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Federal Defender Newsletter
August 2015

CJA PANEL TRAINING

Panel Training is on Summer Vacation!! Enjoy your summer and see you on September 16th in Sacramento and September 15th in Fresno!

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.

14th Annual Federal Defender's Golf Tournament

Join us September 18, 2014 at the **Turkey Creek Golf Club, 1525 California Route 193** in **Lincoln**. Tournament play begins at 1:00 pm with a modified shotgun start. The tournament is just $85 for golf, range balls, cart, dinner and prizes!
Questions? Playing partners? Special menu needs? Contact Henry Hawkins or Mel Buford, Federal Defender's Office 916-498-5700. **All skill levels are welcome.**

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

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, Andras Farkas, Andras_Farkas@fd.org, or Karen Mosher, karen_mosher@fd.org.
Sacramento: Lexi Negin, lexi_negin@fd.org or Ben Galloway, ben_d_galloway@fd.org .

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.

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 2-offense-level reduction in drug cases.

In July, 17 amended judgments were filed resulting in a total time reduction of exactly 28 years (336 months), resulting in a taxpayer cost savings of approximately $820,165.36 and unquantifiable benefits to our clients and their families.

So far 217 defendants in this district have received a reduction in their sentences under Amendment 782.

PLEASE CONTINUE TO CONSIDER JOHNSON'S IMPACT ON YOUR CLIENTS

In Johnson v. United States, No. 13-7120 (June 26, 2015), the Supreme Court held as unconstitutionally void for vagueness the residual clause of the Armed Career Criminal Act (ACCA). Johnson's impact goes far beyond ACCA cases as the language held as unconstitutionally vague also exists in the Guidelines at § 4B1.2(a)(2), and, therefore, impacts Guidelines calculations in other areas, such as career offender, illegal reentry, and felon-in-possession.

Please look for Johnson's application in your current and former cases. If you identify former clients, no pending case, who might benefit from Johnson, please contact Sacramento AFD Ann McClintock, ann_mcclintock@fd.org , with their information.

JENNIFER MANN IS NEW CHU SUPERVISOR

Please welcome Jennifer Mann as our Capital Habeas Unit's (CHU's) new supervisor, a position held for many years by Joseph Schlesinger who retired in February to become Executive Director at the California Appellate Project – San Francisco (CAP-SF).

Those who already know Jennifer through her 12 years as an Assistant Federal Defender in our CHU know her to be knowledgeable and practical. Her common sense approach, extensive capital habeas experience dating to her pre-California years in Florida, and even temperament, an asset to her clients, cases, and habeas teams, have always been shared with our capital habeas CJA Panel and lawyers in and out of California. Since Joe's departure, Jennifer has already been the FD-CAE's representative on the Capital Habeas Panel Selection Committee.

Welcome, Jennifer, in your new role!

♫ NOTABLE CASES ♫

United States v. Chan, No. 14-55239 (7/9/15) (D.W. Nelson with Bybee; dissent by Ikuta). The Ninth Circuit holds that a defendant is entitled to postconviction relief (here, in the form of coram nobis relief and an opportunity to withdraw the guilty plea) if counsel affirmatively gave incorrect advice about immigration consequences of a guilty plea, thus rendering ineffective assistance under Ninth Circuit precedent that preceded Padilla v. Kentucky, 559 U.S. 356 (2010).

Foley v. Biter No. 12-17724 (7/14/15) (Christen, with Schroeder and Nelson). The Ninth Circuit reversed the denial of a California state prisoner's motion for relief from judgment under Rule 60(b)(6), holding that counsel had abandoned the petitioner, thereby preventing a timely appeal from the denial of his § 2254 habeas petition. The facts regarding abandonment were egregious: counsel forgot that he represented the petitioner for approximately six years after denial of the habeas petition. Counsel provided a declaration explaining that he had forgotten about his representation of the petitioner and therefore did not notify him about the denial. Petitioner will now have an opportunity to appeal the denial of his habeas corpus petition, challenging his judgment of conviction for first degree murder and his LWOP sentence.

