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
July 2011

CJA PANEL TRAINING

Panel training will be on vacation for the summer and will resume in September. Have a great summer!

TRIAL PRESENTATION TRAINING PROGRAM

The hands-on trial presentation training was very well received in Sacramento last week. Several panel attorneys were unable to attend, however, so we will try to schedule another session later in the fall. We have also been forced to rework the training session planned for Fresno from July 26 to 29, because of a scheduling conflict with the presenters. We will be contacting all the people who have signed up in Fresno with revisions to that schedule.

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 Melody Walcott (Fresno) melody_walcott@fd.org or Rachelle Barbour (Sacramento) at rachelle_barbour@fd.org.

REDUCED RATE FOR CJA PANEL ATTORNEYS ON TEXTMAP SOFTWARE

LexisNexis and the Office of Defender Services have reached a reduced rate and maintenance agreement for TextMap. LexisNexis has agreed to sell TextMap to CJA panel attorneys at a 50% savings (currently $161.00). TextMap is a transcript summary tool that can be integrated with CaseMap. TextMap offers the ability to link transcripts from case depositions, examinations, and other proceedings to case exhibits and other documents. It can also be used to play video and audio that has been synched with transcript text.

CJA offices will not have to pay any annual maintenance or subscription fees for these licenses, but will still receive technical support and upgrades of the TextMap software, since these costs will now be included in an ongoing national maintenance agreement with the ODS. CJA panel attorneys can currently purchase the CaseMap / TimeMap / DocPreviewer software suite for $387.50, a 50% savings. If CJA panel attorneys are interested in licenses of TextMap (or CaseMap/ TimeMap/DocPreviewer), you can purchase those licenses through LexisNexis: contact Carolyn Winiarz at 904-373-2201 or carolyn.winiarz@lexisnexis.com.

LEGAL SUPPORT REGARDING IMMIGRATION ISSUES

Thanks to an initiative by the Federal Defender Services Training Branch, the Heartland Alliance's National Immigrant Justice Center (NIJC) will be accepting and responding to inquiries from CJA panel attorneys on immigration-related issues. NIJC makes a commitment to respond to inquiries within 24 (workday) hours. The contact information for NIJC's Defenders Initiative is:

208 S. LaSalle Street
Suite 1818
Chicago, IL 60641
(312) 660-1610
defenders@heartlandalliance.org
www.immigrantjustice.org

Please identify yourself as a CJA Panel Attorney when inquiring about immigration matters related to a federal case in which you are appointed.

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.

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

Supreme Court

A District Court May Not Consider Rehabilitation in Deciding Whether to Impose or Increase Incarceration

Tapia v. United States, No. 10-5400 (6-16-11) held that a district court may not impose or lengthen a term of imprisonment in order to promote the defendant's rehabilitation. In an opinion written by Justice Kagan, the Court demonstrates that 18 USC 3582(a), which sets forth the "factors to be considered" when a court orders imprisonment, precludes district courts from considering rehabilitation for purposes of determining whether to impose a term of imprisonment or to lengthen the term of imprisonment. "[W]hen sentencing an offender to prison, the court shall consider all the purposes of punishment except rehabilitation --- because imprisonment is not an appropriate means of pursuing that goal." This conclusion is supported by the text of 3582(a), its context in the SRA (including 28 U.S.C. 994(k), a directive to the Sentencing Commission), and its legislative history.

As part of its analysis, the Court usefully demonstrates that the SRA provides particular guidance regarding how the four purposes of sentencing set forth in 18 USC 3553(a)(2) -- retribution, deterrence, incapacitation, and rehabilitation -- pertain to each type of the primary sentencing options under the Act -- imprisonment, supervised release, probation, and fines. These additional provisions "make clear that a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration." As an example, the Court points out that 18 USC § 3583(c) provides that a court may NOT take account of retribution (the first purpose under 3553(a)(2)) when imposing a term of supervised release.

Finally, in a footnote, the Court notes that this case does not address the question whether Congress intended to prohibit courts from imposing less imprisonment in order to promote a defendant's rehabilitation and that this decision expresses no view on that question. The government rightly argued that Congress did not intend to prohibit courts from imposing less imprisonment to promote rehabilitation. In 28 USC § 994(e), a directive to the Sentencing Commission also part of the SRA, Congress provided as follows: "The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."

The legislative history to this subsection explains that Congress thought that rehabilitative needs may be pertinent to the question of "the kind of sentence that may be imposed" as well as "the length of a term of . . . imprisonment." S. Rep. 98-225, at 171 (1983). Rehabilitative needs may "call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community." Id. at 174-75. For example, the "need for an educational program might call for a sentence to probation . . .even in a case in which the guidelines might otherwise call for a short term of imprisonment." Id. at 172. A drug-dependent defendant's need for drug treatment may call for a "brief stay in prison" for "drying out" followed by participation in a community drug treatment program as a condition of probation. Id. at 173. Or a defendant who otherwise should be sentenced to prison may have family circumstances that might call for allowing the defendant "to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family." Id. at 174.

The Confrontation Clause Prohibits One Lab Technician From Testifying to Another's Results

In Bullcoming v. New Mexico, No. 09-10876 (6-23-11) the Court held that the Sixth Amendment's Confrontation Clause as interpreted in Melendez-Diaz v. Massachusetts does not allow prosecutors to introduce a forensic laboratory report containing a testimonial certification — made to prove a particular fact at trial — through the in-court testimony of an analyst who did not sign the certification or perform or observe the test.

A Defendant Who Enters a Binding Plea is Not Barred From Seeking an § 3582(c)(2) Sentence Reduction

In Freeman v. United States, No. 09-10245 (6-23-11), the Court held that a defendant who enters a plea agreement to a specific sentence under Fed. R. Crim. P. 11(c)(1)(C) is not barred from seeking a sentence reduction under § 3582(c)(2). Such a sentence may be "based on" a subsequently lowered guideline range. A term of imprisonment imposed pursuant to a binding plea agreement (whether within or outside the guideline range) is likely to be "based on" the guidelines, and when it is, a judge is permitted to revisit the sentence "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement."

Ninth Circuit

US v. Evanston, No. 10-10159 (7-5-11) (Hawkins with Kozinski and Gould). The district judge was faced with a hung jury and decided, instead of declaring a mistrial, to ask the jury what issues troubled them and have the parties reargue. The defense objected, but the district court went forward with the procedure and the defendant was convicted. The Ninth Circuit holds that the district court erred, vacates, and remands.

There is no basis to allow such a procedure in federal court. Even though judges have a great deal of discretion in running trials, and administering jury deliberations, the court's procedure improperly involved the lawyers in deliberations. Moreover, the court arguably went against the Ninth Circuit's own model instructions that state that the jury should not tell anyone, including the court, how they stand.

Hurles v. Ryan, No. 08-99032 (7-7-11)(D. Nelson with Pregerson; dissenting by Ikuta). The Ninth Circuit reverses on the basis of judicial bias. The trial judge became involved in an interlocutory appeal, tried to appear as a party,and then presided over the murder trial and was the capital sentencer. The possibility of actual bias rose to an unconstitutional level. The judge had involved herself in the interlocutory appeal; had made comments about the case before witnesses had testified; and the comments concerned the competency of counsel.