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Federal Defender Newsletter

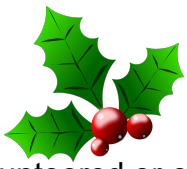
January 2017

CJA PANEL TRAINING

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.

HAPPY NEW YEAR!!!



Thank you for your attendance at the annual Holiday Party! Special thanks to everyone who volunteered or contributed time, effort, and donations to make this event happen.

CONGRATULATIONS TO OUR CJA LAWYERS – Kelly Babineau and Scott Tedmon

The Sacramento County Bar Association – Indigent Defense Panel, named Kelly Babineau its 2016 Attorney of the Year. Kelly had several state and federal successes last year, consistent with her high level of practice. Congratulations, Kelly!

Governor Jerry Brown appointed Scott Tedmon a Sacramento County Superior Court Judge. Scott, a mainstay of our Panel for years, is one of the most respected and capable lawyers in our community. Go forth and do justice, Scott.

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 Ben Galloway, ben_galloway@fd.org.

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.

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 l'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

"DRUGS-MINUS-2" UPDATE

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 two-level reduction to the Base Offense Level in drug cases (Amend. 782). In June 2016, the 9th Cir. decided in *United States v. Davis*, 825 F.3d 1014, that a sentence based on a Rule 11(c)(1)(C) plea agreement does not preclude a defendant from relief under Amend. 782. The decision opened the door for previously ineligible defendants to receive a sentence

reduction. Lexi Negin re-worked these cases and so far five defendants have received sentence reductions totaling 104 months. In 2016, a total of 58 defendants received sentence reductions resulting in a total time reduction of approximately 128 years (**1,540 months**). While the value of early release is inestimable for defendants, their families, and their friends, the early releases in 2016 result in a taxpayer cost savings of approximately **$3,759,091**. So far 392 defendants in this district have received a reduction in their sentences under Amendment 782.

***JOHNSON* UPDATE**

In 2016, a total of six defendants in this district have received a sentence reduction in light of the Supreme Court's decision in *Johnson v. United States*,135 S. Ct. 2551 (2015) which held that the "residual clause" relating to the statutory definition of "violent felony" in 18 USC 924(e) ("Armed Career Criminal Act") was unconstitutionally vague and an increased sentence under the clause violates due process. The sentence reductions in 2016 resulted in a total time reduction of **763 months**, saving taxpayers the cost of incarceration of approximately **$1,862,460**.

IMPORTANT SUPREME COURT CERT. GRANT

Honeycutt v. United States, No. 16-142

Question presented: Whether 21 USC 853(a)(1) mandates joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy.

NINTH CIRCUIT CASES

US v. Shields et al, No. 14-10561 (12-21-16)(M. Smith w/Wallace & Korman). The Ninth Circuit finds instructional error in a wire fraud prosecution. The government argued that the defendants' investment scheme bilked clients out of millions. The defendants, the prosecution argued, fraudulently omitted relevant facts. In instructing the jury, the court failed to give an instruction that the jury had to find that the defendants had a duty to disclose those facts. It gave model instruction 8.124, which does not include a duty to disclose. This was error.

The Ninth Circuit holds that "in order for an omission to support a wire fraud charge, the jury must be instructed that it must first find that the defendant and the defrauded party had a 'trusting relationship in which [the defendant] act[ed] for the benefit of another and induce[d] the trusting party to relax the care and vigilance which it would ordinarily exercise." Milovanovic, 678 F.3d 713, 723-24 (9th Cir. 2012). Where the government alleges fraudulent omissions, the jury must find there existed a fiduciary relationship, formal or informal, that created a disclosure duty.

US v. Yepiz et al, No. 07-50051 (12-20-16)(Noonan w/Reinhardt; Nguyen dissenting). This concerns a Brady violation. Nine members of a Southern California gang appealed their RICO and/or narcotics convictions. The government wrote in a letter that a key cooperating witness received "no benefits" from his testimony and was getting a lesser sentence in an unrelated case. On cross, the witness admitted that he had received $5000 after he testified before the grand jury. On appeal, the government argued that counsel adequately cross-examined on this issue. Subsequently, at a separate trial of a codefendant, the witness said he had received between $100,000 and $200,000 from different agencies. The Ninth Circuit remanded to

the district court for fact-finding on the Brady claim and what benefits were received by the cooperating witness.

The Ninth Circuit also vacated Yepiz's conviction due to defects in the district court's handling of his request to substitute counsel.

