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Federal Defender Newsletter
February 2015

CJA PANEL TRAINING

Sacramento panel training will take place on Wednesday, February 18, 2015 at 5:00 p.m., when Federal Defender Heather Williams will present on "Privilege and Privacy." The training will focus on protecting our client's privacy, fulfilling our obligations, and not infringing on others' privacy rights. The training will take place at the jury meeting room on the 4th floor of the Federal Courthouse, 501 I St. The MCLE will qualify for credit in Ethics.

Fresno panel training will take place on Tuesday, February 17, 2015 at 5:30 p.m. at the Federal Courthouse in Fresno. Representatives from the Delancey Street Foundation and Rehabilitation Consultant Kathy Grinstead will present on "Delancey Street and Other Alternatives to the BOP."

TRAINING BY THE SACRAMENTO COUNTY PUBLIC DEFENDER'S OFFICE

Snitch Files and Brady: The Secret Files Law Enforcement Won't Tell You About and Strategies to Discover Them.
Wednesday, February 4, 2015
12:15 p.m. - 1:14 p.m.
Board of Supervisors Chambers,
700 H Street, Suite 1450
Speakers: Paula Spano and Rod Simpson

FEDERAL DEFENDERS BUILD WITH GREATER SACRAMENTO HABITAT FOR HUMANITY

On January 31, 2015, 15 FD-CAE staff and family volunteered with Habitat for Humanity to work on 3 homes. We met Denise, on whose future home we volunteered as she worked toward the 500 hours of site work she must complete to own her home, and Le and Mary who are expecting their 4th child and 1st son, who are working up to 100 hours to even get on the list for a Habitat home. We painted two homes, stapled insulation into place, and we nailed and the fearless among us rolled trusses on the third home, which will be Denise's. Many among us challenged our fear of heights and all earned the sore muscles they had the next day. There's talk of making it an annual event.

TOPICS FOR FUTURE TRAINING SESSIONS

Do you know a good speaker for the Federal Defender's panel training program, or would you like 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.

Check out www.fd.org for unlimited information to help your federal practice.

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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 January:

- 42 stipulated motions were filed and granted

- resulting in a total time reduction of 65 years (779.5 months).

While the value of early release is inestimable for defendants, their families, and their friends, the early releases in January result in a taxpayer cost savings of approximately $1,903,955.3 million.

So far 74 defendants have received a reduction in their sentences under Amendment 782.

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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** the trainings for you to printout and bring to training for note taking. Any lawyer not on the panel, but wishing training materials should contact Lexi Negin, lexi_negin@fd.org.

♪ NOTABLE CASES ♫

SUPREME COURT

Christeson v. Roper, 574 U.S. __ (No. 14-6873) (1-20-15)(per curiam). Petitioner's appointed federal habeas counsel failed to file a timely federal habeas petition in this death penalty case. Petitioner then requested substitute counsel to represent him in asking for equitable tolling of the statute of limitations because of habeas counsel's misconduct. Tolling is available only for serious instances of attorney misconduct, and the petitioner's appointed attorneys had a clear conflict regarding the duty to present their own misconduct in requesting tolling. The district court denied his motion for substitution. This was error.

Holt v. Hobbs, (No. 13-6827)(1-20-15)(Alito for unanimous court). An Arkansas prison policy that prevented a Muslim prisoner from growing a half-inch beard in accordance with his religious believes violated federal law. The Court rejected the warden's claim that the prisons expertise in identifying short beards as security risks was entitled to deference -- "And without a degree of deference that is tantamount to unquestioning acceptance, it is hard to swallow the argument that denying petitioner a 1/2 inch beard actually furthers the Department's interest in rooting out contraband."

NINTH CIRCUIT

US v. Gnirke, No. 13-50101 (1-2-15) (Christen with Thomas; concurrence by M. Smith). The Ninth Circuit struggles with a condition of supervised prohibiting depictions of "sexually explicit conduct" when the defendant had been convicted of aggravated sexual abuse on a child, refused sexual offender treatment in prison, and was assessed to be a risk to reoffend. The tension is between the First Amendment and the supervisory conditions of supervised release. The Ninth Circuit affirms the imposition of such a condition for (1) any sexually explicit material involving children as defined by 18 USC 2256(2); and (2) any materials with depictions of sexually explicit conduct involving adults, defined as explicit sexually stimulating depictions of adult sexual conduct that the probation officer deems inappropriate. In this manner, the Ninth Circuit seeks to narrow the condition to such material that intends to "arouse" or "stimulate." It believes that the probation officer can monitor such access to material, and places, and that judicial oversight is available.

Mann v. Ryan, No. 09-99017 (12-29-14) (Thomas, CJ, with Reinhardt). The Ninth Circuit partly reversed the denial of habeas relief and remanded for a new sentencing hearing in a capital case out of Arizona, finding that trial counsel was ineffective in failing to present mitigating evidence at the penalty phase. The defense sentencing memorandum contained a hand-written autobiography from the petitioner in which he mentioned a head injury he sustained during a traffic accident about four years before the crime in this case. The trial court imposed a death sentence for each of the murders. This was affirmed on appeal. The habeas court denied the petition.

