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Federal Defender Newsletter
April 2017

CJA PANEL TRAINING

The next **Sacramento** CJA panel training is Wednesday, April 19, 2017 at 5:00 p.m. in the jury lounge, 4th floor of the federal courthouse, 501 I Street. Courtney Linn, Esq. will present "Whose Money Is It? Pretrial Asset Freezes and the Right to Counsel."

The next **Fresno** CJA panel training is Tuesday, April 18, 5:30-6:30 in the jury room of the federal courthouse: CJA Panel Administrator Kurt Heiser and CJA Panel Representative Scott Cameron will present "New CJA Policies: What they Mean for Panel Attorneys."

PLEASE WELCOME NEW FRESNO AFD, ANDREW WONG!

Please join us in welcoming our newest AFD Andrew Wong to the Fresno Office. His first day will be April 17. Andy joins us after having clerked for the Honorable Cam Ferenbach of the United States District Court for Nevada, as Fresno is perhaps the only city as exciting as his current Las Vegas residence. Prior to his clerkship, Andy worked with Legal Aid in San Diego, was an extern one summer for Justice Reinhardt, and was a JusticeCorps volunteer assisting pro se litigants with their filings. After earning his poli-sci degree with a minor in public affairs from UCLA, he then went to USC for law school. We look forward to having Andy's energy, enthusiasm, and commitment to our clients in our office.

Good News for CJA Panel Members

The 22nd Annual National Conference of CJA Panel Attorney District Representatives was held on March 10th and 11th, 2017. Scott Cameron attended as the representative for the Eastern District of California. At the Conference, a representative of the Defender Services Office (DSO) reported on the financial situation for the CJA panel for 2017. According to the DSO representative, "we are in a comfortable position for FY 17." Moreover, the DSO representative stated that there was "no reason to believe there will be a suspension of voucher payments to CJA attorneys in FY 17."

In addition, the Eastern District of California recently implemented the "Criminal Justice Act Policies and Procedures" as approved by the Judicial Council of the Ninth Circuit. The EDCA was one of the first districts in the Ninth Circuit to implement the new policies and procedures. The policies and procedures have resulted in, among other benefits, increased compensation for our valued

service providers such as paralegals and investigators. A copy of the policies and procedures were distributed at the March 15, 2017 CJA panel training in Sacramento and will also be presented and distributed at the April 18, 2017 panel training in Fresno. The policies and procedures are also available on-line at the EDCA Federal Defender's website in the "Secured Documents" under "Training Materials."

For additional information regarding the Annual Conference, contact Scott Cameron at 916-769-8842. For additional information regarding the new Ninth Circuit Policies and Procedures, please contact Kurt Heiser at 916-498-5700.

Save the Dates for our **PATHWAYS TO PROGRESS FAIRS**

- **Fresno**: 4/20/17, 1-3 pm,. Coyle Federal Courthouse — Second Floor Jury Room 1501
- Sacramento: 4/27/17, 12:30-4 pm., Matsui Federal Courthouse, Kennedy Learning Center, 1st floor.

Encourage your Clients to attend!

CJA On-Line & On Call

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.

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.

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.

REDESIGN OF WWW.FD.ORG

The new design of www.fd.org launched in early March. Many of the previously publicly accessible postings will now be available through a log-in. CJA lawyers can log in, and any private defense lawyer can apply for a log-in from the site itself.

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_galloway@fd.org.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet providing 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.

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.

NATIONAL DEFENDER SERVICES TRAININGS
(register at www.fd.org)

Fundamentals of Federal Criminal Defense
Houston, Texas
June 8 - June 9, 2017

Winning Strategies
Houston, Texas
June 8 - June 10, 2017

SUPREME COURT OPINIONS

Manuel v. City of Joliet, No. 14-9496 (3-21-17). The Court issued a 6-2 decision by Justice Kagan in a section 1983 action, holding that petitioners may challenge pretrial detention (in addition to arrest) on the ground that it violated the Fourth Amendment. In this case, Mr. Manuel was detained for 7 weeks for possession of ecstasy where the field test was negative, the evidence tech at the station lied about one of the pills testing positive, and another officer reported that based on his training and experience he knew the pulls to be ecstasy. Even after the state police lab reported that the seized pills contained no controlled substances, Mr. Manuel was detained for more than another month before the charges were dismissed and he was released.

