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Federal Defender Newsletter

December 2016

CJA PANEL TRAINING

There is no panel training in December.
Happy Holidays!

The next Sacramento CJA panel training is Wednesday, January 18, 2017 at 5:00 p.m. in the jury lounge, 4th floor of the federal courthouse, 501 I Street. Dr. Andres Sciolla, an Associate Professor of Clinical Psychiatry in the Department of Psychiatry and Behavioral Sciences at UC Davis, will present on "Childhood Trauma and Law-Breaking Behavior."

Fresno will have no January CJA panel training. Instead, on February 21, 2017, there will be a 2-hour session from 5:00 to 7:00 p.m. with Samuel Eaton and Susan Leff on cross-examination strategies.

JINGLE, MINGLE, & BE MERRY!!!



Please join the Federal Defender's Office and the CJA Panel this Friday, December 9, 2016 for the Annual Holiday Party! We'll be decking the halls at the Old Post Office Building, 801 I Street, in Sacramento from 4:00 to 7:00.

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.

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
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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.



What it lacks in length,
happiness makes up for in height.

~ Robert Frost

**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)

Winning Strategies Seminar
Long Beach, California
January 12 - 14, 2017

Fundamentals of Federal Criminal Defense
Seminar
Long Beach, California
January 12 - 13, 2017

Law & Technology Series: Techniques in
Electronic Case Management Workshop
Long Beach, California
March 2 - 4, 2017

**IMPORTANT SUPREME COURT
CERT. GRANTS**

(1) *Dean v. United States*, No. 15-9260

Issue: Whether *Pepper v. United States*, 562 U.S. 476 (2011), overruled *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), and related opinions from the Eighth Circuit to the extent that those opinions limit the district court's discretion to consider the mandatory consecutive sentence under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the Section 924(c) conviction.

(2) *Esquivel-Quintana v. Lynch*, No. 16-54

Issue: Whether a conviction under one of the seven state statutes criminalizing consensual sexual intercourse between a 21-year-old and someone almost 18 constitutes an “aggravated felony” of “sexual abuse of a minor” under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal.

NINTH CIRCUIT CASES

US v. Lin, No. 15-10152 (11-14-16) (Farris with Wallace and Watford). The Ninth Circuit vacated a sentence for guidelines error based on the use of the wrong base offense level. The district court sentenced for sex trafficking and applied the base offense level of 34, which is the level if the offense of conviction is 18 USC § 1591(b)(1), which carries a mandatory minimum of 15 years. The defendant did not plead to this subsection, nor to an offense that carried a mandatory minimum. The district court should not have used a cross-reference as if he had.

Fue v. Biter, No. 12-55307 (11-17-16) (en banc - Bybee). In an en banc decision on equitable tolling, the Ninth Circuit reversed the dismissal for untimeliness and remanded for further hearings. The petitioner alleged that the California Supreme Court never notified him that it denied his state petition. He wrote them after 14 months inquiring about it. He also stated that the petition was still pending when he filed his federal claim. The Ninth Circuit held that if the petitioner could prove lack of knowledge of the denial, he would be entitled to equitable tolling on these facts.

US v. Williams, No. 15-10475 (12-5-16) (Hurwitz with Rawlinson). The Ninth Circuit affirmed the suppression of a statement given after *Miranda* rights were invoked. The defendant was arrested for murder and invoked his rights under *Miranda*. Hours later, during booking, he was asked if he was a "member of a gang." The prosecution wanted to use this statement to show that the defendant belonged to a criminal enterprise for a RICO charge. The Ninth Circuit found that the "booking exception" (for biographical questions) is subject to the qualification that if the officer knows that the routine questions may incriminate the defendant, then the queries amount to interrogation. These questions exposed the defendant to greater risk due to federal prosecution and to state murder charges. The knowledge for the booking exception is objective; here, the officer should have known. The public safety exception also does not apply under these circumstances.

