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
LINDA C. ALLISON
Chief Assistant Defender
JENNIFER M.C. MANN
CHU Supervisor
CHARLES J. LEE
Fresno Branch Chief
RACHELLE BARBOUR, Editor

Federal Defender Newsletter
April 2016

CJA PANEL TRAINING

The next Sacramento CJA panel training will be on Wednesday, April 20, 2016 at 5:00 p.m. in the jury lounge on the 4th floor of the federal courthouse, 501 I St. Federal Defender Heather Williams will be presenting on "Seals without Eyes: Protecting Clients in Court Filings"

The Fresno CJA panel training will be held on April 19, 2016 at 5:30 p.m. in the jury room at the Fresno District Courthouse. Dr. Matthew Sharps, professor at Fresno State in visual cognition will present, "Did you really see that, or do you just think you did?"

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Good News for CJA Panel Members
from Scott Cameron, CAECJA Representative

The 21st Annual National Conference of CJA Panel Attorney District Representatives was held on March 4th through 5th, 2016. Scott N. Cameron attended as the representative for the Eastern District of California. At the conference, a representative from the Defender Services Office indicated that deferrals of CJA Panel Attorney payments are not anticipated for 2016. Moreover, the representative from the Defender Services Office anticipated a rate increase for CJA Panel Attorneys in 2017.

This is an exciting time for the CJA program nationwide. As you may be aware, the Judicial Conference is undertaking a comprehensive review of the CJA program though the Ad Hoc Committee to Review the Criminal Justice Act Program. Supreme Court Chief Justice John G. Roberts appointed the members of the Committee in his capacity as Presiding Officer of the Judicial Conference. The Committee is conducting hearings across the United States. In early March, Scott N. Cameron, CJA Panel Attorney, Heather E. Williams, Federal Defender for the EDCA, and the Honorable Magistrate Judge Carolyn K. Delaney, testified before the Committee. Based on the questions from the Committee, and the scope of the review, it seems obvious that the Committee is doing a very thorough job.

Lastly, Ninth Circuit Chief Judge Sidney R. Thomas, with the approval of the Ninth Circuit's Court Executive Committee, has appointed an ad hoc working group to study a number of CJA processes and procedures in the Circuit. Scott N. Cameron will be a member of the ad hoc working group which will be having its first meeting later this month. Scott will be making inquiries of CJA Panel Attorneys in the EDCA for input on the various issues discussed by the ad hoc working group. Scott appreciates in advance any assistance CJA Panel Attorneys may be able to provide. Please contact him at snc@snc-attorney.com.

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Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to automatically receive emails when fd.org is updated.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet that provides court clothing to your clients. We are in dire need of court-appropriate clothing for women. Please consider donating any old suits, or other appropriate professional clothing to the client clothes closet.

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 trainings to print out and bring to training for note taking. Not on the panel, but wishing training materials? Contact Lexi Negin, lexi.negin@fd.org

PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at http://wvs.fd.org. The podcast may be downloaded using iTunes.

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

Scott Cameron, (916) 769-8842 or snc@snc-attorney.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857 or dtorres@lawtorres.com, is the Backup CJA Representative.

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 or Ben Galloway, ben_d_galloway@fd.org.

NATIONAL DEFENDER SERVICES TRAININGS

TRIAL SKILLS ACADEMY

SAN DIEGO, CALIFORNIA | April 24 - April 29, 2016

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE SEMINAR

DENVER, COLORADO | May 19 - May 20, 2016

WINNING STRATEGIES SEMINAR

DENVER, COLORADO | May 19 - May 21, 2016

For more information and to register, please visit www.fd.org.

DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to grant sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base Offense Level 2-level reduction in drug cases. In March 2016, 6 amended judgments were filed

resulting in a total time reduction of approximately 17 years. 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 $502,840. So far 366 defendants in this district have received a reduction in their sentences under Amendment 782.

INTERESTING INFORMATION ON-LINE

***TED Talks* - Adam Foss:** A Prosecutor's Vision for a Better Justice System, http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system

Germany's Prison System:
60 Minutes Overtime: Yoga in Prison: Germany's 5-Star Slammer,
http://www.cbsnews.com/news/60-minutes-overtime-yoga-in-prison-germany-5-star-slammer/

SUPREME COURT SORNA WIN!