US v. Yamashiro, No. 12-50608 (6-12-15)(Bell, D.J., with Silverman; partial concurrence and dissent by Bea). Structural error occurs when a victim allocutes at sentencing, the defendant is present, but he is without counsel. This constitutional infirmity is not subject to harmless error because at this crucial phase, counsel was not present.

United States v. Watson, No. 13-30084 (7/10/15) (Kleinfeld with O'Scannlain and Berzon). The Ninth Circuit held that a defendant is entitled to post-conviction DNA testing of evidence that could not be tested at the time of trial. The defendant had been convicted of rape, but testimony at trial was equivocal as to who the perpetrator was (assuming there was a rape at all). There was a DNA sample in the form of semen on the victim's underwear, but it was too small to test at the time of trial in 2006. Because of advancements in technology, it can be tested now, so the defendant moved for post-conviction DNA testing. The district court denied the motion because it was presumptively untimely, having been brought more than three years after conviction. The presumption is rebutted by newly discovered DNA evidence. The Ninth Circuit held that "newly discovered" in this context means that the import of the DNA evidence is newly discovered in light of technological advances. The court thus reversed the denial of the motion for DNA testing and remanded for further proceedings.

Rogers v. McDaniel, No. 11-99009 (7/16/15) (Gould with Silverman and Hurwitz). The Ninth Circuit affirmed the grant of penalty phase relief to a Nevada death row prisoner, holding that a penalty phase jury instruction was unconstitutionally vague and that the vagueness was not harmless. The panel also vacated and remanded the denial of numerous guilt-phase claims in light of intervening precedent on timeliness and procedural default.

US v. Aquino, No. 14-10360 (7-20-15) (Owens, Wardlaw, Berzon). The Ninth Circuit vacates a sentence on a SR violation. The defendant denied use of "illicit drugs." The government proved that she used “spice” but failed to prove that it was an illicit drug. Drug testing failed to reveal any evidence of an illegal or illicit drug in her system. The Ninth Circuit appreciated the concerns of the district court, and the goal of the probation officer, but the evidence did not support that she had used illicit drugs--just that she smoked "spice," and it was unclear what that was and whether it contained a controlled substance.

United States v. Santos-Flores, No. 15-10289 (7/23/15) (July motions panel). In a published order, the Ninth Circuit held that a criminal defendant may not be denied bail simply because he is likely to be

placed in immigration custody and thereby not be made available for trial. The Ninth Circuit parsed the Bail Reform Act, and concluded that Congress did not bar consideration for release. Congress had stated that immigration had to be informed, and that if they did nothing, the defendant could be considered. The Ninth Circuit concludes that there may be various reasons why ICE would not deport or remove someone, or would want them prosecuted. This fact cannot bar release considerations.

Dietz v. Bouldin, No. 13-35377 (Fisher with Bea and Murguia) . The Ninth Circuit held that if a trial judge makes an "appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict," the judge may recall a jury shortly after it has been dismissed to correct an error in the verdict.

US v. Carter, No. 13-50164 (7-28-15)(Melloy with Bybee and Ikuta). During a Rule 11 colloquy, "if a district court learns that a defendant is under the influence of some medication, it has a duty to determine, at a minimum, what type of drug the defendant has taken and whether the drug is affecting the defendant's mental state." In determining the mental state of defendants, the courts "may rely on the defendants' answers to their inquiries as well as their observations of defendants during the hearing." A court can consider medical history and history of mental illness. A court can, but is not required, to look at the dosage of the drugs and the specific names.

US v. Mark, No. 13-10579 (7/31/15) (Friedland, with Murguia and McKeown). When the government promises not to prosecute a witness in exchange for his cooperation, it cannot them indict the witness unless it proves that he failed to cooperate. The Ninth Circuit reverses the defendant's conviction with instructions to dismiss the indictment. It reverses the district court finding that the defendant failed to cooperate, holding that this conclusion was not supported by evidence. The government, through two AUSAs, claimed to have had a phone call with the defendant (before he was indicted) where he refused to cooperate further after having previously cooperated and agreed to testify against a co-conspirator. He was indicted shortly thereafter, but never given notice on why his cooperation was terminated. There were no notes of this supposed phone call, the FBI agent that the AUSAs claimed was there had no recollection of the phone call (despite having documented the earlier phone conversation in a report), and government and defense phone records indicated no such phone call ever happened. The defendant testified that this phone call never happened. On this record, the government failed to prove lack of cooperation and could not go forward with the prosecution. The Ninth Circuit chastised the government for its lack of contemporaneous documentation, indicating that the state of the evidence undermined common sense, fairness, and confidence in the system.

