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Federal Defender Newsletter
January 2012

CJA PANEL TRAINING

Happy New Year!

Sacramento CJA panel training will resume on Wednesday, January 18, 2012 at 5:30 p.m. at 801 I St., 4th Floor. The topic will be "We Are The 97% [or 97% of Our Clients OCCUPY the Prisons] – Everything You Need to Know about Federal Sentencing." AFD Lexi Negin will be presenting.

CJA Panel training in Fresno will be on Tuesday, January 17, 2012 at 5:30 p.m. at the Downtown Club, 2120 Kern St., Fresno. The topic will be announced.

2012 CJA PANEL SELECTION

The CJA Panel Selection Committees for Sacramento and Fresno are completing their review of applications for renewal and inclusion on the felony and misdemeanor panels. The proposed list of names will be submitted to the Chief Judge in late December or early January. After the court's decision is made all applicants will be contacted by letter.

After the first of the year, a review will also be conducted of the non-capital habeas and appeals CJA panels. Due to recent Supreme Court cases, the number of habeas appointments (including habeas appeals) has been steadily declining. Under the Eastern District Criminal Justice Act Plan, the CJA panels in Sacramento and Fresno shall be large enough to provide a sufficient number of experienced attorneys to satisfy the caseload needs, yet small enough so that CJA panel members receive an adequate number of appointments to maintain proficiency in federal law. All current members of the Fresno and Sacramento non-capital habeas and appeals panels, as well as all applicants for either of these panels, will be reviewed. The CJA Panel Selection Committees for each division shall then determine how many attorneys to have on each panel, how long the tenure will be, whether a periodic rotational system should be adopted, and which attorneys will be on each panel. Once these determinations are made, the results will be submitted to the court for review and adoption.

MORTGAGE FRAUD WORKING GROUP

Due to the large number of mortgage fraud cases in the Eastern District of California, CJA attorney Scott Tedmon and AFD Ben Galloway have formed a mortgage fraud working group that includes several CJA attorneys and members of the Federal Defender office. The group has gathered information, memos, sample discovery letters, sample pleadings, and other useful information, and placed it on the Federal Defender web page. The group is also tracking all the mortgage fraud cases in this district as well as any significant cases in other districts throughout the country. To access this information, you must log onto the Federal Defender web page (www.cae-fpd.org), then click on the CJA Panel button to the left. Click on the section marked "Secured Documents."

The pop up informs you that this is a secured, password-protected website. CJA Administrators Kurt Heiser in Sacramento and Connie Garcia in Fresno are in charge of assigning passwords to attorneys on our CJA panels. Please do not provide this password to anyone else, or permit anyone access to these materials without prior approval from the CJA administrator or Federal Defender. If someone not on the panel, or outside the district needs some of this information, they may contact either Scott or Ben.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website - www.cae-fpd.org. If a lawyer is not on the panel, but would like the materials, they can contact Lexi_Negin@fd.org.

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 Debra Lancaster at 498-5700.

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 Charles Lee (Fresno) at charles_lee@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

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

U.S. v. Leal-Felix, No. 09-50426 (11-30-11)(en banc: N. Smith, majority; McKeown, concurrence; Rawlison, dissent). Sitting en banc, the Ninth Circuit holds that a citation is not an intervening arrest for Guideline criminal history purposes. The defendant had two prior citations, issued at different times, and he was sentenced on both at the same time. The district court considered the issuance of a citation subsequent to another to be an intervening arrest (as some state laws and precedents define it). The Ninth Circuit disagrees. The court holds that a citation does not rise to an arrest level for purposes of defining an intervening arrest. "[W]e interpret the term 'arrest' to require that the individual be

formally arrested; the mere issuance of a citation, even if considered an arrest under state law, is insufficient." The Sentencing Commission has not defined a citation as an arrest. An analysis of what is an arrest, drawing from Fourth Amendment precedents, does not cover a citation. The Ninth Circuit's approach finds support in the Supreme Court's definitions of arrest, and the over-all approach of the Guidelines. Here, the defendant was never told he was "under arrest" for driving with a suspended license, he was not transported to a police station, nor booked into a jail. These are formal arrest hallmarks that are missing here. Concurring, McKeown (joined by Kozinski, Graber, and Wardlaw) highlights the common understanding of what an arrest is. The concurrence has practical pragmatic reasons, some amusing (related to applications for jobs, colleges and so forth) as to why citations are different from arrests.

U.S. v. Tapia, No. 09-50248 (12-8-11)(Reinhardt with Schroeder and Hudson, D.J.). The Supremes reversed and remanded the Ninth Circuit in Tapia, 131 S. Ct 2382 (2011), holding that a district court could not consider a defendant's rehabilitative needs in imposing a sentence of imprisonment. The remand was to determine whether the consideration constituted "plain error." The Ninth Circuit holds that it does constitute plain error, especially as the error may have increased the sentence. The sentencing court imposed a sentence that afforded additional time to complete the BOP drug program (RDAP). In looking at plain error, the focus is on "reasonable probability" rather than the higher "more likely than not" standard.

