OFFICE OF THE FEDERAL DEFENDER
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700
Toll Free: (855) 328.8339
FAX (916) 498.5710
2300 Tulare Street, Suite 330
Fresno, CA 93721-2228
(559) 487.5561
Toll Free: (855) 656.4360
FAX (559) 487.5950
Capital Habeas Unit (CHU) (916) 498.6666
Toll Free: (855) 829.5071 Fax (916) 498.6656

HEATHER E. WILLIAMS
Federal Defender
BENJAMIN D. GALLOWAY
Chief Assistant Defender
KELLY S. CULSHAW
CHU Chief
CHARLES J. LEE
Fresno Branch Chief
RACHELLE BARBOUR, Editor

Federal Defender Newsletter
February 2018

CJA PANEL TRAINING

Sacramento CJA Panel Training will be Wednesday, February 21, 2018 at 5:00 p.m., U.S. District Court, 501 I Street, 4th Floor Jury Room. The topic, "Tips for CJA Panel Attorneys, from a Client's Perspective" featuring Federal Defender client, Amado Hernandez, just released from BOP after serving an eight-year sentence for receipt of child pornography. Amado will share his experiences as a client awaiting trial and sentencing and as a BOP prisoner. Amado was a BOP RDAP program mentor for three years and is eager to share insights that will help you in advising future clients and preparing them for BOP. AFD Tim Zindel will moderate.

Fresno CJA Panel Training will be on Tuesday, February 20, 2018 at 5:30 p.m. Fresno Federal Courthouse, 2400 Tulare St., 2nd Floor Jury Room. Branch Chief Assistant Federal Defender Charles Lee will present "Detention Hearing Practice Tips."

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

CJA Representatives

David Torres of Bakersfield, (661) 326-0857, dtorres@lawtorres.com, is our District's CJA Representative. The Backup CJA Representative is Kresta Daly, (916) 440.8600, kdaly@barth-daly.com.

PODCAST RECOMMENDATION

Ear Hustle: Hosted by San Quentin inmates Earlonne Woods and Antwan Williams and San Francisco artist Nigel Poor, *Ear Hustle* allows San Quentin inmates to produce and tell their personal stories in their own words in prison.

CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

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.

IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

NINTH CIRCUIT OPINONS

Hernandez v. Chappell, No. 11-99013 (12-29-17)(Reinhardt w/Pregerson). The district court found ineffective assistance of counsel in the sentencing phase of this capital habeas for failure to investigate and present a diminished mental capacity defense. The State did not appeal the district court's decision to set aside the death penalty. As for the guilt phase, the district court had found no prejudice. The diminished capacity evidence, in the court's opinion, would not have changed the guilty verdict given the facts, the multiple murders, rapes, and the detailed confession. On appeal, the Ninth Circuit panel found ineffective assistance of counsel in the guilt phase as well. The majority also found prejudice. The majority opinion goes through the extensive evidence of diminishment due to organic brain damage, mental illness, and horrid abuse and concludes that one juror probably would have been swayed.

US v. Brown, No. 16-30218 (1-16-18)(Clifton w/Wardlaw; Owens concurring). The Ninth Circuit vacates a sentence for being a felon in possession of a firearm and remands. The district court erred determining that a base offense level guideline enhancement applied based on a previous conviction for a state drug conspiracy from Washington. Under the categorical approach, this state conspiracy was not a match for a federal conspiracy (and therefore a "controlled substance offense" under the guidelines) because, under state law, a defendant can be convicted even if the only alleged coconspirator is a law enforcement officer or an agent. Under federal law, a defendant cannot be convicted if the only alleged coconspirator was a law enforcement officer or agent. The state legislature's amendment to the state general conspiracy code also applied to the drug conspiracy code. The error was not harmless.

US v. Espinoza, No. 16-50033 (1-22-18)(Paez w/Berzon & Christen). The Ninth Circuit reversed a conviction due to the district court's error in precluding third-party culpability evidence. The district court used the standard of whether substantial evidence existed tending to directly connect the third-party with the actual commission of the offense. Rather, under *US v. Armstrong*, 621 F.2d 951 (9th Cir. 1980): "Fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and

to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." Here, the defendant argued a "blind mule" defense. She always said she was innocent. She had evidence that cast suspicion on a next-door neighbor in Mexico. The court should have allowed the evidence and it was not harmless.

