Daniel J. Broderick
Federal Defender

Linda C. Harter
Chief Assistant Defender

Francine Zepeda
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 2012

CJA PANEL TRAINING

Panel training in Sacramento will be MOVING in February! The new location will likely be the jury assembly room on the fourth floor of the District Courthouse, at 501 I St. To accommodate this room change, we'll be starting at 5:00 p.m. instead of 5:30 p.m. Please keep an eye out for an email that will confirm this new location and time. The next date for CJA panel training is Wednesday, February 15, 2012 at 5:00 p.m. Don Heller, Esq., and former SUSPO (and current PI) Robert Storey will be presenting "WHAT GUIDELINES? The Art of § 3553(a) Factors for Sentencing: Mitigation, Investigation, and Sentencing Advocacy Outside the Guidelines."

CJA Panel training in Fresno will be on Tuesday, February 21, 2012 at 5:30 p.m. at the Downtown Club, 2120 Kern St., Fresno. The topic will be announced.

2012 CJA PANEL SELECTION

The CJA Panel Selection Committee for Sacramento has completed its review of applications for renewal and inclusion on the felony and misdemeanor panels. The proposed list of names has been submitted to the Chief Judge and we are awaiting the result of the court's review. The Panel Selection Committee for Fresno is still reviewing applications. After the court's decision is made regarding each panel, all applicants will be contacted by letter.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website - www.cae-fpd.org. If a lawyer is not on the panel, but would like the materials, they can contact Lexi_Negin@fd.org.

CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, or are interested in donating clothing to the client clothes closet, please contact Debra Lancaster at 498-5700.

TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, or if you would like the office to address a particular legal topic or practice area, please e-mail your suggestions to Charles Lee (Fresno) at charles_lee@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive this 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 Kurt Heiser 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.

NOTABLE CASES

United States Supreme Court

In Smith v. Cain, No. 10-8145 (1-10-12), the Court ruled that prosecutors' failure to disclose evidence that the sole eyewitness to the murder of which the defendant was convicted had given the police statements that contradicted his trial testimony violated Brady v. Maryland and required reversal of the conviction.

In Maples v. Thomas, No. 10-63 (1-18-12), the Court held that a state prisoner whose pro bono attorneys abandoned him without notice during state post-conviction proceedings, resulting in his failure to meet a deadline for filing a notice of appeal, has shown the "cause" for the procedural default that is required to allow him to pursue federal habeas corpus relief.

In United States v. Jones, No. 10-1259 (1-23-12), the Court held that the government's installation of a GPS tracking device on an automobile and its use of the device to monitor the vehicle's movement amounts to a search for Fourth Amendment purposes and required a warrant.

In Reynolds v. United States, No. 10-6549 (1-23-12), the Court ruled that the registration requirements of the federal Sex Offender Registration and Notification Act did not apply to offenders convicted before the Act went into effect until the attorney general properly exercised his statutory authority to specify that SORNA did apply to them.

Ninth Circuit

United States v. Havelock, No. 08-10472 (1-6-12) (en banc)(B. Fletcher, for the plurality). Does the federal mail threats statute mean "corporations" when it prohibits sending threatening mailings addressed to "persons?" The court holds that a "person" must be a human being in the context of this statute. The district court and jury may look at the contents of a mailing to determine to whom it was addressed. Because Mr. Havelock's mailings were not addressed to a person, his conviction was reversed.

United States v. Shetler, No. 10-50478 (12-28-11)(Reinhardt, with Berzon, and Kennelly D.J., visiting). The Ninth Circuit reverses the district court and suppresses confessions that followed an illegal search. Facts: Based on a tip, law enforcement searched defendant's garage and found chemicals and gear related to cooking meth. That search was legal. The cops then seized Shetler, got his girlfriend to "consent" to a search of the house, searched his house and re-searched the garage. This second round of searches (which were held by the trial court to be illegal) produced many more items of evidence. The detained defendant watched this search from outside, and was then Mirandized and confessed to making meth. The next day he was Mirandized and interrogated twice more in custody, expanding his confession each round.

The question on appeal was whether the district court erred in finding that the statements made by Shetler were not sufficiently connected to the preceding illegal searches to constitute "fruit of the poisonous tree." The Ninth Circuit held that "[t]he government did not bear its burden of showing that Shetler's statements were not

the product of illegal searches. Contrary to the district court's determination, there is no evidence in the record to support the conclusion that the statements were "the product of the initial legal search of the garage . . . and were not tainted by the illegal searches of the garage.'" The statements should have been suppressed.

United States v. Valenzuela-Espinoza, No. 10-10060 (12-28-11)(B. Fletcher, with Reinhardt and Tashima). The Ninth Circuit reverses the conviction and holds that a confession should have been suppressed, where there was a delay in presenting the defendant to a magistrate judge under Federal Rule of Criminal Procedure 5(a), and where the confession conveniently was obtained after he had already been held for more than six hours without seeing a magistrate judge. The defendant was arrested at 11:15 a.m., his confession was taken after 7:00 p.m. that evening, and he was not presented to a magistrate until 2:00 p.m. the next day. There was a factual finding that "[a]ny number of available agents" could have gotten the defendant before the magistrate on the day of arrest. In denying the motion to suppress, the district court noted its policy to have documents by 10:30 a.m. for a 2:00 p.m. duty appearance. The Ninth Circuit holds that a policy of delaying arraignment because of a paperwork cutoff does not establish that the delay is reasonable. Nor is law enforcement entitled to delay presentment by six hours pursuant to § 3501(c) if that means that a defendant will miss the next available magistrate calendar. In this case, because the defendant was arrested ten miles from the courthouse three hours before the arraignment calendar, the delay was not reasonable. The confession should have been suppressed.