LETTER FROM THE DEFENDER

One of the most confusing and complicated areas of our practice is analiyzing prior convictions. These are priors which can increase our client's time ASTRONOMICALLY. We're talking about increased sentences as an armed career criminal (18 U.S.C. § 924(3)), a repeat sex offender (18 U.S.C. § *) or drug trafficker (21 U.S.C. § *), or a re-entrant after deportation ot removal (8 U.S.C. § 1326(b)(2)), or Guideline enhancements for:

- "crimes of violence" (COV) under U.S.S.G. §§ 2D1.1 (drug trafficking), 2E1.2 (RICO & travel), 2K1.3 (explosives), 2K2.1 (firearms), 2L1.2 (unlawful entry or remaining), 2S1.1 (money laundering), 2X6.1 (using a minor in a COV), 4A1.1 (criminal history category), 4B1.1 (career offender), 4B1.4 (armed career criminal), 7B1.1 (probation/supervised release violations);
- "forcible sex offense" (FSO) within any of the above crime of violence" definition for U.S.S.G. § 2L1.2 (unlawful entry or remaining) and 4B1.1 (career offender);
- "controlled substance offense" (CSO) under U.S.S.G. §§ 2D1.1 (drug trafficking), 2K1.3 (explosives), 2K2.1 (firearms), 4B1.1 (career offender), 4B1.4 (armed career criminal), 7B1.1 (probation/supervised release violations);
- "drug trafficking offense" (DTO) under U.S.S.G. §§ 2K2.1 (firearms), 2L1.2 (unlawful entry or remaining.

Really, no generic term for a crime – robbery theft, kidnaping, etc. – may be immune from our analyses.

What I hope to present here, without being too simplistic in our approach, is to give us a step-by-step questionaire when reviewing convictions – prior or instant.

Step 1: Is a COV alleged?

1. Is a Crime of Violence (CoV) alleged? If YES, >1.A; NO, >2.
   A. Does *Johnson* apply? If YES, YEA! If NO, >1.B.
   B. Is Client's prior an enumerated offense? If YES, >2; if NO, >1.C.
   C. Does the *elements* or *force clause* apply? If YES, >2; if NO, YEA!

Part A: First, does *Johnson v. US*, 135 S.Ct. 2551 (2015) apply?

18 U.S.C. § 924(e)(2)(B)(iii) (Armed Career Criminal Act - ACCA) *Johnson* definitely applies when Client's alleged COV relies in some way upon this language call the "residual clause": *"or otherwise involved conduct that presents a serious potential risk of physical injury to another,"* ACCA language. The Supremes found this language void for vagueness, "unconstituionally vague" due to the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants [due process] and invites arbitrary enforcement by judges."

U.S.S.G. § 4B1.2(a)(2) before August 1, 2016 used "otherwise involves conduct that presents a serious potential risk of physical injury to another" to proclaim a defendant a

"career offender." The Supremes are reviewing this language this term in *Beckles v. United* States.

18 U.S.C. § 16(b) contains similar language: *any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*. This is presently under Supreme Court review this term in *Lynch v. Dimaya* as it applies to removals/deportations for an aggravated felony COV under 8 U.S.C. § 1101(a)(43)(F) which incorporates §16; in Dimaya's case, specifically §16(b). We are also concerned with this when our non-citizen clients face 8 U.S.C. § 1326(b)(2) charges. *Dimaya*'s decision may make the underlying removal unlawful as well as remove the 20 year maximum sentence.

"Substantial risk" language This language is found related to injury, harm, or death in these and other Guideline sections: U.S.S.G. 21§ 1B1.1 App. Note (1)(J) *Definitions*; 2A2.1 (*assault with intent to murder, attempted murder*); 2A2.4 (*obstructing/impeding officers*); 2A6.1 (*threatening/harassing communications*); 2D1.1(b)(13)(C)(ii) and (D) (drug trafficking); 2K1.4 (*arson*); 2L1.1 (*alien smuggling*); 2N1.1 (*product tampering*); 3A1.2 (*official victim*); 3C1.2 (*reckless endangerment during flight*).

Part B: Does an enumerated list of crimes define Client's COV?

After that final phrase of 18 U.S.C. § 924(e)(2)(B)(ii) goes away, § 924(e)(2)(B) defines a violent crime 2 more ways. Subsection 924(e)(2)(B)(ii)'s first phrase includes as a violent crime *burglary, arson, or extortion, [or] involves use of explosives. Enumerated offenses* are analyzed pursuant to *Mathis v. United States,* (136 S.Ct. 2243 (2016)) and *Descamps v. United States*, (133 S.Ct. 2276 (2013)) in a *Taylor/Shepard* modified categorical approach. We'll cover this more later because this approach is not only being applied to COV allegations, but also CSOs and DTOs

Part C: Does Client's alleged COV within the *elements* or *force clause*?

