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Federal Defender Newsletter
December 2015

CJA PANEL TRAINING

CJA Panel training is on break for the holidays. See you in January 2016!

PLEASE JOIN US AT THE ANNUAL FEDERAL DEFENDER & CJA HOLIDAY PARTY

We are decking our hall for the Annual Holiday Party on Friday, **December 11** from 4 to 7 pm at 801 I Street. Please join us for holiday cheer and plenty of food and drink! We will have a room for the kids with lots of goodies. There is also a card-based fundraiser, so come ready to play. The party is brought to you by the Federal Defender's Office, the CJA Panel Attorneys, and other criminal defense practitioners.

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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.

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 APPLICATION & REAPPLICATION DEADLINE

Panel Selection Committees will be reviewing CJA Applications and Reapplications in the next few months.

We are striving to increase our Panels' diversity and ask current Panel members to reach out to and encourage dedicated defense counsel in our communities to apply for our Panels.

Applications can be found at http://www.cae-fpd.org/cja_app.html .

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.
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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 November 2015, 21 amended judgments were filed resulting in a total time reduction of approximately 42 years. While the value of early release is inestimable for defendants, their families, and their friends, the early releases in November resulted in a taxpayer cost savings of approximately $1,235,130.70. So far, 313 defendants in this district have received reductions in their sentences under Amendment 782.

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.

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.

NEW & IMPROVED WEBSITE

Check out our updated website – same URL http://www.cae-fpd.org/.

If you notice any typos or misinformation, please contact Mark Lie, mark_lie@fd.org. Suggestions for content? Let Mark know.

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.

NATIONAL DEFENDER SERVICES TRAININGS

WINNING STRATEGIES SEMINAR
SAN ANTONIO, TEXAS | January 28 - January 30, 2016
REGISTER HERE
DRAFT AGENDA
FINANCIAL ASSISTANCE APPLICATION

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE SEMINAR
SAN ANTONIO , TEXAS | January 28 - January 28, 2016
REGISTER HERE
DRAFT AGENDA
FINANCIAL ASSISTANCE APPLICATION

LAW & TECHNOLOGY SERIES: ELECTRONIC COURTROOM PRESENTATION WORKSHOP
HOUSTON, TEXAS | February 04 - February 06, 2016
REGISTER HERE
DRAFT AGENDA
FINANCIAL ASSISTANCE APPLICATION

ANDREA TAYLOR SENTENCING ADVOCACY WORKSHOP
SAN DIEGO, CALIFORNIA | March 03 - March 05, 2016
REGISTER HERE (WAIT LIST ONLY)
DRAFT AGENDA

♫ NOTABLE CASES ♫

US v. Garcia-Jimenez, No. 14-10484 (11-19-15)(Berzon with Fletcher and Bea). Reversing and remanding a 16-level increase, the Ninth Circuit holds that New Jersey's aggravated assault conviction is not a "crime of violence" under the guidelines. The state statute is broader than the federal generic offense: it includes "extreme recklessness or indifference" as one of various mental states. In addition, the state "attempt" definition is broader than the federal offense because it embraces solely preparatory steps and rejects the concept of "probable desistance," which means that the act will unequivocally go forward unless independent forces intervene. The Ninth Circuit also finds that the error was not harmless even though the court had said that it would sentence the defendant to 46 months regardless of the impact of the prior. The Ninth Circuit stated that the long sentence, three times as long as the correct guideline range, meant that reconsideration and resentencing was in order.

US v. Dixon, No. 14-10318 (11-20-15)(Bea with Fletcher and Berzon). This is an ACCA case where the Ninth Circuit holds that **California robbery is not a "crime of violence."** Under Taylor, California robbery under Penal Code section 211 does not meet the categorical generic definition of "robbery" required for ACCA. The state conviction contains conduct that may not constitute "violent force" or may not be intentional (i.e. reckless or accidental). The statute is not divisible. ** CAUTION: THE GOVERNMENT HAS BEEN GIVEN UNTIL JANUARY 16, 2016, TO FILE ITS PETITION FOR REHEARING.**

Shirley v. Yates, No. 13-16273 (11-20-15)(Reinhardt, with Thomas and Christen). Habeas relief is granted because of a Batson violation. The Batson violation occurred because the prosecutor, in this robbery case, cannot remember why he struck prospective jurors. The prosecutor stated that he was confident there was a race neutral reason. However, such a statement, without corroborating evidence, alone cannot overcome Batson's step 3.