United States v. Alcala-Sanchez, No. 11-50030 (1-10-12)(Gould with Nelson and Ikuta). The Ninth Circuit vacates the sentence and remands the case to a different district judge because the government breached the plea agreement. The government offered a fast-track deal in an illegal reentry case and agreed that the prior conviction was a +8. It agreed to recommend a total offense level of 12 (with no agreement as to the sentence within the range). The probation officer in the PSR concluded however that a different crime was a crime of violence, and worthy of a +16. A "sentencing prosecutor" (not the one that made the agreement) filed a sentencing chart/memo that repeated the PSR's calculations. At sentencing the prosecutor who negotiated the deal appeared and refused to disagree with the sentencing memorandum. The sentencing was continued, and eventually the prosecutor acknowledged the breach. The government finally withdrew its sentencing memorandum and stuck unenthusiastically by the deal. The district court followed the PSR and then varied downwards, but still sentenced higher than the guideline range as agreed-to in the plea agreement.

The Ninth Circuit held that the court clearly erred. The breach here was the failure of the government to live up to its bargain by making a wrong recommendation. Even though the prosecutor eventually admitted her mistake, and fell in line with the recommendation, it didn't matter. A breach, intentional or inadvertent, still was a breach. The defendant lost his right to a "united" front as to the argument that the offense level was a +8 and not a +16. The sentence had to be vacated and remanded to a different judge.

United States v. Kuok, No. 10-50444 (1-17-12)(Bybee with Pregerson and Davidson, Sr. D.J.). The defendant, a citizen of Macau, tried to export military defense articles from the U.S. without a license. In these efforts, he was aided by helpful undercover ICE agents, which led to his arrest in Atlanta while flying to Panama to complete a transaction. At trial, he raised a duress defense, arguing that a Chinese

official made him seek the exports under threat to his family. The court declined to give a duress instruction. Defendant was convicted and appealed. The Ninth Circuit vacated two counts for lack of jurisdiction. One count involved money laundering, where the government failed to establish the $10,000 jurisdictional threshold. Regarding an attempt to export count, the Ninth Circuit held that attempting to cause an export of defense articles without a license is not a crime. In that count, the defendant tried to get an undercover agent to export an article; that differs from the defendant himself attempting. The statute does not reach to others. The Ninth Circuit vacates two other counts and remands for a new trial because the court should have given a duress instruction. It was a close call, but the defendant presented evidence that Chinese officials made a threat, were specific, and the defendant could not extricate himself.

United States v. Melendez-Castro, No. 10-50620 (1-18-12)(Per curiam with Nelson, Gould, and Ikuta). In a collateral attack on a prior deportation, the Ninth Circuit holds that the defendant had not been meaningfully informed of his eligibility for a voluntary departure. He appeared before the immigration judge in in 1997, after a petty offense conviction for stealing $6 briefs. The IJ stated that he never uses his discretion to cancel removal if the defendant has a criminal conviction. The Ninth Circuit concludes that though the defendant had been given his right to seek cancellation, he was basically told in the same breath that it was meaningless. The Ninth Circuit remands for the district court to consider prejudice. The court paints a sympathetic portrait of the defendant of being a hard worker and pretty-much law abiding with extended family here, all lawfully.

United States v. Gonzalez, No. 11-15025 (1-25-12) (Hawkins with M. Smith and Duffy, D.J.). Joint Defense Agreements (JDA) can blow apart when the participants start pointing fingers in an IAC proceeding. Here, the Ninth Circuit looks at a JDA between co-defendant spouses, who were charged with fraud and arson (10 year mandatory minimum). The trials were severed when the husband said that he did it and the wife knew nothing. After severance, the husband went first and then argued that he knew about the fraud (getting rid of a car for insurance), but not the fire. He was only convicted of fraud; the wife was convicted of all counts at her trial. The husband did not testify. The wife - the defendant here - raised IAC, arguing that her lawyer should have called the husband as a witness. The district court ordered depositions. "Wait," said husband, there is a JDA. The court shrugged and said when the parties raised IAC, the JDA became null. Not so, held the Ninth Circuit, on an interlocutory appeal. Explaining JDAs, and the jurisprudence, the Ninth Circuit concludes that attorney-client privilege extended to all involved. There appeared to be a JDA formed here, albeit orally. Now, comments may have been made after the JDA collapsed, but no findings were made. The Ninth Circuit remanded for the district court to hold an in camera hearing to determine if and when the JDA ended, and when the comments about testifying were made.

United States v. McGowan, No. 10-50284 (1-26-12)(Reinhardt, with Kozinski and W. Fletcher). The Ninth Circuit vacated the 51 month sentence, because it was imposed using suspect unreliable statements from a former inmate that went untested. On remand, the case is reassigned to a different district judge.