Nichols v. United States, No. 15-5238 (4-4-16). In an unanimous decision authored by Justice Alito, the Supreme Court, reasoning that "[a] person who moves from Leavenworth to Manila no longer 'resides' (present tense) in Kansas," held that SORNA "did not require Nichols to update his registration in Kansas once he no longer resided there." Accordingly under the plain text of SORNA, the defendant (who had been arrested in the Philippines and brought back to the U.S. for this case) could not be prosecuted for failing to update his Kansas registration under SORNA.

NOTABLE NINTH CIRCUIT CASES

US v. Lemus, No 14-50355 (3-2-16)(M. Smith, with Reinhardt and Paez). The case involved a drug deal in which no drugs were exchanged. The defendant arranged to sell drugs to an informant. The deal was for ounces but at the meeting, the defendant wanted to sell a pound. The deal fell through. The defendant was subsequently arrested at his house, but no meth was found. The Ninth Circuit affirmed the conviction for possession with intent to distribute, but vacated the finding that there were more than 50 grams of the drug. No evidence was produced as to the purity of the meth, which went to the amount. No evidence on purity meant that the amount was unsupported. The government could not look to other drug sales for corroboration. The case was remanded for resentencing.

US v. Werles, No. 14-30189 (3-3-16)(Wilken, with Fletcher and Fisher). The Ninth Circuit vacated an ACCA 15 year mandatory sentence because a prior conviction for "felony riot" under Wash. Rev. Code 9A.84.010 was overinclusive and indivisible, and therefore did not count as a violent crime. The state statute requires three or more persons to use or threaten force, or in any way participate in the use of such force, against a person or property. If an actor has a deadly weapon, it is a felony. The Ninth Circuit held that under the categorical approach, the definition of "force" was overinclusive as under the federal definition it did not require use of force, or physical force against a person. The defendant could have possessed a deadly weapon, and may have been an actor, but that did not make it certain that force would be used. The Ninth Circuit reversed and remanded for a non-ACCA resentencing.

US v. Lara, No. 14-50120 (3-3-16)(Fletcher, with Paez and Berzon). The Ninth Circuit reversed a denial of suppression of a warrantless, suspicionless search of a defendant's cell phone. Importantly, the defendant was on probation at the time for drug trafficking.

The probation officers showed up at his house, announced that it was a search, looked at his cell phone, and viewed weapons in a photo. This led to a second search of the phone and then a tracking down of weapons. All of this evidence should have been suppressed because the search was not reasonable. Yes, the Ninth Circuit acknowledged, the probationer was under probation and had agreed to search of property and person, including containers and items, but this did not reach cell phones.

Tarango v. McDaniel, No. 13-17071 (3-3-16)(Murguia with Fisher; dissent by Rawlinson). The Ninth Circuit reversed the denial of a habeas petition and remanded for an evidentiary hearing. The issue was whether a juror, the sole hold-out, was intimidated by a police car tailing him for seven miles after the court was recessed. The identity of the hold-out juror was known to law enforcement. The tailing of the juror, if true and intentional, may have violated the petitioner's right to a fair and impartial jury.

United States v. Reza-Ramos, No. 11-10029 (Ikuta, with Wallace and McKeown). The Ninth Circuit vacated a federal conviction for felony murder predicated on Arizona's third-degree burglary statute. This crime took place on the Tohono O'odham Indian reservation in southern Arizona. Because Congress passed the General Crimes Act in order to impose a uniform definition of murder, state law could not be used to define the predicate felonies for felony murder in cases like this. Accordingly, because Arizona's third-degree burglary statutes does not match the generic federal definition of burglary, the Ninth Circuit vacated the defendant's conviction for felony murder predicated on burglary.