US v. Rodriguez, No. 16-10017 (1-30-18)(Bennett w/Kozinski & Friedland). In the Ninth Circuit's reversal of an alien smuggling conviction, there are two important issues: (1) a bad jury instruction for "reckless disregard"; and (2) a confrontation clause violation in admission of a video deposition as the government failed to make a sufficient showing of witness unavailability. The Ninth Circuit found that the jury instruction defining "reckless disregard" was flawed. The instruction may have required the defendant to be aware of facts to draw an inference, but it plainly did not require that the defendant actually draw the inference. This was key under the facts of this case. The Ninth Circuit rejected the government's waiver arguments, concluding that the *government* waived any harmless-error review by failing to argue it. Second, the Ninth Circuit held that the government violated the Confrontation Clause by failing to demonstrate that a deported witness was unavailable to testify when the government did not make reasonable efforts to secure the witness's presence at trial. The government did not act in good faith. The government knew that the witness's counsel had lost contact with the witness. Yet, the government possessed the witness's identification card, with his address, and could have taken steps to contact him, or provide the information to the witness's counsel or defendant. The government did not show that the witness would not have returned to testify.

Solorio-Ruiz v. Sessions, No. 16-73085 (1-29-18). (Graber, with N. Smith and Zipps). The Ninth Circuit holds in an immigration appeal that a conviction for California Penal Code § 215(a) is not a crime of violence after *Johnson*. The Ninth Circuit explicitly overruled precedent holding that carjacking was categorically a crime of violence. The Ninth Circuit notes that the force necessary for a crime of violence after *Johnson* is "violent" force and California courts have interpreted section 215 to require only "force in excess of that required to seize the vehicle" - the example is a case where a car was stolen from the dealership by driving away while the salesman was putting up some resistance by trying to open the car door and banging on the trunk. This was enough to violate section 215, and, thus 215 does not require violent force.

US v. Walton, No. 15-50358 (2-1-18)(Rakoff w/M. Smith & Friedland). The Ninth Circuit reversed an ACCA enhancement. Under *US v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), California robbery is not a crime of violence. The Ninth Circuit also concluded that first-degree robbery under Alabama law is not a crime of violence because the state's third-degree robbery is not sufficiently violent to qualify as a crime of violence. Third-degree becomes first-degree if the defendant had a deadly weapon. Third-degree robbery requires force, but it can be nonviolent force. For an ACCA crime of violence, the Supremes have required "substantial" force. *Johnson I*, 559 US at 140; and *Castleman*, 134 S.Ct 1405(2014). Such force is lacking here and the government has not argued divisibility.

US v. Laney, No. 15-10563 (2-5-18)(Hawkins w/Fletcher & Tallman). The Ninth Circuit reversed convictions based on ineffective jury waivers. Defense counsel stipulated that their clients waived their right to a jury trial on fraud charges. Counsel's stipulations were electronically signed and filed following a conference call with the court. There is no record that the defendants were present during these calls. The stipulation set forth reasons for a bench trial, including evidence issues, scheduling, and allowance for a joint trial, which permitted various defendant's statements to come in against co-defendant to avoid a *Bruton* problem. The Ninth Circuit concluded that the record did not adequately show the waivers were voluntary, knowing, and intelligent as required by Fed R Crim P 23(a)(1). Usually written waivers are required; an oral waiver is permissible if the record clearly reflects personal express consent, in open court, knowingly and intelligently given. A post-trial reconstruction of the record cannot substitute. The stipulation here is "tantamount to an oral waiver by counsel outside the defendant's presence, which our precedent deems insufficient." The error is structural and requires reversal and remand.

LETTER FROM THE DEFENDER

Allison Mathis, an Assistant Public Defender at the Law Office of the Public Defender, Aztec, New Mexico, gave me permission to republish here her insightful and inspiring blog post with the National Association for Public Defense (NAPD). If you haven't heard of NAPD, any person accepting indigent defense appointments, whether a Panel or Public Defender lawyer, can join for $25 a year. It's an amazing resource of support, articles, and webinars – all for that $25 a year. http://www.publicdefenders.us/

~ Heather E. Williams

Zen and the Art of Indigent Defense

By: allison.mathis **On**: 02/02/2018 16:35:01

A long time ago, in a place that probably never existed but was nevertheless very far away, there were, or maybe there weren't, two monks traveling through a forest, as monks long ago were wont to do. Soon enough, they came across a river with, of course, a beautiful young woman standing on its banks. "Kind sirs," the woman mewed, plaintively, as women in stories like these are wont to do, "I find myself too weak to cross this river with my stereotypically delicate ankles. Would you be ever so kind as to help me across?"