For the petitioner's penalty-phase IAC claim, the majority first concluded that the AEDPA limitation on relief did not apply. The majority read the state habeas court's denial of relief as requiring the petitioner to prove that it was more likely than not that presenting additional mitigating evidence (specifically relating to the head injury) would have changed the result. That was too onerous a burden under *Strickland*, and thus contrary to *Strickland*. On the merits, the majority concluded that it was unreasonable for trial counsel not to investigate the details of the head injury the petitioner mentioned in his autobiography. There was no reasoned strategic decision not to do that and this mitigating evidence could reasonably have changed the picture for the sentencing judge.

US v. McElmurray, No. 12-50183 (1-26-15)(Kleinfeld with Reinhardt; partial concurrence and partial dissent by Christen). The Ninth Circuit vacates the child pornography convictions and remands because the trial court erred in admitting evidence under Rule 403. The government introduced an interview with state police on a prior state child porn matter and a letter written to another inmate several months earlier to this offense. Defense counsel moved in limine to keep this evidence out and the court had definitively ruled that it would come in, apparently without reading the interview or letter. The admission of the evidence when the Court failed to view it was error. The government had highlighted the statements and letter in its case and so the error was not harmless.

Congrats to John Balazs, former AFD and a member of the Sacramento CJA panel.

FORMER FEDERAL DEFENDER EMPLOYEES AVAILABLE FOR EMPLOYMENT

Yvonne Jurado, yvonneee@live.com, (916)230-0483: Paralegal, Secretarial, Legal Assistant, CJA voucher preparation and filing.

Karen Sanders, kvs.legaltech@gmail.com, (916)454-2957 (h), (916)216-3106 (cell)
Karen has over 20 years of experience as the computer systems administrator at FDO. She'll be providing legal technical and litigation support services. Hourly reasonable rates are available.

Lupita Llanes, lupitallanes@gmail.com, (559) 360-4754: Secretarial and Office Management. Bilingual Spanish/English

LETTER FROM THE DEFENDER

Client: *Well, do you think I'm guilty?*

Client: *What are my chances of winning?*

No answer will ruin the attorney-client relationship quicker than telling a client your personal belief, as her defense lawyer, that she is guilty of the crime charged. No giving of odds nor promise of a winning result will get a lawyer into trouble quicker.

Our role as defense counsel is not to render judgment. Passing judgment on the client is an invitation to lose the confidence and trust required to effectively represent a defendant. Our role is to advise - based on our review and evaluation of the government's case, our own investigation and legal research – on the potential success of the prosecution to get a guilty verdict, our potential success to defend the charge by either simply put the government to its burden of proof or actively presenting a defense, the viability of any particular motion, or the chances of a mitigated sentence.

Yet, in assessing "potential success," we risk our credibility by giving odds – "I give us a 75% chance of getting this dismissed." In discussing the case's impact on our client's life and future, we should only promise we will try our best in representing his interests to and protecting his rights from the prosecutor, the judge, probation, and pretrial.

Our client conversations necessarily include (a) explaining the charges, (b) explaining the offense elements the government must prove, and (c) the possible defenses to the charges and elements. The question should not be whether you, as defense counsel, believe the client is guilty – the question is whether the client, once advised, believes she is guilty.

Even if the client says, "Yes, I'm guilty," our job isn't over. The American Bar Association, in its *Defense Functions,* advises, *"*...The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." Our duty of competence (Cal. Rules of Prof. Cond., Rule 3-110) commands we investigate to determine whether our client's constitutional rights were violated, when a confession is forced or coerced, or if the client is protecting someone else. Only then can we fully provide our clients with all the information they need to make the decisions in their cases.

What decisions are those? Whether or not to plead guilty or to go to trial; if going to trial, whether it's a trial by jury (when permitted) or by the court; and, if there is a trial, whether or not to testify.[i] Invariably, some clients will ask, "What would you do if you were in my position?" I answer, "I am not a risk taker, so I tend to make decisions which give me some control over my life. But 5 years from now, I won't be in prison (hopefully), wondering and maybe regretting my decision. You're the one who must live with it." Maybe not satisfying, but an honest answer.

Our client may also frustrate us in saying, "I don't want to go to trial, but I won't accept that plea offer." Maybe jailhouse rumors told him

you wait for the third offer. You can advise there aren't three offers, there's this one. "If you don't want it, I will go back and ask for less time; but, if the prosecutor won't give us a plea to less time, you have a decision to make: accept whatever offer, plead guilty without any agreement, or go to trial." Even when a client says she doesn't want to go to trial, but won't accept a plea offer or decide to plea without any agreement – **that's** a decision to go to trial.

Clients frequently ask the same questions over and over, each time hoping the answer will be different, something they want to hear, something which will make them feel better, more secure. It is human nature to say what will set another person's mind at ease, but we must resist, for those words intended to comfort will come back and bite us – and our clients.

A colleague advised my law students taking my *Ethics for the Criminal Lawyer* class, "Never say anything you wouldn't want to hear from the witness stand or read in a transcript." Words to live by.

~ Heather E. Williams
Federal Defender, Eastern District of California

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[i] Some jurisdictions add as a client-only decision whether or not to present an insanity defense because of the potential civil commitment if "not guilty by reason of insanity." "Guilty but insane" verdicts may moot that.