US v. Lundin, No. 14-10365 (3-22-16)(Fletcher, with Berzon and Bea). In an important extension of Jardines, the Ninth Circuit affirmed suppression of weapons found after a search conducted for exigent circumstances when the police created the supposed exigencies. The defendant allegedly committed offenses earlier in the evening. The police had probable cause to arrest him, and went to his home at 4:00 a.m. intending to do so. They knocked on the door and heard a crash and a clanging in the back of them home, so they rushed in. They arrested the defendant and found weapons in plain view. The district court suppressed. The Ninth Circuit affirmed, reasoning that a "knock and question" was a legitimate police entry into the curtilage, but not at 4:00 am and not with the clear intent to arrest. The police had probable cause, but chose not to get a warrant. Their unconstitutional actions created the exigency, and having probable cause does not make the finding of the weapons inevitable.

United States v. Nickle, Nos. 14-30204, 14-30229 (Kozinski, with Fletcher and Fisher). The Ninth Circuit vacated a conviction on drug charges where the district judge refused to accept a guilty plea because the defendant did not volunteer enough information about his criminal activity beyond what was necessary for a factual basis for the plea. The government offered him a plea bargain -- in exchange for his guilty plea, the government would drop the more severe charges and make favorable sentencing recommendations. The judge refused to accept the plea, so the defendant went to trial.

The Ninth Circuit held that the judge had no right to refuse to accept the defendant's guilty plea under these circumstances. The defendant did what he was required to

do -- admitted to the elements of the crime. "There is no requirement in Rule 11(b) that the defendant himself give an in-depth account of his crime or confirm that everything in the government's offer of proof is true." The judge is only allowed to reject the guilty plea if he had doubts about whether the defendant understood the charges or was disputing his guilt -- and then he must explain why he is rejecting the plea. And the judge's refusal to accept the guilty plea made the defendant worse off in this case, because he went to trial and was convicted on more serious charges.

At trial the judge erred by keeping the defendant from cross-examining cooperating witnesses about the benefits they received for their cooperation. The Ninth Circuit held that the terms of the cooperating witnesses' deals with the government were relevant, and the district judge erred by concluding that because the government had not yet bestowed those benefits (here, by filing a motion under Rule 35 for a sentence reduction), the terms of the deals weren't relevant. The judge further erred by failing to identify a proper basis under Rule 403 for excluding this relevant evidence. The Ninth Circuit specifically called out the district judge here for not heeding its opinion in United States v. Larson, 495 F.3d 1094 (9th Cir. 2007) (en banc), chastising the district judge for threatening defense counsel with sanctions for pursuing a line of inquiry that the Ninth Circuit had previously held was proper.

These two errors, along with the district judge's order directing that forfeited monies go to pay for the defense, led the Ninth Circuit to direct that the case be reassigned.

Brooks v. Yates, No. 12-17607 (per curiam with Wallace, Kozinski, and O'Scannlain; concurrence by Kozinski). The Ninth Circuit reversed a denial of habeas. The Ninth Circuit held that the district court abused its discretion in finding that the petitioner was not abandoned by his counsel. The Ninth Circuit stressed that the focus is not so much on counsel's abandonment but on whether extraordinary circumstances prevented the petitioner from timely action. Here, the record indicates that the counsel turned a cold shoulder to petitioner's pleas to take timely action, and that counsel was grossly negligent. The matter was remanded so that the court could make findings. In a separate concurrence, Kozinski names names: he calls out habeas counsel for his dereliction, and nudges the California Supreme Court to take action. Congrats to our own AFD Peggy Sasso in Fresno.

US v. Hernandez-Lara, No. 13-10637 (3-29-16)(per curiam with Reinhardt, Fernandez, Clifton). The Ninth Circuit makes clear that the § 16(b) "void for vagueness" holding in Dimaya v. Lynch, 803 F. 3rd 110 (9th Cir. 2015), applies to the same language in USSC § 2L1.2(b)(1)(C), for illegal reentry. In Dimaya, the Ninth Circuit considered the language in the residual clause of 18 USC § 16(b), which reads that an offense is a "crime of violence" if the acts create a substantial risk of physical violence to a person or property. The Ninth Circuit found this was too vague under the categorical approach and under Johnson. The same language was incorporated into the residual clause for aggravated felony in the reentry guideline. For the same reasons as outlined in Dimaya, this language must be stricken as too vague.

