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
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CJA PANEL TRAINING

AFD David Porter will present the Supreme Court Update at the Sacramento CJA Panel Training on Wednesday, April 21, 2010 at 5:30 p.m. It will take place at 801 I St., 4th Floor.

Robert Beegle of Delta Phase Inc. will be presenting a training on Cellular Phone Records and Forensic Analysis at the Fresno CJA Panel Training. It will take place on Tuesday, April 27, 2010 at 5:30 p.m. at the Downtown Club, 2120 Kern Street, Fresno. Please note that this is on the fourth Tuesday in April.

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 at the Fresno office at melody_walcott@fd.org or Rachelle Barbour at the Sacramento office 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 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.

CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, please contact Dawn at 498-5700 to use the client clothes closet. If you are interested in donating clothing, we could use more women's clothing and men's dress socks.

NOTABLE CASES

United States Supreme Court

Bloate v. United States, No. 08-728 (3-8-10). The Court held that the time a federal district judge grants for a defendant to prepare pretrial motions is not automatically excludable from the Speedy Trial Act's 70-day time limit under 18 U.S.C. § 3161(h)(1); rather, that time may be excluded only if the judge has made case-specific findings pursuant to Section 3161(h)(7).

Padilla v. Kentucky, No. 08-651 (3-31-10). The Court held that as a matter of federal constitutional law, counsel must inform a client when his or her plea carries a risk of deportation. "[A]s a matter of federal law, deportation is an integral part -- indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." When the deportation consequence is clear, as it was in this case (transportation of marijuana), the duty to give correct advice regarding the deportation is equally clear." The Court held that Mr. Padilla's counsel was constitutionally deficient in assuring him that he would not be deported for his conviction, and remanded the case to allow Mr. Padilla the opportunity to show prejudice.

Ninth Circuit Court of Appeals

U.S. v. Garrido, No. 08-10398 (2-25-10) (D. Nelson, joined by Farris and Bea). The Ninth Circuit vacated the defendant's sentence and remanded for consideration of an acceptance of responsibility reduction. The offense was an armed robbery, where the security guard recognized the defendant, and testified that a firearm was pointed in his face. The defendant argued that he did not use an actual firearm. He offered to plead to the robbery, which was rejected. He was convicted of the robbery and the firearm at trial. At sentencing, the district court denied acceptance of responsibility because the court said that he had to accept responsibility for all the counts. This was error, the Ninth Circuit decided, because the defendant only had to accept responsibility for counts that were grouped. The 924(c) count was not grouped, nor could the defendant receive acceptance for it (a mandatory 7 years). The Ninth Circuit stressed that the defendant could receive acceptance after trial if he admitted the elements, and showed remorse, for the grouped counts. This accords with other circuits.

Rice v. Holder, No. 05-74297 (2-26-10). A nonpermanent resident's expunged state conviction for using or being under influence of controlled substance does not prohibit his seeking cancellation of removal in an immigration proceeding.

U.S. v. Arias-Ordonez, No. 08-10259 (3-8-10) (Schroeder with Berzon and Shadur, D.J.). An alien's due process rights were violated when the order to appear for removal proceedings falsely stated no administrative relief was available to him. The defendant was mislead and misinformed by the government as to his administrative remedies for a relatively minor misdemeanor offense of possession. The alien did everything he was instructed to do to effectuate his removal, after it had been ordered in absentia. He even sent his mother to report for removal in his place while he obtained proper identification. But the order instructing him to report for removal misinformed him that he had no administrative remedies and he was never told that he had a right to reopen to seek voluntary departure. On appeal, the

government did not contest the district court's ruling that the flaws in the underlying removal prejudiced the alien. However, the government argued that the subsequent summary reinstatements of the flawed removal can support the criminal indictment for illegal reentry. The Ninth Circuit rejected the governments argument. Because the original removal order was flawed, the seven subsequent reinstatements of the removal order could not provide an independent basis because they simply reinstated the removal that had not complied with due process.

US v. Cha, No. 09-10147 (3-9-10)(Beezer with Graber and Fisher). The Ninth Circuit holds that a 26.5 hour seizure of a house was constitutionally unreasonable and the evidence must be suppressed. The wife was arrested and taken to the police station. The house was seized. The husband (and later codefendant) was not allowed back in. Over the next day, the police leisurely prepared the application for warrant, taking their time and not displaying any rush. In the meantime, the husband was barred for hours from getting his medication, and then only with an escort. He had no place to go. He called his lawyer, who was also unable to get the police to allow him back in. The Ninth Circuit agreed with the district court that the seizure was too long. Although there was probable cause, the police had no other reason to excuse such a delay. The Ninth Circuit looked at the systematic failure of the police to prepare the warrant quickly, and described the police conduct as systematically unreasonable and reckless. Herring does not excuse the actions, because that was a one time negligent act of not checking if the warrant was quashed, while here, the police conduct was sufficiently culpable to warrant suppression. Although probable cause did exist before the seizure, an unreasonable seizure can lead to suppression for deterrence, and that was the case here.

Espinosa v. City and County of San Francisco, No. 08-16853 (3-9-10). Law enforcement officers are not entitled to qualified immunity where they failed to show exceptions applied to warrantless search of apartment where victim was fatally shot.

S-Yong v. Holder, No. 07-70619 (3-9-10). The removal order was reversed where the immigration judge relied on an alien's admissions to establish fact of previous conviction.