This *elements* or *force clause* manifests in language saying "has as an element the use, attempted use, or threatened use of physical force against the person of another."

CATEGORICAL AND MODIFIED CATEGORICAL APPROACHES:
MATHIS/DESCAMPS/TAYLOR/SHEPARD

DOES THE STATUTE CONTAIN PHRASES COVERING SEVERAL DIFFERENT CRIMES (*alternative elements*), VERSUS SEVERAL DIFFERENT METHODS OF COMMITTING ONE CRIME (*alternative means*)?

Definitions

Enumerated offenses mean the generic versions of those offenses.

Elements are the parts of a criminal act which the prosecution **must prove** beyond a reasonable doubt or the client must admit at a change of plea to be found guilty of the crime.

Brute Facts: Sometimes prosecutors throw in other information – other acts to make the client look bad or to support a particular non-statutory enhancement. These are *brute facts* and are not elements.

Step 2: Enumerated Offenses and Offense Elements

Part A: Categorical Approach and Enumerated offense analysis: Is the statute of conviction broader than the definition in the federal crime or Guideline?

A. Is the statute of conviction indivisible – it sets out a single set of elements to define a single crime? If Yes, are those elements **broader** than the federal crime or Guideline definition (*Shepard* Categorical Approach)? If Yes, YEA! If No, > 2.B.

For CoVs in 1.B and 1.C

A.1. Is the statute of conviction or jury instruction or case law definition **broader** than the *force* required for the alleged CoV? If Yes, YEA! If No, >2.A.2.

A.2. Is the statute of conviction or jury instruction or case law definition **broader** than the *intentional mental state* for the alleged CoV? If Yes, YEA! If No, >2.B.1.

A court begins its analysis by determining "the least of the acts criminalized under the elements of the state statute." *United States v. Werle*, 815 F.3d 614, 623 (9th Cir. 2016). If, however, the state statute is broader than the comparable federal statute, the court "must use the so called modified categorical approach." In these circumstances, the court, if possible, must determine "whether the conduct for which the defendant was convicted fits within the federal definition of the offense." *US v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (*en banc*), *citing Taylor*, 495 U.S. at 602. For instance, the Ninth, in *US v. Andrade-Calderon*, 638 Fed.Appx. 622, 626 (9th Cir. 2016) (unpublished), held 21 U.S.C. § 841(c)(2) is an overbroad, indivisible statute and, therefore, could not be used as a "drug trafficking offense" under U.S.S.G. § 2L2.1. State drug purchase or sale offenses including drugs not federally controlled are not "drug trafficking offenses" under U.S.S.G. § 2L2.1 and, thus, is overbroad and indivisible. *US v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012); *US v. Sanchez-Fernandez*, 2016 WL 5404056 (9th Cit. 2016) (unpublished).

For CoVs in 1.B and 1.C

Part A.1 Is the alleged COV broader than the Force Clause in the federal crime or Guideline?

The statute can only be a "crime of violence" if those acts "necessarily" include "as an element the use, attempted use, or threatened use of physical force against the person of another." *See* U.S.S.G. § 4B1.2(a)(1); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Werle*, 815 F.3d at 618-19. "Physical force" means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. US*, 559 U.S. 133, 140 (2010) (*Johnson II)*.

The possibility of causing unintended harm is not the same as an intent to use violent physical force. *Parnell*, 818 F.3d at 980 (concluding even a "willingness" or "readiness" to use violent force is not the same as the actual threatened or attempted use of force).

Many times, we'll need to research state case law to see how offense elements are defined and interpreted within the state courts. For instance, *Dixon* pointed to California case law showing a robbery could be committed so long as the defendant had the intent to steal, regardless of whether he or she had the intent "to use force against another." *Dixon*, 805 F.3d at 1197, *citing People v. Anderson*, 51 Cal.4th 989, 993 (2011).

Part A.2 Is the alleged COV broader than the "intentional" mental state in the federal crime or Guideline?

Even if such force is present, a state offense still is not a "crime of violence" unless the force was applied intentionally. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (*en banc*) ("The bedrock principle of *Leocal* is that to constitute a federal crime of violence an offense must involve the intentional use of force . . .."). The use of force must be intentional, not just reckless or negligent. *US v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010); *see also Leocal*, 543 U.S. at 12–13.

Thus, a state offense not necessarily requiring the intentional use, intentional attempted use, or intentional threatened use of violent physical force does not meet the elements clause because it is broader than the federal crime. *US v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (holding California robbery does not have, as an element, the use attempted use, or threatened use of force because it can be accomplished using unintentional force).