LETTER FROM THE DEFENDER

COMPETENCY CONTINUED

This month we continue to talk about when you have a client you feel may not be competent.

What is competency? It's Client's ability to "understand the nature and consequences of the proceedings against him or assist properly in his defense":

1 by understanding what is happening in court and what she's being charged with;
2 to be able to make the decisions only Client can make
   a. whether to plead guilty or go to trial and,
   b. if Client goes to trial, to decide between a trial to the court or to a jury,
   c. then, during that trial, whether or not to testify acting upon the lawyer's advice.

   [In some jurisdictions, Client must be able to consent to presenting an insanity defense. This is because the consequence in some jurisdictions with a "not guilty by reason of insanity" is a civil commitment – a liberty consequence sometimes longer than the crime itself. I found nothing in California discussing this.]
3 to aid her lawyer in defending her charges.

In federal court, competency matters are governed by 18 U.S.C. § 4241. Suspicion that Client suffers from a "mental disease of defect" impacting any of the above prompts a motion by either defense counsel or the Government for an **evaluation** by a psychiatrist or psychologist. It is possible for the attorneys to agree and stipulate Client is presently likely not competent, eliminating the evaluation, and moving directly to the required **restoration** stage. This has occasionally happened. It is possible the Government agrees restoration is not likely within a reasonable period of time and dismisses the charges, but I've never heard of that happening.

Evaluation

The lawyers for both sides can agree upon an evaluating doctor or each can elect their own evaluator. Department of Justice pays for the evaluations regardless. Having local doctors do the evaluation carries two benefits:

(1) it will take less time than if the Government insists on sending Client away for their doctor's evaluation (if they so insist, Client is usually sent to MDC-Los Angeles; this is an evaluation-only facility so, if Client is incompetent, Client's custodial time is increased by the trip to Los Angeles and back, then off to a restoration facility); and
(2) invariably, if Client is sent to a restoration facility (FMC–Butner, North Carolina; FMC-Carswell, Texas; FMC-Devens, Massachusetts; FMC-Lexington, Kentucky, or FMC-Rochester, Minnesota) and medication is part of restoration, the medications are messed up or discontinued during transport and return to California, or just the destabilization of facility changes can be enough to undo any restoration work and a revaluation on return is easier to accomplish when the evaluating doctor(s) are local.

If the Government insists the competency evaluation happen at MDC-Los Angeles, **be sure to set a status conference for 6 weeks away** – you don't want transport to and from to cause Client to languish through the Government's ridiculous insistence.

You can help your evaluating doctor by providing as many of Client's mental health, school, prior criminal case records as possible. Interviewing family members, friends, coworkers, doctors, counselors to generate reports of their observations also help. I include for the evaluating doctor a copy of the indictment, elements jury instructions, disclosure, the court's order, and a copy of 18 U.S.C. § 4241.

Restoration

Once the judge utters the magic words "Defendant is not competent to proceed," the judge **must** order Client into the Attorney General's custody to "hospitalize the defendant."

- *Why*? For treatment to become competent.
- *Where?* "[I]n a suitable facility," i.e. one of the FMCs listed above.
- *For how long?* "[F]or such a reasonable period of time, not to exceed four months," whatever time is needed to see if "substantial probability" exists "that in the foreseeable future" Client can be restored (assuming Client was ever competent to begin with) so the federal criminal justice process can continue to press Client's case to trial or guilty plea.
- *What if 4 months isn't long enough?* The court can permit "an additional reasonable period of time," provided the court specifically finds that "a substantial probability" exists that, within such additional time, either Client "will attain the capacity to permit the proceedings to go forward" or the Government will dismiss the charges, whichever happens first.

Ask the court to include in the order to BOP that BOP notify the court before any *Harper* hearing (see below under *Restoration*).

Once the judge orders Client into Attorney General custody, send the BOP treating doctors copies of everything you sent to your doctor as well as your doctor's report; you never want the Government's argument to be that BOP could restore Client if only defense counsel had helped out.