LETTER FROM THE DEFENDER

Ego.

It's what makes us good lawyers, and what interferes with us being good lawyers.

In the strictly Freudian sense, *ego* is the organized, realistic portion of our psyche (our conscious and unconscious thoughts), mediating between the id's uncoordinated instincts and desires and the super-ego's moral, critical restraint. Its definition has evolved to describe one's sense of self – synonyms include self-esteem, self-

importance, self-worth, self-respect, self-image, self-confidence – and now suggest having an *ego* as a negative quality.

Dr. Leonard Mlodinow, in his book *Subliminal: How Your Unconscious Mind Rules Your Behavior* (Knopf Doubleday 2012), notes "Freudian therapists and experimental psychologists agree . . . our ego fights fiercely to defend itself." And, accordingly, even those considered the most normal and healthy "tend to think of themselves as not just competent but proficient, even if they aren't."

The ego tries to embark on a path to the truth be wearing 2 hats: a scientist's and a lawyer's. According to psychologist Jonathan Haidt, as Dr. Mlodinow points out,

- the ego scientist consciously gathers evidence, looks for what makes sense, forms theories to explain the observations, then tests those theories, while
- the ego lawyer unconsciously starts with its conclusion – what it wants to convince others exists, looks for evidence supporting that conclusion, and tries to discredit evidence that doesn't.

This latter "ego lawyer" approach reeks of motivational reasoning, confirmation bias, and cognitive dissonance, like when our kids say, "La! La! La! La! La! La! La! La! I can't HEAR you!" when we try to tell them something – like "No" – which they don't want to hear. As Dr. Mlodinow observes, "As it turns out, the brain is a decent scientist but an absolutely outstanding lawyer."

So how do we figure out if we're one of the competent to proficient, and not just delusional? The math says not all of us can be in the top 10% of the world's greatest lawyers. We are loathe to let go of the ego giving us our confidence and assurance in the courtroom or in the chair actually advising other human beings – yes, clients - when they make some of the most challenging decisions they'll ever make.

At the same time, that ego can prevent our becoming exceptional attorneys. We must set aside our beliefs we are experts at anything, for each case, each client, is different. Not every African-American male gang member charged with being a felon-in-possession of a firearm is just like the last one you represented nor the next one you'll meet. Not every Mexican national found on-site at a marijuana grow is like the last similarly situated client you had. The sooner we take this to heart, the sooner we're on our path to convince an AUSA, probationer officer, and judge of the same.

Each brings to their intersection with us his own story, her own history. I tell clients they are the experts in their cases, but we have to believe it. That means investing time and that ever-popular "being present" in client meetings. It means listening to their concerns for that piece of property they need back or their observed "They never gave me my rights, so my charges should be dismissed," and investigating or researching those concerns rather than dismissing them without consideration. It means keeping your word with clients, granting them the same respect we hope for, even expect. It means admitting when we aren't acting in our clients' best interests because our egos interfere.

Ooh. This may be out of our comfort zone, so try it just for one meeting with one client. Pick a meeting to focus on the client and go armed with questions about more than the alleged offense. Ask first what questions the client has of you, any concerns at present. Once those are answered or a course of action plotted,

now go through your prepared questions: family relationships, school career, favorite sports, TV shows, movies, music. Do they have a hero? Growing up, what job did they want to eventually have? Ask those questions which mold for you a person out of a defendant.

You just created the means to now connect with your client's "ego lawyer." It's not just our egos in this defense battle – our client's ego can be the representation's traitor. And, sometimes, we have to let it. Meanwhile, let's try to minimize that damage by suppressing our own egos.