OFFICE OF THE FEDERAL DEFENDER
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700
Toll Free: (855) 328.8339
FAX (916) 498.5710

2300 Tulare Street, Suite 330
Fresno, CA 93721-2228
(559) 487.5561
Toll Free: (855) 656.4360
FAX (559) 487.5950

Capital Habeas Unit (CHU) (916) 498.6666
Toll Free: (855) 829.5071 Fax (916) 498.6656

HEATHER E. WILLIAMS
Federal Defender
BENJAMIN D. GALLOWAY
Chief Assistant Defender
DAVID HARSHAW
CHU Chief
ERIC KERSTEN
Fresno Branch Chief
RACHELLE BARBOUR, Editor
Assistant Federal Defender

Federal Defender Newsletter
December 2020

HAPPY HOLIDAYS FROM THE FEDERAL DEFENDER'S OFFICE!!

During this strange year, we celebrate the continuing resilience of our clients, staff, and colleagues. We appreciate the unwavering commitment of our CJA Panel to helping clients facing the loss of liberty, life, and health in the face of this pandemic.

CJA PANEL TRAINING

We will continue to create remote training opportunities ourselves, and to publicize training provided elsewhere. We do not expect to meet in person for months, accordingly, please keep an eye on your emails for MCLE opportunities as they arise.

Check out www.fd.org for unlimited information to help your federal practice, including a variety of free trainings. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself.

The Federal Defender Training Division also provides a **telephone hotline** with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

CJA Representatives

Kresta Daly, (916) 440.8600, kdaly@barth-daly.com, is our District's CJA Representative.

Fresno CJA Panel lawyers: please email us if you are interested in being our District's Back-up CJA Panel Representative (3 year term), to then be our District's Primary CJA Representative for 3 years.

Our utmost thanks and gratitude to David Torres who admirably served as our District Back-up, then Primary CJA Representation and whose term expired November 30, 2020. We appreciate all your hard work for our Panel lawyers and indigent defense in the Eastern District!

2018 Sentencing Guidelines Still in Effect

The Sentencing Commission did not pass any amendments this year, therefore the 2018 Sentencing Guidelines (Red Book) are still the operative guidelines.

Duty Contact at Marshal's Office

Please email USMS.CAE-PRL@usdoj.gov or call the Marshals cellblock number at 916-930-2026, for any Sacramento duty matters regarding arrestees.

Due Process Protection Act (DPPA)

By now you've likely seen or heard judges advise the parties on the Government's duty to provide exculpatory evidence to the defense. This advisement is required by the Due Process Protection Act, and its recent amendment of Fed. R. Crim. P. 5(f) (2020). *See* Pub. L. No. 116-182 (2020) PUBL182.PS (congress.gov).

The DPPA tasks each Circuit's Judicial Council with formulating a first appearance "oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law." The district courts in that Circuit will be expected to provide the Circuit-created language.

The Ninth Circuit Federal Public Defenders will suggest language to the Judicial Council for this. Until the Judicial Council does approve any language, the district's are giving their interim versions of the advice.

This is a weapon for defense counsel to get the information we need which may better our clients' situations. Wield it wisely, but be sure to wield it!

TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno: Peggy Sasso,
peggy_sasso@fd.org
or Karen Mosher,
karen_mosher@fd.org
Sacramento: Lexi Negin,
Lexi_negin@fd.org.

NINTH CIRCUIT

US v. Litwin, No. 17-10429 (8-27-20)(Bress w/Gould & Christen). Fraud and conspiracy convictions, resulting from a lengthy fraud trial, are reversed and remanded due to the improper dismissal of a juror during deliberations. The district court dismissed Juror #5 (a paralegal who had practiced as a defense lawyer in the Philippines) because of perceived malice towards the judicial system and a refusal to deliberate. This occurred three hours into deliberations after a 36-day trial. The record did not support such animosity, even if there was anger at the court making her sit as a juror. Rather than refusal to deliberate, the record suggested confusion over jury instructions. The Ninth Circuit was sympathetic with the court, but concluded that the removal was too soon and without a sufficient justification or record. The error was structural.

US v. Valencia-Lopez, No. 18-10482 (8-19-20)(Bennett w/Hawkins; dissent by Owens). The Ninth Circuit vacated and remanded convictions for transportation and importation of marijuana. The defendant, a truck driver, argued he acted under duress, because the cartel forced him by threats to his family to transport 6000 kilos of marijuana. Over defense objection, the government called an agent to testify as an expert that the cartel does not operate that way and would never entrust this amount of drugs to a coerced driver.

