miami-Dade County School Bd., No. 06-14633 (Feb. 5, 2009).

Carnes' former clerks say that reading and writing are Carnes' primary interests. The judge likes to read books by and about good writers, such as Oliver Wendell Holmes and Abraham Lincoln, says Luck, to collect quotes for possible use in the "Federal Reporter."

"He chooses his words carefully, and he likes for his opinions to be interesting," says another former clerk, Alston & Bird partner Jeffrey J. Swart. "It's all right with him if they're not always dry as dust."

In 2006, Carnes took issue with Barkett's insistence that the court take en banc review of a case, Boxer X v. Harris, 459 F.3d 1114, brought by a prisoner who claimed a female guard made him masturbate for her entertainment. The panel had

concluded that the prisoner had a claim for a violation of his privacy rights, but not an Eighth Amendment claim, and Barkett thought the full court should look at the Eighth Amendment issue, too.

Carnes wrote that it was too academic a matter to merit the full court's consideration in light of the prisoner's ability to proceed on at least one of his legal theories.

"Judges, acting like law professors, sometimes get caught up in the twists and whirls of a legal issue and debate beyond the point of conceivable consequence the doctrinal tags and tickets to be attached," he groused. "Especially when deciding whether to take the extraordinary step of going en banc, we should keep in mind that the role of our court system in civil cases is not to decide how many analytical angels can dance on the head of a particular injury."

Carnes can be just as tough on the other side of prisoners' rights battles. A little over a year ago, Carnes blasted arguments made by lawyers defending jail officials who were sued by a plaintiff complaining she lost her baby while she was an inmate because the officials didn't heed her cries for more medical attention.

The district court had dismissed the suit because she hadn't appealed a jail captain's unhelpful response to her complaint—a response she didn't receive until days after her baby was stillborn. Although the plaintiff could not have known about any further administrative appeal process, because it was in a handbook inmates weren't allowed to see, some of the defendants said that administrative appeal remedy still might be considered "available" under the law.

"That argument could have been inspired by the Queen of Hearts' Croquet game," wrote Carnes in Goebert v. Lee County, 510 F.3d 1312, footnoting Lewis Carroll's "Alice's Adventures in Wonderland," "since there is nothing on this side of the rabbit hole to support it."

Oral argument attitude

Although Carnes has been praised by lawyers for his opinion-writing, a few complain that his attitude in oral argument crosses the line.

The Almanac of the Federal Judiciary compiles anonymous evaluations of federal judges by lawyers, and its lawyer reviews of Carnes' legal ability and opinion writing are generally positive. But some of the anonymous lawyer comments in Carnes' almanac entry describe the judge as at times sarcastic and rude in the courtroom. To be sure, Carnes is not the only judge on the 11th Circuit or elsewhere whose tone during oral argument drifts into sarcasm and sometimes genuine frustration.

But Bright complains that Carnes has at times been "overbearing" and "abusive," saying the judge has sometimes "taken sides and been quick to make accusations without knowing all the facts."

He points to a 2005 hearing in a high-profile case over stickers in Cobb County science books that questioned the validity of the theory of evolution, Selman v. Cobb County School Dist., 449 F.3d 1320 (2006).

At the close of the hearing, Carnes took the unusual step of recalling to the lectern the lawyer for the plaintiffs, who had won the case at the district court level. Carnes suggested the attorney, Jeffrey O. Bramlett of Bondurant, Mixson & Elmore, had deliberately tried to mislead the court about the timeline of events in the case and demanded he file an explanation.

The panel later issued a special order clearing Bramlett of any implication that he misled the court or tried to do so. But Bramlett, now the president of the State Bar of Georgia, didn't fully escape Carnes' radar. Last summer, Carnes penned an opinion likening Bramlett and other lawyers who were seeking attorney fees for their challenge of the state's foster care system to John D. Rockefeller, the oil baron known for saying "just a little bit more" money would be enough for him.

"The attorneys for the plaintiff class in this case want more than just a little bit more," Carnes added. (Bramlett did not respond to requests for input for this story.)

Bright says the rules of judicial ethics say judges are to be courteous to the people who appear before them. "He seems to like being mean to people," Bright says of Carnes.

Luck, who spent a total of almost three years as Carnes' law clerk, says that over the course of observing Carnes in more than 100 oral arguments, he doesn't remember one time where the judge could be described as rude or abusive. He says if a lawyer comes away from oral argument with a bad taste in his mouth, it's probably because he expected to be spending 15 minutes making a sort of closing argument, while Carnes has prepared himself to explore the one or two issues that will decide the case.

"If the attorney is dead set against going down the road that the panel wants to go down, and instead insists on sticking to her script, then it's going to make for an awkward oral argument, where no one comes away satisfied," writes Luck. "If, on the other hand, the attorney goes with the flow and helps the panel to explore the whittled down issues, even if that's not what she had planned or puts her in uncomfortable legal territory, then I think the oral argument becomes what it should be: a chance to help the judges make the right decision under the law."

Swart says that his former boss' questions at oral arguments are simply designed to help him decide the case, and lawyers shouldn't take it personally.

"He is having a dialogue with the lawyers about the issues in the case," says Swart, "and sometimes that involves sort of some banter back and forth. That's why they call it argument. It has to be done in a very constrained amount of time. ... There's not time for a lot of niceties always, and it's really not his style. But I think lawyers getting ready to argue before an appellate panel need to thicken their skin up a little bit."