Daniel J. Broderick
Federal Defender

Linda C. Harter
Chief Assistant Defender

Marc C. Ament
Fresno Branch Chief

OFFICE OF THE FEDERAL DEFENDER
EASTERN DISTRICT OF CALIFORNIA
801 I STREET, THIRD FLOOR
SACRAMENTO, CALIFORNIA 95814
(916) 498-5700 Fax: (916) 498-5710

Federal Defender Newsletter

February 2008

Edited by Benjamin Galloway , Research & Writing Specialist

CJA PANEL TRAINING

■ The next Sacramento panel training will be held on Wednesday, February 20, 2008 at 5:30 p.m. at 801 I Street in the 4th floor conference room. The presentation will be led by Jeff Staniels and Sacramento County Assistant PD Matthew Scoble. The session will consist of a nuts-and-bolts presentation of Adobe Acrobat Standard/Professional, Trial Director, and Power Point. Panel members who are adept at the use of any of these programs are invited to send "tips" to be included in the presentation to Jeff (jeffrey_staniels@fd.org) or Matt (scoblem@saccounty.net).

■ The next Fresno panel training will be held on Tuesday, February 19, 2008 from 5:30 to 6:30 p.m. at the Downtown Club, 2120 Kern Street, Fresno. David Porter will be presenting. The topic is Federal Sentencing in Light of Gall and Kimbraugh.

TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, if you would like the office to address a particular legal topic or practice area, or if you would like to be a speaker, please e-mail your suggestions to AFD Melody Walcott at the Fresno office at melody_walcott@fd.org or Senior Litigator AFD Caro Marks at the Sacramento office at caro_marks@fd.org, or AFD Rachelle Barbour, also in Sacramento, at rachelle_barbour@fd.org.

ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive the newsletter. If your address, phone number or email address has changed, or if you are having problems with the email version of the newsletter or attachments, please call Cynthia Compton at (916) 498-5700. Also, if you are receiving a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

ASSISTANT FEDERAL DEFENDER POSITIONS TO BE AVAILABLE IN THE FRESNO OFFICE

The Office of the Federal Defender for the Eastern District of California is now accepting applications for Assistant Federal Defenders in the Fresno Division. These positions will be open in May, 2008. These are full-time

positions with federal salary and benefits based on qualifications and experience. The positions will remain open until filled.

Applications should be sent to:

Attention: Personnel
Office of the Federal Defender
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814

or applications may be reached via e-mail CAE_HR@fd.org. No telephone calls or faxes please.

REQUEST FOR CLOTHING & FOOTWEAR DONATIONS

The Clothes Closet is available to all AFDs and panel attorneys. It contains suits, shoes, socks, and shirts that clients can wear for court appearances. We also have some clothes that can be given away when necessary. Donations are greatly appreciated.

Currently, the Sacramento Office has an ***immediate need for women's clothing and footwear*** for clients who are released from the jail with no street clothes. Please contact Becky Darwazeh to make arrangements to drop off clothing.

If you take borrowed clothes to the jail or U.S. Marshal's Office for your clients, please be put either your name/phone number or our name/phone number on the garment bag so that the facility will contact us for pickup of the items. Please note that you do not have to pay for the cleaning of any items used. The district court has graciously arranged for funds to pay the cleaning costs.

See Becky Darwazeh at the Sacramento Office or Nancy McGee at the Fresno office to pick up or drop off clothes.

NINTH CIRCUIT OPINIONS

CRIMINAL CASES

US v. Calderon-Segura **Date:** 01/09/08 **Case Number:** 05-50820 **Summary:** This an appeal from a 1326 conviction and failure to allege prior conviction and removal. The Ninth Circuit noted that under Salazar-Lopez, the indictment should have alleged, in addition to facts of the prior removal and subsequent reentry, the date of the prior removal or that it occurred after a qualifying conviction. The indictment should have alleged it, but it was harmless because there was no prejudice, and no objection to the dates in the PSR or at sentencing.