Given the 4 month specified time, **it is vital a status conference be set at most 4 months out.** Try to contact BOP doctors to remind them to send the judge, who will forward to counsel, a report which will either say Client is competent or will ask for the additional time, but rarely specify what, if any progress Client has made, what BOP's diagnoses are, what their plan is going forward, etc.

Part of BOP's treatment plan may involve medication. Meds exist for several psychological conditions, but not for all conditions. Also, some of the medications which work may work a little bit, with levels needing constant adjustment to find the dosage which will work. With many of these medications, the fix isn't worth the side effects to Client and Client may refuse medication. At that point, BOP doctors will let the AUSA know, who will file a motion to force medication. To prepare for this motion hearing, you will need to:

- Contact the Client to see why medication is refused.
- Make sure you know what diagnosis BOP made and check to see if it matches your doctor's diagnosis (I had a client who had 4 different diagnoses over several different evaluations – makes one question whether it's science at all or just really studied guesswork).
- Print out the drug manufacturer's paperwork on the medication.
- Find a pharmacologist to consult with and possibly testify.

Gear up for a *Sell* hearing (*Sell v. United States*, 539 U.S. 166 (2003)). Once Client has been found incompetent to stand trial, the court must decide the following before forcing Client to take medication in an effort to restore competency:

1. Is an **important** governmental interest are at stake, asking, for example:
   A. Is Client accused of a serious crime?
   B. Is the Government, through its prosecution, seeking to protect the basic human need for security?
   C. What are Client's individual case facts or special circumstances?
   D. How long has Client been confined so far or will be confined to reach competency?
2. Will involuntary medication **significantly further** those concomitant state interests?
3. Is involuntary medication is **necessary** to further those interests?

4. Is administration of the desired drugs **medically appropriate**, i.e. in the patient's best medical interest in light of his medical condition?

For instance, in Dr. Sell's case, he was diagnosed with delusional disorder – no medication exists to treat delusional disorder. BOP wanted to give him medication for schizophrenia and Dr. Sell, being a doctor, knew the horrible side effects of the medication, so refused the medication. Dr. Sell's charges included trying to hire a hitman to kill the FBI agent who, in Dr. Sell's delusion, Dr. Sell concluded was out to get Dr. Sell. Dr. Sell ended up never being forcibly medicated.

Sometimes, BOP will want forced medication pursuant to a BOP internal *Harper* hearing (*Washington v. Harper*, 494 U.S. 210 (1990)). In this BOP review hearing, BOP can ask to force medication if it can show Client is a danger to himself or others and the medicine prescribed is in his best medical interest. Defense counsel are not always notified when these hearings occur, hence the suggestion above to include notification if BOP plans a *Harper* hearing.

After this first 4 month stint, or even after any additional time, BOP doctors can conclude a defendant is not competent and cannot be rendered competent within a reasonable period of time. This happens rarely, really rarely. The Government could also dismiss charges at any time – this also rarely ever happens. I have heard of clients being held up to a year in BOP's attempt to restore. It all depends upon what the court finds "reasonable." Client is entitled to a hearing every time BOP requests additional time. **This is why status conferences are important.**

Frequently, BOP eventually deems Client competent to proceed and returns Client to the district. And, at times, Client really isn't competent or might have been competent but the instability of traveling across the country back to our District or, if medications were involved in restoration, they haven't been given or different (similar but not same) medications were used instead of the ones BOP used, so whatever competency gains have been lost. If you are still concerned Client is not competent, have Client reevaluated and, should your doctor agree, set it for hearing. Consider having Client testify so the judge can see exactly what your concerns are.

All too often, defense counsel feel they have little control over the competency evaluation and restoration process, but we can and must continue to advocate for clients during this process. After all, these clients are the most vulnerable to the "criminal justice" process, the ones so mentally ill they generally cannot fight for themselves without our help, who will get bulldozed by the voodoo which can be psychological or psychiatric treatment. Don't idle in Client's case during this process.

Next month: ideas for the incompetent Client who is out of custody, to avoid Client being ordered in to the Attorney General's custody for restoration.