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# Federal Defender Newsletter

## February 2011

### CJA PANEL TRAINING

Sacramento CJA Panel Training will take place on Wednesday, February 16, 2011 at 5:30 p.m. Dr. Baljit Atwal will be speaking on Forensic Psychological Evaluations: Nuts and Bolts of Psychological Testing. She will cover what attorneys need to know about psychological testing, including actuarial sexual and violence risk assessments, psychopathy checklists, personality inventories (i.e., MMPI-2, PAI, and others) and intellectual/cognitive tests. The location is 801 I St., 4<sup>th</sup> floor.

The date, topic, and time for the next Fresno CJA Panel Training will be announced.

### TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, or if you would like the office to address a particular legal topic or practice area, please e-mail your suggestions to Melody Walcott at the Fresno office at [melody\\_walcott@fd.org](mailto:melody_walcott@fd.org) or Rachelle Barbour at the Sacramento office at [rachelle\\_barbour@fd.org](mailto:rachelle_barbour@fd.org).

### WELCOME NEW PANEL MEMBERS!

The district court has adopted the Selection Committee's recommendation that the following attorneys be added to the Sacramento CJA panel:

Clyde Blackmon  
Bill Portanova  
Steve Plessner  
Stan Kubochi  
Tasha Paris  
Kelly Tanalepy  
Kendall Wasley  
Jennifer Noble

### CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, or are interested in donating clothing to the client clothes closet, please contact Dawn at 498-5700.

### ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the email version of the newsletter or attachments, please call Kurt Heiser at (916) 498-5700. Also, if you are receiving a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

## NOTABLE CASES

Swarthout v. Cooke, 562 U.S. \_\_\_\_, No. 10-333 (2011)(1-24-11)(per curiam).

This per curiam opinion addresses the federal due process rights of state prisoners. This opinion was issued without the benefit of full briefing or oral argument. It holds that California law creates a federally-protected liberty interest in parole for California inmates serving sentences with the possibility of parole. The opinion substantially limits this protection, however, by finding that the only federally-protected right is procedural and that "it is no federal concern" whether California law was correctly applied. The Court finds that providing Mr. Cooke with the opportunity to speak at his parole hearing, to contest the evidence against him, to have access to his records in advance, and to be notified of the reasons parole was denied is sufficient under the federal due process clause. The Court does not address whether prisoners have a federal due process right to an unbiased decision maker or other traditional components of federal due process.

U.S. v. Liquidators of European Federal Credit Bank, No. 09-10183 (1-4-11)(Graber with Callahan and Bea). Take a look at this case if you are ever representing former Ukrainian prime ministers charged with money laundering. This is the forfeiture issue that arose from the conviction. U.S. v. Lazarenko, 564 F.3d 1026(9th Cir), cert. denied, 130 S. Ct. 491 (2009). In this case, the government seized accounts held by Bank of America. The Ninth Circuit reverses the seizure, finding that the assets were not listed in the charging papers, and that the government was barred by res judicata by a final judgment against the government in a civil forfeiture action. This case has a good review of forfeiture and res judicata law.

U.S. v. Doss, No. 07-50334 (1-14-11) (Hawkins with Berzon and Clifton). In an appeal from convictions for sex trafficking of children, transportation of minors into prostitution, conspiracy, and two counts of witness tampering, the Ninth Circuit reverses one count of witness tampering. The invalid

count was based on the defendant's request to his spouse to assert her marital privilege. Such a request was not "corrupt" as required by the statute. The Ninth supports this conclusion with dicta in the Supremes' Arthur Anderson decision, 544 U.S. at 703-04. The Ninth Circuit also vacated the life sentences for the sex trafficking of minors counts to allow determination beyond a reasonable doubt regarding whether the prior sex offense involved a minor. The Ninth holds that a fact-specific analysis, not a Taylor analysis applies, based on the language of the federal statute.

U.S. v. Munoz-Camarena, No. 09-50088 (1-28-11) (per curiam -- B. Fletcher, Pregerson, Graber). The defendant in this illegal reentry case had three prior California convictions for simple possession. Under Carachuri-Rosendo v. Holder, 130 S. Ct 2577 (2010), the second or subsequent prior convictions do not qualify as aggravated felonies when the state convictions are not based on the fact of a prior conviction. That was the situation here, so the guideline calculation was in error. The government argued that a remand was unnecessary because any error was harmless: the sentencing court had stated that it was going to sentence the defendant to 65 months regardless of whether the felony was aggravated under the guidelines, or the enhancement was 4 or 8 levels. The Ninth Circuit noted that the guidelines must be calculated correctly, and a different calculation may have influenced the sentence. The district court for example would have to explain the extent of any variance, and a "one size fits all" explanation does not suffice. There is strong language about the need for a remand.

U.S. v. Burgam, No. 09-50449 (1-25-11)(Fisher with Gould; dissent by O'Scannlain). The Ninth Circuit vacated and remanded the sentence in this bank robbery case because the trial court improperly treated the defendant's inability to pay restitution as an aggravating factor. The fact that the trial court considered it, and failed to say what part it played in formulating the sentence, required a remand.