Admission of the testimony was error and was not harmless. The Ninth Circuit held that the district court did not properly fulfill its gatekeeping role under Daubert for two reasons: (1) it qualified an agent as an expert without explicitly finding that his proposed testimony about the likelihood of coercion was reliable, and (2) a "more important reason," it admitted the agent's testimony despite the government establishing no reliable basis for his expert testimony about the likelihood of duress in Mexico. The agent had no support or expertise for his testimony that the cartel would never operate this way. There was no methodology behind this opinion.

"It is one thing for a witness with Agent Hall's expertise to testify as to the risks to a cartel of using a coerced courier. But that is a far cry from him essentially testifying that the cartel never does it." Given his lack of experience within Mexico, and with no explanation of his methodology, "there is simply too great an analytical gap between" his experience and his conclusion. The court could not just say it goes to the weight; the court must perform the Daubert reliability gatekeeper function. The errors were not harmless.

US v. Swenson, No. 18-30215 (8-19-20)(M. Smith w/Bress; partial dissent by N. Smith). This is a garnishment case. Under the MVRA, the government garnished the Social Security funds of a spouse to pay the restitution of a defendant convicted of wire fraud. The Ninth Circuit tells the Government it may not garnish these funds. The funds belong to spouse in a separate account. The defendant had no property rights to spousal Social Security funds. The Social Security Act preempted Idaho community property law. The MVRA does not override the Social Security Act or make an exception.

Kipp v. Davis, No. 16-99004 (8-19-20)(Paez w/Murguia; dissent by Nguyen). The Ninth Circuit granted habeas relief in this related case to another capital murder/rape case. The Ninth Circuit held that introduction of yet another unadjudicated murder/rape violated petitioner's due process rights as the offenses were too dissimilar to be considered a pattern. Petitioner overcomes AEDPA deference because the state court misstated the facts as to the offenses and ignore petitioner's evidence as to the differences between the offenses.

US v. Fuentes-Galvez, No. 18-10150 (8-10-20)(Sessions w/Fletcher & R. Nelson). The Ninth Circuit reversed and remanded a conviction and sentence for egregious errors in the change of plea proceeding. The defendant pled guilty to illegal reentry during a procedure that the Ninth Circuit considered truncated, incomplete, and meeting plain error standards. The magistrate judge omitted standard Rule 11 inquiries while combining others. The judge critically failed to ask about the defendant's competency or understanding, whether the plea was knowingly and voluntarily given, whether he was under the care of a physician or taking medications, or whether he understood his attorney or was satisfied with counsel. The court did not discuss the guidelines, clearly inform the defendant of certain constitutional rights, or that counsel could be with him at trial. The court further did not address whether his plea resulted from force or threats. The magistrate judge accepted the plea and recommended to the district judge to accept it. The court accepted the plea, but it rejected the plea agreement for guideline errors. The district court then rejected a revised plea agreement. The defendant then pled without an agreement. The district court did not engage in a colloquy about the plea

to the charge. The court sentenced him to 42 months, a sentence a year longer than top of the guidelines range. The Ninth Circuit found the change of plea lapses prejudicial. It questions the voluntariness, because the defendant had little schooling, a history of mental health disorders, including PTSD, depression, and anxiety. He also had medical physical ailments. There was a reasonable probability that the errors affected his decision to plead guilty.

US v. Oriho, No. 19-10291 (8-10-20)(Tallman w/Siler & Hunsaker). The defendant was charged with fraud; the proceeds were allegedly sent to banks in Africa. The District Court ordered Mr. Oriho to repatriate the funds "out of Africa" to preserve them for potential forfeiture. The defendant took an interlocutory appeal. The Ninth Circuit vacates the order to repatriate as violating the Fifth Amendment right against self-incrimination. By forcing the defendant to repatriate the funds, basically under a restraining order, the Government would force the defendant to incriminate himself by identifying and demonstrating his control over untold funds in bank accounts unknown to the government. The court, the Ninth Circuit concluded, failed to apply the proper "foregone conclusion" test; that is, that the government already knew where the funds were, amounts, dates and places.