LETTER FROM THE DEFENDER

It was Sunday when police, with no warrant in hand, came to his home to arrest him. No one expected it, but it had something to do with his friend, the police

officer. Police arrested 2 other friends too. His US citizen wife heard they tried to beat a confession – to what? – out of him over the next five days. They didn't even try to hide the beatings – weeks later his arms still show the bruises. Later he disclosed they electrocuted his nipples. Off-duty police, out of uniform, came by the home saying they needed to search, had the right to search, though they produced no papers. His wife stood up to them – *You have no warrant, you have no right, I'm calling the American Consulate* – and the police left.

His first hearing was the next Thursday; no charges were filed but he was ordered detained for 15 more days along with the others, for investigation. His family hired a lawyer. On the 15th day, a hearing in chambers, lawyers only, still no charges, no idea for what or when he's being investigated, but he and the others are ordered detained another 2 weeks. Yesterday, witnesses said they didn't recognize the man and his friends, yet still no charges and all are detained another 15 days – more investigation.

That is Cairo, Egypt.

After November 8th, how many of you despaired, fretted, worried over the future United States, your personal futures, our clients – past, present and future clients? We followed any news story, any Facebook posting, sought out like-minded friends to confirm our biases, to find consolation. But still we were, and maybe some of us still are sure the sky is falling.

But it isn't.

An imprisoned client, an immigrant whose case resolution was crafted to avoid mandatory deportation, an immigrant from a country in turmoil from its Russian

neighbor, wrote, “Frankly, I fear that, under current political change, I could be targeted by the new conservative government. . . . Republicans will control the House, Senate, White House and the Supreme Court. Additionally, the new (potential) Attorney General is a conservative from Alabama.” Spot on to your concerns?

Well, it’s not the first time we’ve been here, and the last time was a mere 9 to 14 years ago. From 2002 thru 2007, for 4½ years, America had President Bush II and a Republican majority House and Senate. It was those years immediately following the most generally traumatic event for most in recent history (November’s election excluded): 9/11. The Supreme Court from 2002 to 2007 had 7 Republican appointees and only 2 Democratic appointees. Today, we have 4 Republican Supreme Court appointees and 4 Democratic appointees with one vacancy. And I dare anyone to say Attorney General John Ashcroft was any less conservative than Senator Jeff Sessions might be – AG Ashcroft had bare-breasted Department of Justice statues modestly hidden behind drapes. The newly created Cabinet Department of Homeland Security (sounding a bit too much like Nazi Germany’s Fatherland), increased deportable alien arrests 23% from 2003 to 2005.

Somehow, we survived. The “checks and balances” placed by our Constitution’s creators worked then, with ebbs and flows, and, despite the winning party’s rhetoric, no one’s looking to scrap the Constitution.

So, will our work as federal crimes defense lawyers become harder? When has it ever been easy? We’ll continue to do what we do best – fight. Fight to be sure the prosecutors follow the rules, and not just the statutes and procedural rules, but precedent like *Brady*. Fight challenging

evidence when law enforcement violates our Constitution, from *Miranda* to its application in the 9th Circuit’s *Williams* case decided December 5 (described above), challenging stops, searches, and seizures. Ensuring our courts give each singular accused the rights and protections all are guaranteed. We will make sure there is no pretense to process without there being actual process, unlike in Cairo, Egypt.

With this election, the racism, bigotry, xenophobia, and misogyny, apparently always there, was exposed like sour cream rising to the top. As Egyptian comedian and satirist Bassem Youssef says, “We call that *Monday*. This is the Middle East every single day.” But even before this election, and reinforced because of it, we always fought these curdling attitudes which insinuate themselves into profiled stops, pretrial incarceration of the poor, the slavery of sentencing incarceration, and our juries.

We - as defense lawyers, as citizens, and as human beings - can stop “Monday” here. This is not Cairo, Egypt.

We must listen to those with whom we disagree, hear their thoughts, try to source the why behind their opinions. Talk **with** them, not to them. Distinguish opinion from misinformation and lies from fact – (there was a shot at JFK from the grassy knoll vs. it was Ted Cruz’s father, or maybe even a 17 year old Donald Trump at the knoll vs. the knoll was grassy). Ask questions and inform, not lecture.

We can and will work harder than ever to protect our clients, to make their stories heard, to give breath to our Constitution and rights. It’s what we do best.

~ Heather E. Williams, FD-CAE