U.S. v. Grant, No. 10-10245 (12-5-11)(Kleinfeld, with Beezer and Graber). The Supreme Court in Tapia held that the goal of rehabilitation cannot be considered in imposing imprisonment at the initial sentencing. This case considers whether Tapia applies to imposing imprisonment upon a supervised release revocation. The Ninth Circuit holds that it does. Upon a SR revocation, a court cannot consider rehabilitation in imposing imprisonment. This case involves a defendant who had several chances on SR and kept violating for drug violations. One of the last instances involved the defendant encountering his supervising officer at a California sushi restaurant. The waiter confirmed that the defendant had ordered a sake. The defendant then failed a breathalyzer test. A violation was filed. At the SR disposition hearing, the court said it needed to impose 24 months imprisonment to afford the defendant an extended chance at rehabilitation. This consideration, concluded the Ninth Circuit, is contrary to Tapia and the Supreme Court's analysis that rehabilitation is not part of the statutory imprisonment calculus. The Ninth Circuit recognizes that this may be difficult for trial courts, but they cannot consider what imprisonment will do for rehabilitation prospects. This is a BOP concern.

Gonzalez v. Wong, No. 08-99025 (12-7-11)(Clifton; partial concurrence and partial dissent by W. Fletcher; partial dissent by O'Scannlain). This is a notable decision discussing Pinholster and what it means for newly discovered evidence. The petitioner was sentenced to death for the murder of a police officer attempting to search the petitioner's house. A jailhouse informant reported that the petitioner told him he was waiting for the officer so he could bag a cop. Here the new evidence was Brady impeachment of that informant, a key state witness. The impeachment involved numerous prison mental health reports that concluded the witness was mentally ill and a liar. The state did not disclose this Brady evidence, and stonewalled its disclosure throughout the state appellate process. While the Ninth Circuit concludes that Pinholster bars its consideration of the new evidence in the Brady claim since review is limited to what was before the state court, it

has to do something with this bombshell of new evidence. If it is considered a new claim, then exhaustion issues are raised. However, the Ninth Circuit concludes that it should remand the issue to the district court with instructions to stay the federal habeas proceedings to allow the petitioner to present to state court his Brady claim with the subsequently disclosed materials. This allows the state court to channel the claim and take first crack at the new evidence. Once the state court has decided, then the petitioner can return to federal court. W. Fletcher concurs, but dissents as to the remand here because, under these facts, this court should decide. He argues this because of the state's stonewalling and efforts to hide the evidence and the state court's decision not to require disclosure leaves the issue to the federal courts. This is due to the specific facts here.

Johnson v. Finn, No. 10-15641 (12-8-11)(Reinhardt, with B. Fletcher and Tashima). The Ninth Circuit reverses a denial of a Batson claim in a habeas petition, and remands for the district court to conduct an evidentiary hearing or accept the magistrate court's credibility determinations. The petitioners raised a Batson challenge in state proceedings. When it reached federal court, the magistrate judge conducted an evidentiary hearing and determined that the prosecutor had discriminated. The court made lengthy credibility conclusions. The district court rejected the conclusions and denied the petition. The Ninth Circuit held this was error, because there has to be credibility determinations in jury selection, especially in a Batson challenge, and so determining credibility is a matter of constitutional due process. The Ninth Circuit also finds that AEDPA deference does not apply because the state court apparently used a wrong legal standard, citing a case that equated "reasonable inference" with "strong likelihood." This was incorrect. "Reasonable inference" is a lower standard. The Ninth Circuit also stresses that if AEDPA does not apply, for example because of a wrong legal standard, then the Pinholster bar to new evidence also falls.

Congratulations to Sacramento AFD David Porter for prevailing at this stage!

Merolillo v. Yates, No. 08-56952 (12-12-11)(Navarro, D.J., with Schroeder and Gould). The issue at trial was causation: did the trauma to the victim's head lead, thirty days later, to her death by aortic aneurysm. At a preliminary hearing, the pathologist said it did, but did not testify at trial as he was no longer employed by the county. The testimony was allowed in over a confrontation clause objection. All courts agreed that there was error -- the witness was not shown to be unavailable. The state courts found it to be harmless, as did the district court. The Ninth Circuit reverses, and remands with instructions to grant the writ. There was clear error -- all courts agreed -- but the Ninth Circuit found it to be prejudicial. The test for AEDPA prejudice, stressed the Ninth Circuit, was laid by the Supremes in Fry v. Pliler, which held that Brecht is applied without regard to the state's harmlessness determination. That is the case here: the testimony was prejudicial because it went to the crux of the case, it was given great weight, the testimony itself was confused, contradictory, and inconsistent, and the jury seemed to focus on it. It was also not cumulative, as the experts disagreed on the cause. The finding of prejudice also met the higher Chapman standard of harmless beyond a reasonable doubt.