US v. Tulaner **Date:** 01/09/08 **Case Number:** 06-10304 **Summary:** This concerns the issue of loss in a sophisticated fraud. The defendant was seeking to gain highly technical platinum discs used in the manufacture of semiconductors. He ordered twelve, but the manufacturer said that he could only get four at a time. The scheme went bust, and at sentencing, the issue was whether the loss should be for all twelve (they were the intended target) or the four he received. The Ninth Circuit (Tallman) affirmed the sentence, reasoning that all twelve were the object of the fraud, and the cost should be their worth. In dissent, Thomas argued that the attempt became limited to four because the twelve were out of reach.

US v. Thornton **Date:** 01/10/08 **Case Number:** 06-50597 **Summary:** This is an appeal (Berzon joined by Reinhardt and Singleton) that considers the scope of an Ameline remand. The Ninth Circuit holds that "where sentencing issues are raised but not decided in an appeal prior to an Ameline remand, those issues are properly before the

Court on any subsequent appeal from the Ameline remand, along with any challenges to the results of the Ameline remand itself." The defendant won the issue but the result was an affirmance as the error was harmless.

US v. Ross **Date:** 01/14/08 **Case Number:** 06-50569 **Summary:** A conviction and 188-month sentence following a guilty plea to conspiracy to distribute crack is affirmed in part and remanded in part where: 1) a failure to advise defendant of the standard of proof during the plea colloquy did not constitute plain error; 2) there was no abuse of discretion in denying defendant's motion to withdraw his guilty plea; and 3) a remand was warranted pursuant to Ameline. Here, the defendant had signed a plea agreement that laid out the burden, and in an affidavit to withdraw his plea, he stated that he thought the government had to prove drug amounts beyond a reasonable doubt. The defendant could not show that he was prejudiced. The Ninth Circuit holds therefore that the district court's failure to advise about the burden of proof was not per se plain error. The Ninth Circuit does remand though under Ameline in light of Booker's advisory Guidelines holding.

US v. Calvert **Date:** 01/14/08 **Case Number:** 06-30643 **Summary:** When someone is convicted of retaliating against a federal witness in violation of 18 U.S.C. section 1513(b), the eight-level increase found in U.S.S.G. section 2J1.2(b)(1) for an offense "causing or threatening to cause physical injury to a person...in order to obstruct the administration of justice" may be imposed even if no judicial proceeding was pending at the relevant time. The facts here involve a tax protester who went to prison because of a witness's testimony. The protester -- here the defendant -- is released, and vows vengeance. He recruits someone he served time with, puts him in his debt, and then sends him on a mission to possibly kill the witness. There is a home invasion, and the invader is shot, and dies. The investigation traces the impetus back to defendant. He is convicted on various counts of conspiracy, prohibited possessor, and so forth. He also gets an eight level adjustment under 2J1.2(b)(1) for obstruction. The Ninth Circuit holds that this was proper given the circumstances, and the fact that the obstruction occurred after the conviction, and in the absence of any proceeding, was not a bar.

US v. Casteneda **Date:** 01/15/08 **Case Number:** 05-10372 **Summary:** In one of the first post-Kimbrough decisions, the Ninth Circuit remands a crack conspiracy conviction for resentencing. At sentencing, the district court acknowledged that the crack penalties may be "out of whack," but said it was not for the district court to change them; that was up to Congress. "Wrong," said the Ninth Circuit (Nelson joined by Goodwin and Callahan). The Booker remedy of advisory Guidelines extends, under Kimbrough, to the crack/cocaine disparity, and the district court could, and should, consider it as a sentencing factor.

US v. Lowry **Date:** 01/16/08 **Case Number:** 06-10469 **Summary:** The Ninth Circuit tackles the issue of whether an Indian, laying claim to Forest Service land, bears the burden of proving she has individual aboriginal title, or does the Forest Service have to prove it as an element. The defendant here is a member of the Karuk people, who have occupied the Oak Bottom area of the Klamath National Forest in northern California from "time immemorial." The defendant, convicted of unlawful occupancy, had argued that she had a right to the land as an Indian allotment. The Forest Service had denied her claim, because the land was in the Wild and Scenic corridor, was not being used for agricultural

purposes, and she did not meet statutory the requirements. The Ninth Circuit affirms the conviction because the defendant had the burden (relying somewhat on Kent, 945 F.2d 1441 (9th Cir. 1991)) and she failed to meet that burden. The defendant should shoulder the burden, reasoned the Ninth Circuit, because it was easier for her to prove Indian ancestry, and continuous occupancy (in question here), and it would create a presumption of ownership for Indians if the claim were treated as an element.

