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Federal Defender Newsletter
April 2015

CJA PANEL TRAINING

Sacramento panel training will take place on **Wednesday, April 15, 2015 from 5:00 to 6:30 p.m**. David Mann from "The Other Bar" will present *Substance Abuse in the Legal Profession: Prevention, Detection, and Treatment*. The presentation will qualify for 1.5 hours of substance abuse CLE credit. The training will take place in the jury meeting room on the 4th floor of the Federal Courthouse, 501 I St. All are welcome!

Fresno panel training will take place on **Tuesday, April 21, 2015 at 5:30 p.m.** in the Jury Assembly Room at the Federal Courthouse in Fresno. AFD David Porter will be presenting his 2014 Supreme Court Review.

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Check out www.fd.org for unlimited information to help your federal practice. While you're there, take the survey on the home page and have input in the redesign of the site! Please note that you can also sign up on the website to automatically receive emails when fd.org is updated. 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.

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 suggestions to:

Fresno – Peggy Sasso, Peggy_Sasso@fd.org, Andras Farkas, Andras_Farkas@fd.org, or Karen Mosher, karen_mosher@fd.org.

Sacramento: Lexi Negin, lexi_negin@fd.org.

DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to start granting sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base Offense Level 2-level reduction in drug cases. In March, 32 amended judgments were filed resulting in a total time reduction of approximately 49 years (592 months). While the value of early release is inestimable for defendants, their families, and their friends, the early releases in March result in a taxpayer cost savings of approximately $1,435,289 million. So far 135 defendants in this district have received a reduction in their sentences under Amendment 782.
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ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes panel training materials through its website: www.cae-fpd.org. We will try to post training materials **before** the trainings for you to print out and bring to training for note taking. Any lawyer not on the panel, but wishing training materials should contact Lexi Negin, lexi.negin@fd.org.

♪ NOTABLE CASES ♫

SUPREME COURT

Grady v. North Carolina, No. 14-593 (3-30-2015)(per curiam). After serving a sentence for second degree sexual offense and taking indecent liberties with a child, Grady was ordered to wear tracking devices at all times because the state court determined he should be subjected to satellite-based monitoring as a recidivist sex offender. Grady challenged this as a violation of this Fourth Amendment right to be free from unreasonable searches and seizures. The North Carolina Courts concluded it was not a search. Today, the Supreme Court said, it is a search: "a State... conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements," whether the monitoring is civil or criminal in nature. The Court then sent it back to North Carolina to decide whether the search was reasonable.

NINTH CIRCUIT

Rudin v. Myles, No. 12-15362 (3-10-15)(Murguia with Adelman (E.D. Wisc.); dissent by O'Scannlain)(withdrawing previous opinion and filing new opinion). The Ninth Circuit reversed the district court's dismissal of this 28 U.S.C. § 2254 habeas petition as untimely, finding enough equitable tolling (for a variety of reasons) to render the petition timely filed. The panel remanded the case to the district court for a determination of the merits of the petitioner's claims.

United States v. Zaragoza-Moreira, No. 13-50506 (3-18-15) (Gettleman (N.D. Ill) with Reinhardt and Gould). The Ninth Circuit reversed the denial of a motion to dismiss a drug-trafficking indictment, holding that the government violated the defendant's due-process rights when it destroyed a videotape of the pedestrian line at a port of entry, the footage of which could have supported the defendant's claim of duress. This opinion cautions the government to conduct plea negotiations against a backdrop of full disclosure of evidence requested by the defense, which did not happen here. Defense counsel asked the government to preserve any videotaped recording of the events leading up to the arrest. The pedestrian line at the San Ysidro port of entry is under constant video monitoring. Once the defendant had been indicted, defense counsel filed a formal motion asking the government to preserve the video evidence because of its potential exculpatory value. The district court so ordered, but the prosecutor learned that the agents who ran the port of entry had destroyed the video. Under California v. Trombetta, 467 U.S. 479 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988), the defendant must show that the evidentiary value of the evidence was apparent to the officers at the time of destruction, that he has no way of obtaining comparable evidence by alternate means, and that the government agents acted in bad faith. Here, the Ninth Circuit concluded that all three of these elements were met. Importantly, "plea negotiations should be based on full disclosure of the requested evidence," and even if plea negotiations were successful a

duress defense could have mitigated the defendant's sentence.