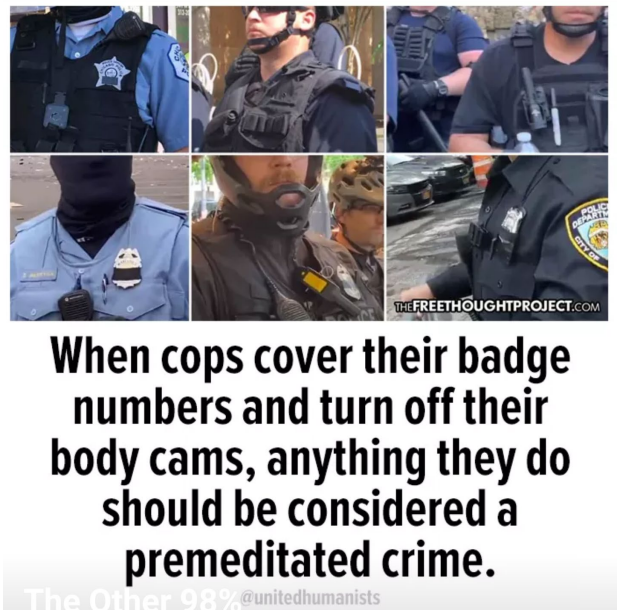
US v. Bundy, No. 18-10287 (8-6-20)(Bybee, with Fletcher and Watford). During trial the Government began disclosing information in its possession that under Brady was arguably useful to the defense and should have been produced. The district court ultimately dismissed the indictment with prejudice because of the Brady violations. The Government appealed. The Ninth Circuit affirmed, holding that the district court's exercise of its supervisory powers was appropriate: the Government's misconduct was flagrant and substantial prejudice resulted. Flagrant misconduct need not be intentional. If any government agencies or actors acted with a reckless disregard for Brady obligations, that conduct is imputed to the prosecution. Here, the Government withheld surveillance-camera evidence, FBI 302s, and threat assessments. This was reckless – the evidence was facially exculpatory and directly negated the Government's own theory at trial. The deliberate choice to withhold these items was not a case of simple misjudgment.

US v. Alhaggagi, No. 19-10092 (10-22-20)(M. Smith w/Ezra; dissent by Hurwitz). The defendant was convicted of "material support" by providing social media accounts for ISIS sympathizers. The court imposed a massive guideline adjustment for terrorism under USSG 3A1.4. The Ninth Circuit held this increase was inappropriate. There was no proof that providing the accounts was intended to intimidate, coerce, or retaliate against government conduct. The GL adjustment, distinct from the conviction, requires a federal crime of terrorism and thus the specific intent. The district court failed to make sufficient findings that the defendant specifically knew how his social media accounts would be used. The government had to carry this burden by clear and convincing evidence because of the massive difference in guideline range. Without the adjustment, the range was 46 to 57 months. After the adjustment, it was 360 to 564. The court's failure to make the findings that supported such an increase was an abuse of discretion.

US v. Ngumezi, No. 19-10243 (11-21-20)(Miller, with Hunsaker, and Schiltz [D.J.]). "[O]pening a door and entering the

interior space of a vehicle constitutes a Fourth Amendment search." The remedy for the suspicionless search in this case is the exclusion of evidence discovered as a result of that violation. The Ninth Circuit vacates the conviction for felon in possession.

Pay attention to the facts in your vehicle search cases and the order in which actions happen. Get body and dash cams whenever possible. If they don't exist, argue the intentional absence of evidence from which the court can presume the facts which would have hurt the Government.



9th Circuit Criminal Jury Instruction 4.18
LOST OR DESTROYED EVIDENCE

Comment

An instruction concerning evidence lost or destroyed by the government is appropriate when the balance "between the quality of the Government's conduct and the degree of prejudice to the accused" weighs in favor of the defendant. *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir.1979) (en banc) (Kennedy, J., concurring), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir.2008); *see United States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir.2013). The government bears the burden of justifying its conduct, and the defendant bears the burden of demonstrating prejudice. *Id.*, 714 F.3d at 1173. In evaluating the government's conduct, a court should consider whether the evidence was lost or destroyed while in the government's custody, whether it acted in disregard of the defendant's interests, whether it was negligent, whether the prosecuting attorneys were involved, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. *Id.* (citing *Loud Hawk*, 628 F.2d at 1152). Factors relevant to prejudice to the defendant include the centrality and importance of the evidence to the case, the probative value and reliability of secondary or substitute evidence, the nature and probable weight of the factual inferences and kinds of proof lost to the accused, and the probable effect on the jury from the absence of the evidence. *Id.* at 1173-74 (citing *Loud Hawk*, 628 F.2d at 1152). While a showing of bad faith on the part of the government is required to warrant the dismissal of a case based on lost or destroyed evidence, it is not required for a remedial jury instruction. *Id.* at 1170.

US v. Bautista, No. 19-10448 (11-23-20)(Fletcher w/Schroeder & Hunsaker). A prior Arizona conviction for attempted transportation of marijuana under ARS 13-3405(A)(4) was overbroad and indivisible with respect to a generic "controlled substance offense" under USSG 4B1.2. The state statute includes hemp; the federal statute, 21 USC 801 et seq, as of December 20, 2018, excludes hemp. Thus, the federal guidelines cannot use the state offense as a recidivist enhancement for

sentencings after December 20, 2018. Keep an eye on marijuana priors: many state statutory schemes still include hemp, while the federal definition now excludes it. An overbroad prior cannot be used to increase your client's sentence.