US v. Carr **Date:** 01/25/08 **Case Number:** 07-30133 **Summary:** The Ninth Circuit (Canby joined by Graber and Gould) affirm a conviction for being a felon in possession, finding that the State of Washington's "gross misdemeanor" for violation of a protective order is transformed into a felony with two prior convictions of a protective order. That occurred here. The Ninth Circuit held that the state statutory scheme mandates such treatment, especially when the defendant at the state change of plea and sentencing plead to all the elements that made it a felony. The Ninth Circuit's line of cases that looks at "core" convictions for recidivist purposes are distinguishable because the statutes at issue there go to federal definitions and classifications (drug and immigration). Here, the statute specifically looks to state classifications.

US v. Cherer **Date:** 01/25/08 **Case Number:** 06-10642 **Summary:** A conviction and sentence for attempting to persuade, entice, or coerce a minor to engage in sexual acts with him is affirmed over claims that: 1) the district court committed prejudicial error by improperly instructing the jury; 2) the district court improperly admitted evidence of his past conviction and other prior bad acts under Federal Rule of Evidence 404(b); and 3) the sentence of 293-months was unreasonably long. The defendant was caught in a sting operation traveling to visit what he thought was a 14 year old girl. That "girl" was a middle-aged FBI agent. At trial, the defendant argued that he didn't know the girl was fourteen. The jury instructions failed to state the element that the defendant had to believe that the target was a "minor." The Ninth Circuit pointed to three exchanges when the target indicated she was fourteen, and other exchanges. This would seem to go to weight. The Ninth Circuit (Trager joined by McKeown and Noonan on this issue) didn't see it that way. At sentencing, the defendant got a 293 month sentence (almost 25 years). This was at the top of the guidelines range. The Ninth Circuit found it "reasonable," looking at the guidelines factor, the within range term, and the recent Gall/Kimbrough focus on the position of the judge to know best (even citing the FPD amicus brief). Dissenting, Noonan wonders how a "clumsy" attempt at sex with a minor results in a sentence that could be three times the length of an actual sexual assault (cases cited). Noonan stresses that an appellate court could always rely on the superior position of the sentencing judge to feel the facts in affirming a sentence, but that is an abrogation of the appellate duty. Noonan cites Scalia in Booker warning that there is a danger of rubber stamping. Noonan argues that took place here, given the length of the sentence (which even the majority notes may be "unduly harsh").

US v. Snipe **Date:** 01/28/08 **Case Number:** 06-30215 **Summary:** The police received a call from a man screaming that he needed emergency help, he was hurt, and then the call was disconnected. The police were dispatched to the address of defendant's father. The police got there, noticed the door ajar, knocked, and entered. They noticed "a large amount of drugs" sitting on the table. The police ascertained that no one appeared in need of help, left, and got a warrant based on the drugs visible on the table. The

subsequent search yielded drugs and guns. The defendant conditionally pled to being a prohibited possessor because of an obliterated serial number. The Ninth Circuit (Bybee joined by Thompson and Kelinfeld) upheld the search and sentence. The Ninth Circuit noted that the precedential test for emergency laid out in Cervantes, 219 F.3d 882 (9th Cir. 2000), which has a subjective component (second prong). The Supreme Court in Brigham City v. Stuart, 126 S. Ct 1943 (2006), established the test being an objectively reasonable basis for an emergency and the scope was reasonable. In light of this, the Ninth Circuit now adopts "a two-pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." The facts here met this test.