US v. Marcia-Acosta, No. 13-10475 (3-23-15) (Berzon with Fisher and Christen). The Ninth Circuit vacates a sentence and remands for resentencing, holding that a federal sentencing court, following Taylor, and Shepard, may not rely on defense counsel's characterization at a state change-of-plea of the defendant's mental state to determine whether the defendant pleaded guilty to intentional assault, which would constitute a "crime of violence." The defendant was convicted of illegal reentry following a jury trial. At the state-court change-of-plea hearing on his prior aggravated assault charge, defense counsel provided the factual basis for the plea, explaining that the defendant "intentionally" hit the victim with a metal bar. Arizona's assault statute is categorically overbroad because it defines assault as involving intentional, knowing, or reckless conduct, while the generic definition does not encompass "ordinary" reckless conduct. See US v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009). Arizona's statute is divisible, so the sentencing judge could look to some Shepard-compliant documents to see whether, under Descamps, the defendant plead guilty to "intentional" assault, which would be a "crime of violence" under the guidelines. Under Shepard, the federal sentencing judge can't look at the state-court plea colloquy for purposes of assessing the factual basis of the plea, but whether the plea necessarily rested on the elements of the generic offense. Only if the charging document or the plea agreement -- together with the factual basis for the plea -- indicate that the defendant admitted the elements of a generic offense may the federal sentencing judge conclude that the prior conviction is a crime of violence.

US v. Haischer, No. 13-10392 (3-25-15)(Clifton with Tashima and McKeown). The Ninth Circuit emphasizes that a defendant should be, and must be, given great latitude in mounting a defense. Here, the defendant in a wire fraud prosecution was precluded from arguing a duress defense. The defendant presented evidence that she was abused and even forced to sign loan papers before her boyfriend and codefendant would take her to a hospital to set her broken leg. The trial court forced her to either admit guilt if she wanted to argue duress, or to argue burden of proof and forgo the duress defense. This was error. A defendant can argue inconsistent defenses (duress and failure to meet the burden of proof for mens rea). Moreover, the preclusion of defense evidence under Federal Rule of Evidence 403 should be rarely used and implicates due process concerns. Clearly prejudice existed.

US v. Hymas, 13-30239 (3-25-15)(Clifton with M. Smith and Hurwitz). In this fraud case for a bad mortgage loan application, the trial court considered all sorts of other relevant conduct to raise offense levels under the Guidelines. The Ninth Circuit vacated the sentence, revisiting the factors to be considered and admitting that the precedent has not been "a model of clarity." The Ninth Circuit holds that a preponderance standard was appropriate for the one count to which the defendant pled guilty but that the relevant conduct from the other loans should have been proved by clear and convincing evidence. The factors to consider are: whether the statutory maximum for the offense in which the relevant conduct was applied was exceeded; whether the prosecution was relieved of its burden to prove guilt; whether a new offense was used or proved; whether conspiracy was used; whether using relevant conduct would result in an upward adjustment of 4 or

more offense levels; and whether the Guidelines range doubled (or more). No one factor is determinative. The clear and convincing standard should have been used.

CALIFORNIA SEX OFFENDER RESIDENCY RESTRICTIONS UNCONSTITUTIONAL

In In re Taylor, No. S206143 (3-2-15), the California Supreme Court unanimously ruled that the 2000 foot residency restriction imposed on sex offenders by Proposition 83 in 2006 (and codified at California Penal Code § 3003.5(b)) is unconstitutional. This proposition has been previously applied to federal sex offenders on supervised release (because they are subject to registration under Section 290) despite it being codified as a mandatory parole condition for California offenders. The Cal. Supreme Court held, "**Blanket enforcement of the residency restrictions . . . has severely restricted their ability to find housing in compliance with the statute, greatly increased the incidence of homelessness among them, and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services . . . while further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety**." Please keep this in mind for your clients on supervised release.

LETTER FROM THE DEFENDER

TO PLEA OR NOT TO PLEA, THAT IS THE QUESTION.

I was in a district judge's court recently when, at several scheduled status conferences, counsel cited, as the T4 basis for waiving a speedy trial (U.S.Dist.Ct. – EDCA Gen.Ord. 479, http://www.caed.uscourts.gov/caed/DOCUMENTS/GeneralOrders/479.pdf), "ongoing plea negotiations." The district judge provided the speedy trial exclusion findings: the ends of justice. "Plea negotiations" are not a lawful basis for supporting excluded time for trial. *U.S. v. Ramirez-Cortez*, 213 F.3d 1149, 1155-56 (9th Cir. 2000). Without excluding the time, we're in trial next week.

