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# Federal Defender Newsletter

## November 2011

### CJA PANEL TRAINING

Panel training in Sacramento will take place on November 16 at 5:30 p.m. at 801 I St., in the 4<sup>th</sup> floor conference room. Courtney Linn, a defense attorney of counsel at Orrick and a former AUSA, will be speaking on "Money Laundering: Suspicious Activity Reports, Currency Transactions Reports, and the Crime of Structuring."

Regular Fresno panel training will not be held this month. Instead, the Fresno Electronic Voucher Training will be held on December 8, 2011. Panel members should have already received an email announcement about this training. If you have not, please contact Connie Garcia at [connie\\_garcia@fd.org](mailto:connie_garcia@fd.org). The Probation Training which had been scheduled for October 24 will be rescheduled for later in November.

### ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing voluminous panel training materials through our website - [www.cae-fpd.org](http://www.cae-fpd.org). Click on CJA Panel, then Secured Documents. The user name and password have already been distributed and are also available from Kurt Heiser. If a lawyer is not on the panel, but would like the materials, they can contact [Lexi Negin@fd.org](mailto: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.

### ANNUAL FEDERAL DEFENDER HOLIDAY PARTY

We are having our Annual Defender Holiday Party on Friday, December 9, beginning at 3:00 p.m. and going until 7:00 p.m. All are welcome. Our children's area will once again be in full swing with fun activities for the little ones. Please join us for great food, great drinks, and a great time!

### FEDERAL CJA PANEL HOLIDAY PARTY

The panel is hosting a holiday party December 2, from 4:00 to 8:00 in the lobby of the Traveler's Building at 428 J Street. Everyone is invited with their families!

### 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](mailto:melody_walcott@fd.org) or Lexi Negin (Sacramento) at [lexi\\_negin@fd.org](mailto: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**

James v. Schriro, No. 08-99016 (10-12-11) (W. Fletcher with Berzon and M. Smith). The Ninth Circuit grants IAC relief on the penalty phase of a capital sentence. The court finds that trial counsel completely failed to investigate and present mitigating evidence of the petitioner's troubled childhood, mental illness, and drug abuse. Such failure was prejudicial.

United States v. McEnry, No. 10-10433 (10-13-11) (Tashima with Rawlinson and Hatter, Sr. D.J.). The Ninth Circuit finds sentencing procedural error when it incorrectly calculated the defendant's guidelines. The defendant was charged with operating an aircraft as an airman without an airman's certificate in violation of 49 USC § 46306(b)(7). At sentencing, there was no guideline on point, so the court used a guideline that referenced interference with a flight, based on relevant conduct. The Ninth Circuit found error because relevant conduct cannot be used to pick out a guideline; rather, the guideline has to be most applicable to the crime, and here it would be § 2B1.1, which has enhancements for risk.

United States v. Wilkes, No. 08-50063 (10-19-11) (Alarcon with O'Scannlain and Silverman). This appeal arises from a case related to the bribery prosecution of Congressman "Duke" Cunningham. The Ninth Circuit remands for an evidentiary hearing on whether the government's refusal

to grant immunity to a defense witness, after granting immunity to many of its witnesses, so skewed the trial as to require a constitutionally mandated grant of immunity. In this, the Ninth Circuit follows its precedent in United States v. Straub, 538 F.3d 1147 (9th Cir. 2008). In Straub, the Court held that a district court can compel a defense witness's immunity without a finding of prosecutorial misconduct. It can do so in "exceptional cases" where the fact-finding process is distorted by the government's granting immunity to its own witnesses while denying immunity to a defense witness who has directly contradictory testimony. Straub, 538 F.3d at 1166. Here, the defense witness was found by the court to have relevant, contradictory evidence. The district court thought it needed to find prosecutorial misconduct (Straub came out subsequently).

United States v. Sanchez, No. 10-50192 (11-1-11) (Pregerson with Fisher and Berzon). "Why don't we send a memo," said the AUSA in rebuttal argument, "to all drug traffickers" south of the border, indeed to everyone, that to get away with being caught as a courier, all they have to say is that their "family was threatened." Duress would be their acquittal ticket. Instead the Ninth Circuit sent a published opinion that this was inflammatory and prosecutorial misconduct. This required reversal, even under a plain error standard, because the prosecutor personalized the "send a message" argument with "send a memo." The statement crossed the line, and went beyond fair response to defense argument. It was prejudicial because the defendant had testified that his family felt threatened when stopped.