US v. Lococo **Date:** 01/28/08 **Case Number:** 05-50550 **Summary:** Appeals from defendants' convictions and sentences for conspiring to possess and distribute cocaine are dismissed in part and affirmed in part, but vacated in part and remanded where the district court erred in sentencing one defendant under 21 U.S.C. section 841(b)(1)(B) based on the amount of crack "involved" in the conspiracy, without finding that defendant knew or could reasonably have foreseen that the conspiracy involved crack. (Amended opinion)

US v. Banks **Date:** 01/29/08 **Case Number:** 05-10053 **Summary:** A conviction and sentence for violence in aid of a racketeering enterprise (VICAR), use of a firearm in a crime of violence, and possession of a firearm by a convicted felon is affirmed in part, but reversed in part as to the VICAR conviction where the district court erred by instructing the jury that it could convict defendant under the VICAR statute if it found that any element of his motivation in assaulting a rival gang member was to maintain his membership in his gang. Convictions for use of a firearm in furtherance of a crime of violence are also reversed as they were predicated on the VICAR convictions. (Amended opinion)

HABEAS CASES

Davis v. Silva **Date:** 01/02/08 **Case Number:** 05-16821 **Summary:** Dismissal of a habeas corpus petition involving a prison disciplinary hearing is reversed where, contrary to the finding below, petitioner did exhaust the factual basis for his claim because he presented to a state court all the facts necessary to give application to the constitutional principle upon which he relied. The petitioner, who was serving a nine year sentence, was docked 150 days good time. He argued that he was prevented from calling a witness at the disciplinary hearing. He federalized the claim, citing the Constitution, regulations allowing witnesses, and precedent about the ability to call a witness (Wolff). Although the appeal to the state supreme court lacked a factual discussion, the Ninth Circuit felt, and held, that under the liberal construction approach for pro se, a claim was made, supported by authorities, and clearly put the state and courts on notice that the claim derived from his allegedly being barred from calling a witness at the administrative hearing. Another congratulations to Krista Hart for a published victory in the Ninth Circuit!

Hayward v. Marshall **Date:** 01/03/08 **Case Number:** 06-55392 **Summary:** In habeas proceedings arising from circumstances in which petitioner was twice granted a parole date by the California Board of Prison Terms, and Governor Davis reversed the Board's determinations that petitioner was suitable for

parole, denial of habeas relief is reversed where: 1) a state court unreasonably applied the "some evidence" standard when it concluded that the governor's reversal of the Board's parole grant was justified; 2) no evidence in the record supported a determination that petitioner's release would unreasonably endanger public safety; and thus 3) the reversal of the parole grant violated his due process rights. The petitioner, having served close to 30 years, had a sterling record of rehabilitation. The Governor put forward various reasons that he was a danger, that state courts affirmed and the district court upheld. The Ninth Circuit though found that it was a violation of due process (Gould joined by Kozinski and Friedman). The record had none of the dangers presented to the public that would be a basis for denying parole, and the record was replete indications of the petitioner's remorse and rehabilitation. The Ninth Circuit found the Governor's reasoning without merit, and that the state courts were unreasonable in their application of constitutional due process standards.

Saleh v. Fleming **Date:** 01/03/08 **Case Number:** 04-35509 **Summary:** Incarceration does not ipso facto render an interrogation custodial, and the need for a Miranda warning to a person in custody for an unrelated matter is only triggered by "some restriction on his freedom of action in connection with the interrogation itself." In this case, the petitioner, suspected of murder of his ex-wife, and serving a sentence for an assault on his son-in-law, placed a collect call to the detective who had met with him previously to unburden himself. This unburdening resulted in incriminating statements that were used at trial. The Ninth Circuit (O'Scannlain joined by Tashima with a concurrence by Berzon) held that these statements (other earlier ones had been suppressed) were not "custodial" because, even though petitioner was in custody, he wasn't in custody on this issue. Moreover, he placed the call, could have terminated it, and spoke freely. As for the "cat out of the bag" argument (petitioner had previously confessed, but those were suppressed), the time and separation, and voluntary nature, made these statements admissible. Berzon concurred, just noting that the "cat" issue was foreclosed by precedent, but that the dissent by Judge Norris in Medeiros v. Shimoda, 889 F.2d 819 (9th Cir. 1989)(Norris, J., dissenting) was well reasoned, and that the lack of a second Miranda warnings after the previous interrogation, and invocation, should have made the subsequent phone call involuntary.