LETTER FROM THE DEFENDER

I know I promised *Before the Sentence, the Priors* which will include information on client prior convictions which, by recent court decision or statutory changes, may no longer be crimes of violence or felonies, or may be reduced or dismissed by filing a simple motion. It will be in January's newsletter.

A recent SACRAMENTO BEE article and an Op Ed alleging "secrecy" in our district court (Denny Walsh and Sam Stanton, *Is secrecy taking over federal courts?* (11/20/2015), http://www.sacbee.com/news/investigations/the-public-eye/article45686829.html, and Joyce Terhaars, *Do we want secrecy in Sacramento's federal courts?* (11/21/2015), http://www.sacbee.com/opinion/opn-columns-blogs/joyce-terhaar/article45583176.html), followed now by some judges sealing denials, refusing to seal pleadings with cooperation information and information protected by federal privacy laws, need addressing.

I submitted to Mr. Walsh and Ms. Terhaar, asking it be forwarded, the below Op Ed discussing sealing pleadings related to cooperation. I did not hear back from them (granted I emailed it to them the day after Thanksgiving). Monday November 30, 2015, I sent the same Op Ed to THE BEE's Viewpoints Editor. To date, I still have no response.

But I do have this Newsletter. Here is my response to THE BEE's position.

IT'S NOT ABOUT SECRECY IN FEDERAL COURT. IT'S ABOUT KEEPING PEOPLE SAFE. TO SEAL, OR NOT TO SEAL, COOPERATION PLEADINGS

Op Ed by Heather E. Williams
Federal Defender, California Eastern District
Lawyer for the accused for 29 years

Have you ever visited www.whosarat.com? It's a website dedicated to outing informants and cooperators used by law enforcement and prosecutors. It's a great resource for lawyers like me who represent people accused of committing crimes –public defenders and private criminal defense lawyers - to sniff out who may have led police to my client, who perhaps may have entrapped my client, and who may benefit from inculpating my client – sometimes falsely – to gain a reduced sentence, money or preferred treatment, and even no filed criminal charges against the "rat."

It also strikes fear into mine, my client, and my client's family's hearts once my client decides to cooperate. The fear is that my client or her family may now become a target. And that the help my client wants to give police and prosecutors – to put those sometimes more culpable, those who organize criminal activity or committed other crimes, those who provided the client that criminal opportunity – may become worthless through the public advertising of my client's cooperation.

Both the danger of cooperation, by either introducing undercover agents to those committing crimes or testifying against them in court or before a grand jury, and its value to law enforcement and justice, was recently reinforced through U.S. District Judge Charles Breyer's order directing the courtroom closure for the testimony of undercover FBI agents during the California Northern District's "Shrimp Boy" Chow trial - the public could watch at another location a video feed not showing the witnesses. Judge Breyer also allowed the agents to testify using other names, all based upon the prosecutor's motion "to protect the safety and security of its (agents), who . . . may continue to be engaged in undercover activities."

Unlike the undercover FBI agents, my client has no phalanx of armed comrades and is prohibited from having any weapon to protect her. My client has the prosecutor, the judge, and me to protect her, and one way we do that is to ask certain documents in the court's docket be sealed.

The national Federal Public Defender position on sealing cooperation plea agreements and sentencing pleadings? Do not seal. Our justice system, in theory, is kept honest by keeping court hearings and legal filings public. And responsibility for our client's safety should fall to those using his cooperation – the Department of Justice (DOJ), the prosecutors and law enforcement.

But the reality is, unless DOJ plans to provide my detained client a bodyguard to shadow him 24/7, including into the jail's showers, any efforts mean little once my client's cooperation becomes public. If it's not the person he cooperated against, or his co-conspirators, fellow gang members, family members, or friends, then it's the guy in prison wanting to prove his creds under the general principle that snitches deserve pain. While this harm is "potential," as Joyce Terhaar's *Do we want secrecy on Sacramento's federal courts?* notes, you can see the harm has become more "when" than "if" it will happen. Publishing cooperation can guarantee the "when."

And I represent individuals in their individual case. I work to protect them and minimize their damage from our criminal justice system – police, prosecutors, the court. I do this by being their voice in court, by filing motions and going to trial to hold the government and court to its Constitutional obligations. And I try to protect my clients from the consequences of their decisions, to include any decision to cooperate.

