

Heather Williams  
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

## June 2013

### **CJA PANEL TRAINING**

We recently surveyed our CJA Panel to see if we should change our training days or times. We also asked for MCLE suggestions. One reason we ask is, with our budget cuts, we're looking for ways to save FD money and reduce our furlough days. Our current MCLE time (after regular hours) costs the FD in overtime utilities. A noontime training won't.

Regular training is on summer break until September. We may experiment with a noontime CLE in Sacramento in July or August - we'll let you know.

Have a great summer!

### **JEFF STANIELS IS RETIRING**

After 38 years defending the public, including 30 years as an Assistant Federal Defender and over 23 years as an AFD with the Eastern District of California, Jeff Staniels will be retiring at the end of June. His last day is June 28, 2013. He will be joining the CJA panel after his retirement. Please join us in thanking Jeff for his decades of commitment to public defender work and wishing him well in his post-retirement life.

### **CLIENT CLOTHES CLOSET**

Do you need clothing for a client going to trial or for a client released from the jail? Are you interested in donating clothes to our Client Clothes Closet or money to cover the cost of cleaning client clothing? If so, please contact Debra Lancaster at 498-5700.

### **TOPICS FOR FUTURE TRAINING SESSIONS**

Do you know a good speaker for the Federal Defender's panel training program, or would you like the office to address a particular legal topic or practice area? Email your suggestions to Francine Zepeda (Fresno) at [francine\\_zepeda@fd.org](mailto:francine_zepeda@fd.org) or Lexi Negin (Sacramento) at [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org).

### **ADDRESS, PHONE OR EMAIL UPDATES**

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

## ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website: [www.cae-fpd.org](http://www.cae-fpd.org). We will try to post training materials **before** the trainings for you to printout and bring to training for note taking. Any lawyer not on the panel, but wishing training materials should contact [Lexi Negin@fd.org](mailto:Lexi_Negin@fd.org).

## NOTABLE CASES

### Supreme Court

McQuiggin v. Perkins, No.12-126 (5-28-13) Ginsburg, J. (5-4 vote). Actual innocence, if proved, serves as a method to achieve judicial consideration of habeas claims, whether the impediment to consideration of the merits of a constitutional claim is a procedural bar, as it was in Schlup v. Delo and House v. Bell, or expiration of the Antiterrorism and Effective Death Penalty Act statute of limitations, as in this case.

Trevino v. Thaler, No.11-10189 (5-28-13) Breyer, J. (5-4 vote). When, as here, a state's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise on direct appeal a claim that his trial counsel provided ineffective assistance, the good cause exception recognized in Martinez v. Ryan applies.

Peugh v. United States, No. 12-62 (6-10-13) Sotomayor, J. (5-4 vote). The Supreme Court ruled that sentencing a defendant under a version of a U.S. Sentencing Guideline that was promulgated after the commission of the criminal acts and that recommends a higher sentencing range than the version in place at the time of the offense violates the Constitution's Ex Post Facto Clause. In this case, the petitioner was convicted in federal court in 2009 on five counts of bank fraud for conduct that occurred in 1999 and 2000. The

2009 sentencing guideline recommended a 70 month sentence, twice as long as the one in effect on the date of offense. Using the harsher, new guideline violates the Ex Post Facto Clause because, although advisory, the Guidelines have "force as the framework for sentencing" and place a check on district court discretion.

### Ninth Circuit

US v. Ramirez, No. 11-50346 (4-29-13)(Kozinski with McKeown and Smith, M.). The Ninth rejects a district court's sua sponte instruction that the jury shouldn't speculate why the government didn't call a key witness. Here's one of many great lines in the opinion: "It was not the court's function, after both sides had rested, to give an instruction that filled in the evidentiary gap the court believed the government had left in its case." Id. at \*3.

US v. Mancuso, No. 12-30174 (5-1-13)(Bea with Clifton and Mahan). As the opinion describes it: "Mancuso was a dentist who distributed a lot more than free toothbrushes to his friends and acquaintances in Billings, Montana." His alleged cocaine distribution lead to various federal charges of possession with intent to distribute, distribution, and maintaining a drug house. The jury convicted on most counts, but found the amount to be distributed as less than 500 grams. On appeal, the Ninth Circuit affirmed the conviction for possession with distribution (count 1), but vacated the distribution count as being duplicitous; that is, joining two offenses into a single count. The Ninth Circuit also vacated the count for running a drug house, because the court committed plain error in instructing the jury that there had to be a "significant purpose" in using the premises for distribution rather than the correct "primary or principal use" for a house. The instruction applies to a professional office (dentist) as well as a residence.