Plumlee v. Masto **Date:** 01/17/08 **Case Number:** 04-15101 **Summary:** Denial of habeas relief from a conviction and sentence for first degree murder and robbery is affirmed where the Nevada Supreme Court did not misapply clearly established federal law as determined by the Supreme Court in ruling that: 1) defendant was not entitled to the appointment of a different lawyer; and 2) his waiver of counsel was not involuntary. The defendant in this case had issues with his appointed lawyer, but the trial court refused to allow the public defender to withdraw, finding no conflict. The distrust was so great that the defendant stated that he would rather represent himself than have the public defender, who he believed was undermining his case. "Done," said the trial court, and the defendant went pro per and was convicted. The state courts upheld. A panel of the Ninth Circuit had reversed, but it went en banc, and the Ninth (Silverman) held that the state courts were not unreasonable in denying the change of counsel as there were no conflicts that prevented representation. The state courts, in hearings, had concluded that the public defender had not acted against defendant's interests. Troubling, though, was the complete

breakdown in the lawyer-client relationship, to such an extent that the client was forced, in his mind, to proceed without counsel. This struck Pregerson, who dissented, as a Sixth Amendment violation.

~~Jackson v. Brown~~ **Date:** 01/23/08 **Case Number:** 04-99006, 04-99007 **Summary:** Denial of habeas relief for petitioner as to his convictions for burglary and murder, and a grant of conditional relief as to special circumstances findings and his death sentence are affirmed on appeal and cross-appeal. The state's promise to jailhouse informants was made and paid, but not disclosed. Moreover, the state prosecutor stayed silent when the informant, under oath, testified that no promises were made of any kind. The district court granted partial relief, upholding the convictions (two elderly women murdered) but vacated and remanded the death sentence and the special circumstances findings. The state conceded the death reversal, but argued for special circumstances. The Ninth Circuit affirms district court, allowing the vacation to stand because of the Brady implications and prejudice. The Ninth Circuit rejects relief on petitioner's claims. There is also an interesting discussion on prisoner clothes. The petitioner wore prisoner garb at trial. The Ninth Circuit acknowledges that being forced to wear inmate clothing is unconstitutional, but the Supreme Court requires an objection to be made. Petitioner argued here that court appointed counsel should not be forced to object, and that he is in effect a state actor. The Ninth Circuit rejected the claim, requiring the objection, and opining that it was a tactical choice by counsel.

Estrada v. Scribner **Date:** 01/23/08 **Case Number:** 06-55013 **Summary:** Denial of a habeas petition for a new trial after petitioner's conviction in California state court for, inter alia, second-degree murder is affirmed over claims that his rights to due process and a fair and impartial jury were violated because juror misconduct resulted in the consideration of impermissible extraneous information by the jury, and because two jurors were impermissibly biased. Here petitioner claimed that he fended off the advances of the victim, who had offered him a ride and then supposedly sexually assaulted him. In the fight, the petitioner stabbed the victim to death. He was charged with first degree murder and convicted of murder in the second degree. Subsequently, there were various juror declarations, in which jurors said that they were pressured, and felt compelled to vote the way they did even though, in their heart of hearts, they felt the petitioner was only guilty of manslaughter. The prosecutor got other declarations from jurors that conceded that it was internalized pressure. The Ninth Circuit agreed with the district court that the evidence amounted to juror mental processes, and were inadmissible. The Ninth Circuit also rejected the claims of extrinsic evidence being introduced.

Hess v. Bd. of Parole & Post-Prison Supervision **Date:** 01/29/08 **Case Number:** 06-35963 **Summary:** Denial of a petition for habeas relief is affirmed over a claim that an Oregon statute which allows the Parole Board to postpone petitioner's parole release date if it finds he has "a psychiatric or psychological diagnosis of a present severe emotional disturbance such as to constitute a danger to the health or safety of the community," is unconstitutionally vague. The petitioner had been serving a sentence in Oregon since 1984. When he came up for appeal, a psychiatrist diagnosed him as a pedophile and suffering from a personality disorder. His behavior though had been fine except he didn't go to the "counseling" in prison. The board took the report, and victim testimony, into consideration and denied parole. The courts, and the Ninth Circuit,

found that the statute was not unconstitutionally vague because it sets standards for parole consideration, including review of a psychological report, and the determination was for the safety of the community.