Valdovinos v. McGrath, No. 08-15918 (3-10-10)(B. Fletcher with Kleinfeld and Duffy, D.J.). The petitioner was convicted of first degree murder for a shooting outside of a San Jose nightclub. Several witnesses identified the petitioner as the shooter. Their identifications had inconsistences as to clothes and build. At trial, it was revealed that the witnesses had been presented with a photo line-up of the petitioner, one had failed to identify him, and the other expressed doubts. Later, it also came to light that the prosecutors had an anonymous letter that tied the victim into a drug debt, and there was evidence of cocaine baggies found close by. The prosecutor also had a statement that one of the witnesses interviewed admitted he lied to the police to cover for himself. The Ninth Circuit found that these were Brady violations, and that they were prejudicial. As the opinion concludes: "A pattern of non-disclosure permeated the proceedings against [petitioner]." The prosecution deprived petitioner of due process.

Stanley v. Schriro, No. 06-99009 (3-10-10)(Rawlison; concurrence by B. Fletcher; partial concurrence and partial dissent by Kleinfeld). The Ninth Circuit grants a

remand for an evidentiary hearing on an IAC sentencing claim in this capital murder petition. The petitioner murdered his wife and young child in 1986. He got a life sentence on his wife's murder and death for the child's. The Ninth Circuit held that counsel's failure to make use of psychological evidence of a disassociative state could have had a prejudicial impact on mitigation. This evidence could well have gone to negate premeditation.

US v. Rocha, No. 08-50175 (3-18-10)(Bybee with T. Nelson and M. Smith). Defendant assaulted another inmate at FCI-Victorville during a prison brawl. As caught on videotape, the defendant grabbed the ankles of the victim and pulled them, causing the victim to fall to the concrete fall. The victim later died from knife wounds. The defendant was charged with assault to commit murder, assault with a dangerous weapon, and with an assimilated crime of assault by means of force to cause great bodily injury. He was acquitted of assault to commit murder, but convicted of the other two charges. The Ninth Circuit reverses the convictions. The court holds that the defendant could not be tried under the Assimilative Crime Act, because Congress had defined assault, and had precluded application of state law by its comprehensiveness. The court also, importantly, holds that hands cannot be considered a dangerous weapon. After looking at prior decisions, the court reasoned that if the weapon could be hands, or a body part, than basically all assaults would be with a dangerous weapon. The court also was not willing to let the jury decide the issue on a case by case basis.

US v. Christensen, No. 08-30120 (3-24-10)(Paez joined by Rawlison and Jenkins, D.J.). As a result of an undercover operation, the defendant was convicted of enticing a minor to engage in sexual activity. He received a two-level enhancement for unduly influencing a minor under the Guidelines, even though the "minor" was a FBI agent posing as an underage female. He objected to this enhancement. After the case was submitted, the Sentencing Commission amended the application note to section 2G1.3(b)(2)(B) to reflect that an adjustment should not be given when the "minor" is actually an undercover agent. The court finds that the application note applies, and that it should apply retroactively. The Ninth Circuit holds that the amendment resolved a circuit split, and that in such a case, the clearing up of conflicting interpretations should be considered a clarification, and held retroactive.

US v. Denton, No. 09-50253 (3-24-10) (Bea joined by Gould and Molloy, D.J.). The defendant violated his supervised release by physically abusing his girlfriend. California did not prosecute the defendant for his conduct, but the district court found that the conduct could have been charged under California Penal Code § 273.5. A violation of this section is a wobbler that can either be a felony or a misdemeanor. If the violation was considered a felony, it would be a Grade A violation; if a misdemeanor, then a Grade C violation. Under California law, if charged, the wobbler is presumed to be a felony unless reduced or sentenced as a misdemeanor, but here the conduct was uncharged. The Ninth Circuit holds that uncharged conduct is not presumed to be a felony. To "grade" the character of the uncharged conduct, the district court has to determine whether (1) a prosecutor would have charged a felony or a misdemeanor; and then (2) whether the state court would have imposed a misdemeanor rather than a felony. The factors to consider are set out in People v. Superior Court (Alvarez), 14 Cal. 4th 968, 978 (1997). Evidence can consist

of affidavits from prosecutors and defense lawyers as to the nature and circumstances of the offense, results from other similar cases, and so forth. This determination focuses on the actual conduct and how it should be characterized

US v. Castro, No. 09-50164 (3-26-10)(Goodwin joined by Canby and Fisher). In a reentry sentencing, the defendant had a prior under Calif. Penal Code section 288(c)(1) for lewd or lascivious acts on a child 14 or 15 by a person at least ten years older than the child. The Ninth Circuit considered whether this was a "crime of violence," and held was not, because it constitutes neither "sexual abuse of a minor" nor "statutory rape." The Ninth Circuit compares section 288(c)(1) with sexual abuse of a minor, and finds that 288(c)(1) does not contain the element of "sexual abuse". Further, lewd acts may be broader than abuse, and the age requirement does not make any sexual conduct per se abusive. As for statutory rape, the Ninth Circuit finds that section 288(c)(1) does not contain the requirement of a "sexual act." At a minimum, the generic definition of statutory rape requires an intentional touching not through clothing of a minor's genitalia. The sentence is vacated and remanded.

Ledezma-Galicia v. Holder, No. 03-73648 (3-29-10) Alien convicted of sexually abusing 10-year-old girl before Nov. 18, 1988 is not removable as alien convicted of aggravated felony.