US v. Sivilla, No. 11-50484 (9th Cir. May 7,

2013) (Noonan with Pregerson and Paez). The Ninth Circuit vacated a criminal conviction and remanded for a new trial, holding that the district court should have given a remedial jury instruction to account for the government's negligent destruction of potentially exculpatory evidence. This was a blind mule case. The defendant, a perfume retailer in Tijuana, Baja California, loaned his Jeep Cherokee SUV to his son-in-law. Two days later, while the defendant was driving it into San Diego to pick up more perfume inventory, he was referred to secondary inspection, where Border Patrol agents (with the help of a mechanic) discovered packages of cocaine and heroin hidden inside the engine manifold. (The son-in-law was killed shortly after the defendant was arrested.) Concealing the drugs in the engine manifold was an extremely complicated maneuver, and demonstrating that to the jury would bolster the defendant's blind-mule defense. Accordingly, counsel asked the government to preserve the SUV until he could have a chance to inspect it -- first by letter shortly after the defendant was arrested, and then later by formal court motion. The district court ordered the government to preserve the SUV, but the government failed to do so. A snafu in communication between the prosecutor and the agents led to the agents selling the SUV at auction, after which it was stripped and sold for parts. By the time the defendant got around to asking to inspect the SUV, it had long been destroyed. The defendant therefore moved to dismiss the indictment, or in the alternative for a remedial jury instruction. The district court heard oral argument and denied both requests, finding no bad faith on the part of the prosecution. The complexity involved in hiding the drugs in the engine manifold was central to both parties' presentation. No defense expert could assess the compartment in the SUV in this case, because the government allowed it to be destroyed well before trial. Having no way to rebut the government's evidence about the manifold (including some "indecipherable" photographs of the manifold taken by the case agent), the defendant was convicted and sentenced to 10

years in prison.

The Ninth Circuit accepted the district court's conclusion about a lack of bad faith on the prosecution's part in relation to the destruction of the SUV. The Ninth Circuit did characterize the government's conduct as negligent, which led it to vacate the conviction because the district court refused the remedial instruction. "The prosecutor promised to protect the evidence but failed to take any affirmative action to that end. The government attorney prosecuting the case participated in the events leading to the failure to preserve. In total, the government's conduct was poor." Clarifying the holding in United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979) (en banc), the court held that the holding in Loud Hawk was that a balance of the government's relative culpability in the destruction of evidence against the prejudice to the defendant stemming from the destruction determines whether a remedial instruction is required. Because the district court applied the wrong legal standard (bad faith), and there was no adequate substitute for the SUV that would have allowed the defendant to make his defense, the district court abused its discretion when it refused the remedial instruction, and the defendant was entitled to a new trial.

US v. Joseph, No. 11-10492 (5-19-13)(Paez, with Thomas and Reinhardt). The Ninth Circuit rejects the government's arguments and holds that the district court erred by imposing consecutive terms for these Section 1791 offenses. In reaching the issue, the court discusses the plain error standard of review for sentencing errors. It holds that the first prong of plain error -- "contrary to the law" -- is satisfied in this case.

## **CJA REPRESENTATIVE**

Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, [carl.faller@fallerdefense.com](mailto:carl.faller@fallerdefense.com).

Each district has a [CJA Panel Attorney District Representative](#) (pdf), selected from among the members of the CJA panel, with the approval of the chief judge.

*CJA Panel Attorney District Representatives:*

- *lead their district CJA panel;*
- *attend the annual National Conference of CJA Panel Attorney District Representatives;*
- *serve as liaison between the CJA panel and the federal defender organization, the court and the AO's Office of Defender Services;*
- *comment on proposed legislation relating to the CJA;*
- *work toward improving the quality of representation as well as the conditions under which panel attorneys provide representation.*

Check out [www.fd.org](http://www.fd.org) for unlimited information to help your federal practice.