Dean v. United States, No. 1509260 (4-3-17). In a unanimous decision authored by Chief Justice Roberts, the Supreme Court held today that a district court may take into account a consecutive mandatory minimum under 18 U.S.C. § 924(c) when determining the appropriate sentence for the underlying offense. As the Court put it, "[n]othing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count." In other words, "nothing . . . prevents a district court from imposing a 30-year mandatory minimum sentence under § 924(c) and a one-day sentence for the predicate violent or drug trafficking crime, provided those terms run one after the other."

For Levon Dean, who was 23 years old when he committed the two robberies, "[t]hat he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether—in connection with his predicate crimes—still more incarceration is necessary to protect the public. Likewise, in considering 'the need for the sentence imposed . . . to afford adequate deterrence,' § 3553(a)(2)(B), the District Court could not reasonably ignore the deterrent effect of Dean's 30-year mandatory minimum." The Eighth Circuit's contrary holding was reversed.

Moore v. Texas, No. 15-797 (3-28-17). In this Texas death penalty habeas case, a 5-3 opinion authored by Justice Ginsburg, the Court ruled that although states have the primary responsibility for ensuring that they do not execute intellectually disabled inmate, they cannot disregard the clinical standards in medical guides on intellectual disabilities. In doing so, it noted that many prior factors rely on inaccurate stereotypes

of the intellectually disabled by laypeople, and would result in the execution of persons with relatively mild disability. In reaching this holding, the Court affirmed that the Constitution bars the states from executing anyone with an intellectual disability.

CERT. GRANTS

On April 3, 2017, the Supreme Court granted cert in Ayestas v. Davis, a Texas death penalty case that involves the standard for determining when a death-row inmate is entitled to receive federal funds to assist him in his federal post-conviction proceedings.

NINTH CIRCUIT OPINONS

US v. Martinez, No. 15-50205 (3-10-17)(Wardlaw w/Reinhardt & Whyte). The Ninth Circuit held that the district court erred by responding to a jury note without consulting counsel in violation of Fed. R. Crim. Pro. 43(a) and the Sixth Amendment. The jury was asked for a special finding in a 1326 reentry case. The special finding dealt with the date of removal (raising the stat max from 2 years to 20). The jury asked about the date's significance, and the court, without consulting counsel, responded to the note by stating that it was a matter for the court to consider. This response could not be harmless. The immigration file had numerous mistakes, and the defense was that the government could not prove removal, with the mistakes, beyond a reasonable doubt. The court response relieved the jury of finding the date beyond a reasonable doubt. The sentence was vacated and remanded. On remand, the government can retry the removal date issue or the defendant can be sentenced under the two-year max.

US v. Perkins, 15-30035 (3-13-17)(Tashima w/Kleinfeld). The Ninth Circuit suppressed evidence found on a defendant's computers because of a Franks violation in obtaining the search warrant. The defendant, traveling from abroad, was stopped in Canada and his laptop computer searched. The defendant had a prior sex offense. The Canadian police found two photos of underage females, but determined that they did not meet the Canadian definition of "sexual purpose." When the defendant got back to the United States, the Homeland Security agent took a look, and decided that the images met the federal definition. In seeking a warrant, he omitted the Canadian determination and images of the photos for the magistrate to make a neutral determination. The warrant issued for a further search and child porn was found. The defendant entered a conditional plea and appealed the denial of the motion to suppress.

The 9th suppressed. The district court clearly erred in not finding that the agent acted in reckless disregard in omitting relevant evidence. Such reckless disregard in omitting the evidence misled the magistrate. If the facts had been included, probable cause would not have been found. As such, under Franks, the evidence must be suppressed.

US v. Job, No. 14-50472 (3-14-17)(Friedman w/Tashima and Paez). The Ninth Circuit reversed the denial of a suppression motion, vacated a conviction, affirmed a conspiracy conviction, made sentencing rulings, and remanded for resentencing. This case concerned a meth conspiracy and possession with intent to distribute.

The search of the defendant was supposedly conducted under a probation

waiver of Fourth Amendment rights. However, the officers conducted the search of the person and car without knowing of the defendant's probationary status or the waiver. Further, the Ninth Circuit found the search unreasonable and not a valid Terry search. The evidence should have been suppressed, which would vacate the possession with intent conviction.