A long time ago, in a place that probably never existed but was nevertheless very far away, there were, or maybe there weren't, two monks traveling through a forest, as monks long ago were wont to do. Soon enough, they came across a river with, of course, a beautiful young woman standing on its banks. "Kind sirs," the woman mewed, plaintively, as women in stories like these are wont to do, "I find myself too weak to cross this river with my stereotypically delicate ankles. Would you be ever so kind as to help me across?"

The monks looked at each other solemnly. Both silently acknowledged that he had taken vows to never touch a member of the opposite sex, let alone hoist her by her petticoats, so to speak, across something as primeval and suggestive as this glistening waterway. Suddenly, much to the younger monk's poorly-suppressed surprise and horror, the elder monk lifted up the woman and carried her across the river without another word, depositing her safely on the other side.

Hours later, as the monks collected soft moss to sleep on, the younger monk finally spoke. "Hey- why in the world did you DO

that? Do you know what kind of position that puts ME in? You know even better than I do what our vows are. I can't believe you not only TOUCHED that woman, you carried her across the river! I've been trying to figure out why you would do that for hours now. I just don't get it. What is *wrong* with you?"

The older monk looked at the younger monk, and I imagine that he permitted himself just a tiny glimmer in his eye when he responded, "Brother. *Brother*. I put her down on the other side of the river. Why are you still carrying her?"

I think about this story probably twice a week. I should probably think of it more often than that. It's the kind of story that has a lot of different lessons in it if you unpack it, and I think some of them are particularly applicable to us, in this strange and sometimes equally fantastic land of indigent defense. I think we, even more than people in other professions, and even more than other lawyers, have to seek to be mindful and present, or we risk our clients' lives.

The danger is that sometimes we don't realize that we're carrying an immense amount of weight around with us, and even if we don't realize we're carrying it, it is still weighing us down. Once, as a young lawyer, I stood next to a client halfheartedly arguing for him to be released from custody after a series of him failing to appear for court dates. "My client wants me to represent to you that… he really promises this time, you know, he won't do it again…" You could practically hear the exasperation in my own voice. The truth was that I'd been summoned to court to do this hearing with no notice, having stood next to this client or someone like him a hundred times already, taken away from my precious office time that I never had enough of, that I desperately needed to catch up with the immense amount of stuff I needed to do for other cases. Cases where people showed up to court.

The judge started haranguing the client, and I looked over at this man for a minute as the judge carried on. He was probably twenty years older than me, and he was relying on *me* to keep him out of jail. And he was terrified. And here I was, exasperated and casual. And all of a sudden my heart just sank and I realized what I had been carrying. I looked down and saw myself knee-deep in mud. I have to put down the weight of all those past cases, past clients, even the behavior of this guy in the past, his prior failures to appear.

This guy didn't give me too many cases. The Government did. This guy didn't mean to make my day a little more difficult. That was the State. This guy is terrified he's going to go to jail and his lawyer is just about to yawn. Even if there's nothing I can say that will sway the judge, it's my job to try. It's my job to not be anesthetized to the system to the point that this is not a big deal. This person is about to be thrown into a cage. Did you hear me?? This PERSON is about to be THROWN into a CAGE! Does it matter what he did, even? This is NOT the answer! What about his mom, who relies on him for support? His kids? His freaking dog? Raise the alarm, guys, did you know the f-ing Government is caging people against their will???

If the judge wants to harangue him, if the judge wants to throw him in jail, at the end of the day, I might not be able to do anything about that, but there should be no doubt in anyone's mind that I was on his side, fiercely and genuinely.

Sometimes the blasé malaise comes in other forms. I know there are days and weeks where I look at a file and it feels the same as the last dozen cases I've handled with the same charge. Possession of a controlled substance, consent search, no outstanding legal issues, significant priors for similar drug-related charges. Driving While Intoxicated, clear reasonable suspicion for the stop, admission to drinking, high blood alcohol content. Tedium. Blurring clients together. It's easy to do with a massive caseload of similar fact patterns.

Sometimes, when you start feeling this way, you mistake it for competence. “I've handled so many of these cases, I know exactly what to look for.” This is actually the *opposite* of competence, though- it's tunnel-vision. We're carrying with us all the prior experiences and expectations we have about certain types of cases, certain types of clients, and certain patterns of evidence. While it's important we learn from our previous experiences, it's also important we don't become so conditioned that we can't see the individuals we represent and their unique and distinct personal and legal situations and our unique and awesome responsibility to them.

We have to do a lot of lifting in this job. We carry people we never thought we'd carry over things we didn't see coming. We only make the job harder and more hazardous to the next person we have to pick up when we never put the last one down. Brother. *Brother*- put her down.