This "ends of justice" finding allows for excluded time when calculating the magic 70 days "from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs," when a defendant then "enjoys" her Sixth Amendment "right to a speedy and public trial . . .." Judge Shubb once said he'd be stunned if he ever presided over a trial occurring within 70 days of arraignment without excluding any time – the very first trial setting. While Judge Shubb would "enjoy" that, the defendant's "enjoyment" stems from his "possess(ion) and benefit from" part of having his trial within a brief – speedy – time period.

The "70 days" comes from a 1974 statute codifying the Sixth Amendment/Speedy trial case law and intent behind the phrase. 18 U.S.C. § 3161(b), (h) and (i). Here it cites the several bases for continuing trial and excluding from speedy trial calculations the time in between. They're listed in shorthand in General Order 479 – none cites "ongoing plea negotiations." What is it we mean to say? What actually provides the lawful bases to exclude time? Your ongoing investigation, research and trial preparation, in case those plea negotiations fall through. This solidly falls within Section 3161(h)(7)(B)(ii):

that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

Now, that's a T4. And, lest you become too inspired by this letter, you can't have the speedy trial in less than 30 days from the defendant's "first appearance with counsel," (18 U.S.C. § 3161(c)(2)), unless the client signs off on less time to trial.

I want to also address the obligation of prosecutors to stand up for their plea agreements. To do otherwise violates a defendant's right. "The Supreme Court has recognized that the government's breach of the parties' plea agreement is "undoubtedly a violation of the defendant's rights." *Puckett v. U.S.,* 556 U.S. 129, 129 S.Ct. 1423, 1429, 173 L.Ed.2d 266 (2009).

Tim Warriner prevailed in *U.S. v. Whitney* when the Ninth found (1) an AUSA's use on the defendant's statements at sentencing, when she said she wouldn't, and (2) arguments for a sentence greater than the plea agreement's terms specifying the Government would recommend the low end of the applicable guideline range. 673 F.3d 965, 970 (9th Cir. 2012).

The AUSA's obligation applies to Fed.R.Crim.Proc. 11(c)(1)(C) plea agreements, when the plea agreement specifies the AUSA will agree a specific sentence or sentencing range, a particular Sentencing Guideline's provision or policy statement, or a sentencing factor does or does not apply. *U.S. v. Heredia*, 768 F.3d 1220, 1231 (9th Cir. 2014).

AUSA actions which were considered breaches include:

- introducing information serving "no purpose but 'to influence the court to give a higher sentence.'" *U.S. v. Johnson,* 187 F.3d 1129, 1135 (9th Cir. 1999).
- introducing evidence irrelevant to any matter the government is permitted to argue. *Johnson,* 187 F.3d at 1135.
- referring to information the court already has, including statements about how serious a defendant's prior record is. *U.S. v. Mondragon,* 228 F.3d 978, 980 (9th Cir. 2000).
- making "statements indicating a preference for a harsher sentence." *U.S. v. Franco-Lopez,* 312 F.3d 984, 992 (9th Cir.2002) (quoting *Johnson,* 187 F.3d at 1135).
- "complying with the explicit terms of the agreement in such a way that render() its promises illusory." *Franco-Lopez,* 312 F.3d at 988-89
- focusing on only aggravating sentencing factors when the agreement calls for a Guideline's low end sentence. *U.S. v. Palomino*, ___ F.3d ___ (9th Cir. 3/23/2015) (unpublished).
- When an AUSA covers the sentencing hearing for the AUSA who originally negotiated the plea, and the appearing AUSA says she might or would recommend a sentence "different than what the sentencing assistant was going to recommend." *U.S. v. Alcala-Sanchez*, 666 F. 3d 571, 574-75 (9th Cir. 2012).

These are breaches because each is designed "solely for the purpose of influencing the district court to sentence [the defendant] more harshly." *Johnson,* 187 F.3d at 1135.

The Ninth concludes that, when a defendants does "not get what he bargained for in the plea agreement," the breach "negatively impair(s) the integrity and reputation of judicial proceedings," and might "make it harder for the government to reach plea agreements in the future." *U.S. v. Manzo*, 675 F.3d 1204, 1212 (9th Cir. 2012).

Hopefully this helps everyone negotiate the plea agreement minefield without stepping on one.

~ Heather E. Williams
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