As for sentencing, the district court failed to make findings as to three objections. This concerned the importation of meth, the use of a home for production of meth, and the toxic discharge. All three were sentencing adjustments that the government failed to support with evidence. The sentence was vacated and remanded.

US v. Rodriguez, No. 15-50096 (3-14-17)(Friedman w/Tashima and Paez). The Ninth Circuit vacated the defendant's sentence and remanded because the district court failed to allow the defendant to challenge the 851 prior convictions that led to an enhancement.

LETTER FROM THE DEFENDER

Bites at the Sentenced Apple or Is There *Johnson* Life After *Beckles?*

Yes.

Recall, *Johnson* applies to deciding whether a prior or concurrent conviction is a crime of violence. It found the definition "crime of violence" as an offense that "involves conduct that presents a serious potential risk of physical injury to another" to be unconstitutionally vague and overbroad "due to the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants [due process] and invites arbitrary enforcement by judges."

That or similar language is found in the following statutes:

18 U.S.C. § 924(e)(2)(B)(iii) (Armed Career Criminal Act - ACCA) This is the *Johnson* case.

18 U.S.C. § 16(b) contains similar language: *any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*. This is presently under Supreme Court review this term in *Lynch v. Dimaya* as it applies to removals/deportations for an aggravated felony COV under 8 U.S.C. § 1101(a)(43)(F) which incorporates §16; in Dimaya's case, specifically §16(b). We are also concerned with this when our non-citizen clients face 8 U.S.C. § 1326(b)(2) charges. *Dimaya*'s decision may make the underlying removal unlawful as well as remove the 20 year maximum sentence.

Beckles found, since the Guidelines are advisory, Guideline language mimicking 18 U.S.C. §§ 16(b) or 924(e)(2)(B)(iii) is not subject to vagueness challenges under the Due Process Clause. The Guideline sections including this "substantial risk" language are U.S.S.G. §§ 4B1.2(a)(2), 1B1.1 App. Note (1)(J) *Definitions*; 2A2.1 (*assault with intent to murder, attempted murder*); 2A2.4 (*obstructing/impeding officers*); 2A6.1 (*threatening/harassing communications*); 2D1.1(b)(13)(C)(ii) and (D) (drug trafficking); 2K1.4 (*arson*); 2L1.1 (*alien smuggling*); 2N1.1 (*product tampering*); 3A1.2 (*official victim*); 3C1.2 (*reckless endangerment during flight*).

Should you be arguing *Johnson* in your Guideline cases involving these sections going forward? Of course! While it's not controlling, *Johnson*'s "arbitrary enforcement by judges" concern, when integrated with 18 U.S.C. § 3553(a)(6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," makes *Johnson* a righteous consideration under these Guideline sections.

Also, *Johnson* post-*Beckles* may still apply to pre-*Booker* (January 12, 2005 – remember this date) guideline sentences involving any of

those Guideline sections. Recall: *Booker* changed Guidelines from being mandatory to advisory. Those pre-*Booker* cases have hopefully already been filed and are making their way through the system.

But this raises a question concerning the Supremes' April 3, 2017 decision in *Dean v. United States.* David Porter shared with me Professor Doug Berman's blog on *Dean Claims* for April 3 and 4, 2017. http://sentencing.typepad.com/sentencing_law_and_policy/ *Dean* overturned Eighth Circuit's holding that, "in calculating the sentence for [a] predicate offense, a judge **must** ignore the fact that the defendant will serve the mandatory minimums imposed under §924(c)." (Emphasis added.) Translating into the positive: a court can consider the mandatory minimum sentence(s) (such as Section 924 statutorily consecutive mandatory minimum sentences) when deciding a sentence on remaining consecutive counts.

Dean's judge, after imposing the required consecutive 924 15 year sentences totally 30 years, sentence to one consecutive day on the remaining count despite the advisory Guideline recommended sentence. The Supremes say this is not just lawful, but required by 18 U.S.C. § 3553(a)'s "The court shall impose a sentence sufficient, but not greater than necessary, to comply with (3553(a)'s) purposes."

Prof. Berman's April 4 discussion wonders whether *Dean* may have retroactive application. Will it be limited to sentences imposed pre-*Booker*? If you are haunted by a sentence imposed in conjunction with a mandatory minimum sentenced count, this may be the opportunity to right that wrong.

Expect to see more information on this in coming weeks.

~ Heather E. Williams, FD-EDCA