Now, if I or anyone else wants to find out if a defendant is cooperating, we have only to look at the case's court docket and see if there are SEALED EVENTs or skipped docket numbers near either the change of plea minute entry, or leading up to or around sentencing. There may be other explanations for SEALED EVENTs – pleadings referring to medical and psychological diagnoses and treatment, employment records, birth dates, minors' names, full addresses, financial account numbers, Social Security numbers, for these and other information must be kept confidential by law. Some pleadings are always filed under seal by rule – references to grand jury proceedings or investigations, presentence reports, etc. But people seeking to halt or discourage cooperation, or to get even for cooperation, they likely don't stop and engage in any analysis on why there are sealed events, and their jumped-to conclusions can be harmful to my client.

Why would my client agree to cooperate? In this day of ever increasing mandatory minimum sentences, even for the first time offender, sometimes the only way to permit a below mandatory sentence is to cooperate. Defense lawyers talk about "the race to the courthouse" – the reality that, among codefendants, the one reaching the prosecutor first to testify against the others wins the lesser sentence. Known as a 5K departure, created under the federal Sentencing Guidelines in the late 1980s, "(a) defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor." In fact, the Sentencing Commission (made up of judges and appointed community members), suggested that judges, in imposing a lesser sentence, "may elect to provide its reasons to the defendant in (chambers) and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation."

While perhaps the practice in California's Eastern District federal court to seal plea agreements may appear to be routine, judges continue to exercise discretion, and prosecutors and defense counsel generally weigh before the hearing whether to request sealing or not. Not all motions must be in writing. I will sometimes ask my Motions to File Under Seal also be filed under seal, to fully protect the sealed information. And it's important to note the reporters of *Is secrecy taking over our federal courts?* were never kept out of court for any plea hearings – the public still has access to our federal courts, just not everything in its dockets.

With concerns over the delicate balance between full and continued public access to our courts, providing law enforcement with help sometimes only a cooperator can provide, and cooperator safety, the Federal Defender proposes all plea agreements be public and that each plea agreement have a paragraph addressing a "Plea Addendum" which may or may not exist. If it does exist, it will contain additions to the plea agreement – spelling out a defendant's agreed upon cooperation or exceptional circumstances (medical, familial, financial, etc.) for sentencing consideration, restitution specifically benefitting victims who were minors when the offense was committed, etc. And that Addendum would be filed within a proposed *Master Sealed Event*, an automatic docket entry immediately after an indictment is filed, in every single case. Other cooperation-related sentencing pleadings can also be filed there, **but only within the judge's discretion**. This way, those looking for cooperators through missing or SEALED EVENT docket entries won't know if the defendant in any particular case is cooperating, giving a bit better protection to my client.

Finally, the media must recognize its role in potentially endangering defendants under the guise of the press's freedom and the public's right to know. In a similar context, for instance, the Bee is selective in which U.S. Attorney press releases it publishes. On November 18, 2015, the U.S. Attorney issued a release about the guilty verdict after his Sacramento federal trial of John James Kash, Redding, for marijuana trafficking; the Bee wrote nothing about it. The following day, the U.S. Attorney's press release concerned a Sacramento man who the federal grand jury charged with child pornography production and distribution, and with buying children, occurring in Thailand and the

Philippines. You bet the Bee published this press release, because articles on perverted sex sell papers and advertising, even though publishing that article could endanger this latter defendant should he get out of custody, and most assuredly endangers him while he remains in custody. And while some argue that publishing the defendant's name and charges in the sex case can invite other victims, if they exist, to come forward (see, as an example, the press coverage of rape accusations against Bill Cosby), why isn't the Bee publishing the marijuana trafficking case trial results so any minors might come forward who may have been victimized if that defendant sold drugs to them?

So, Sacramento Bee, are you really concerned about "secrecy" in what have been open court hearings, freedom of the press, and the public's right to know? Or are you more concerned about selling papers and advertising, a human being's safety be damned?

As for sealing other information (medical, psychological, bank, education, employment records, etc.), I didn't realize my client gave up his/her right to privacy under, for example, the Fair Credit Reporting Act (FCRA), Fair and Accurate Credit Transactions Act of 2003 (FACTA), Family Education Rights and Privacy Act, Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA), Health Insurance Portability and Accountability Act (HIPAA), and Federal Privacy Act of 1974, not to mention the several California statutes granting our client's privacy, once charged with committing a crime.

Who knew?

~ Heather E. Williams, FD-CAE