To determine whether a prior offense is a "crime of violence," "drug trafficking," or other type of enumerated or generically described offense, courts must employ the categorical approach. *Mathis v. US*, 136 S.Ct. 2243 (2016); *Descamps v. US*, 133 S. Ct. 2276, 2283 (2013); *Taylor v. US,* 495 U.S. 575, 600-02 (1990); *US v. Parnell*, 818 F.3d 974, 978 (9th Cir. 2016). This approach requires courts "look only to the statutory definitions—i.e., the elements—of a defendant's [offense] and not to the particular facts underlying [the offense]," requiring the court compare of a state's criminal offense elements with the federal statute or common law definition of the predicate offense. *Descamps*, 133 S. Ct. at 2283 (internal quotation marks and citation omitted); *Taylor*, 495 U.S. at 602; *Parnell*, 818 F.3d at 978; *US v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007). Under *Taylor*, a state conviction "will categorically qualify as a predicate offense 'only if the full range of conduct covered by the . . . statute falls within the meaning of those terms,'" and "if, and only if, its elements are the same as, or narrower than, those of the generic offense." *US v. Strickland*, 601 F.3d 963, 967 (9th Cir. 2010)(*en banc*), *citing Sinerius*, 504 F.3d at 740 and *US v. Baza-Martinez*, 464 F.3d 1010, 1014 (9th Cir. 2006); and *Mathis*, 136 S.Ct. at 2248.

Interesting arguments arise when, for instance, U.S.S.G. § 4B1.2(a)(2), in defining a *Career Offender*, enumerates "burglary of a dwelling, arson, extortion, or an explosives offense" as qualifying priors, but its *Commentary*, App. Note 1 includes "robbery" in its consideration. The government has argued "robbery" as a form of "extortion." If the "robbery" prior alleged is in California, delving into the statutes and case law show (a) California "robbery" includes "taking . . . by means of . . . fear" or force, and (b) though the Supreme Court's generic extortion definition includes "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats," (1) the "robbery" taking is not consensual (**thereby failing the definition of generic extortion**); and

(2) California courts found "one may (commit California robbery) by *accidentally [i.e. negligently]* using force" or, presumably, fear or threats.

Part B: Elements vs. Means analysis and Modified Categorical Approach.

B. Is the statute of conviction *divisible – alternative elements*? If YES, > *Descamps* Modified Categorical Approach, >2.B.1.

B.1. Look @ the record of conviction to decide what statutory *elements* Client was convicted of, then compare those elements with the generic offense.

DO NOT answer this with what or how Client did the crime.

Change of plea list elements?
Jury instruction?
Indictment, complaint or information?

If answer = disjunctive alternatives ("or"), statute is overbroad and cannot be used – YEA!
= single option, can use statute.
= if isn't answered yet, >Mathis analysis 2.B.2.

B.2. Does divisible statute have *alternative means* of committing offense – listing various factual ways of committing a single offense element? In this situation, a jury does not need to unanimously agree on the *means* to find the *element* proved.

- Does the statute on its face answer the *element* or *means* question?

Alternative = Different penalties? = *element*
Illustrative examples? = *means*
Things which **must** be charged? - *element*

- Does state law interpret the statute's language?
  If answer = *element*, statute is overbroad and cannot be used – YEA!
  If answer = *means*, can use statute.
  If isn't answered yet, >2.B.3.

B.3 If isn't answered, only then look at the record of the prior conviction itself, "peek at the documents" for "the sole and limited purpose of determining whether [the listed items] are" offense elements. *Mathis citing Rendon v. Holder*, 782 F.3d 466, 473-474 (9th Cir. 2015), J. Kozinski dissent from denied reh'g *en banc*.

Does the statute contain phrases covering several different crimes (*alternative elements*), versus several different methods of committing one crime (*alternative means*)?

Mathis, having been decided last June, is still being tested. In *Mathis*, the Supreme Court agree that the Iowa burglary statutes which listed multiple unlawfully entered loci beyond the generic "building or other structure" as satisfying its burglary statute. *Mathis*, 136 S.Ct. at 2250. It found the Iowa statute set out an "'alternative method of committing [the] single crime' of burglary, so that a jury need not agree on which of the locations was actually involved." *Id.* One crime, indivisible, broader than the generic.

As mentioned above, state drug purchase or sale offenses including drugs not federally controlled are not "drug trafficking offenses" under U.S.S.G. § 2L2.1 and, thus, is overbroad and indivisible cited *Mathis*. *US v. Sanchez-Fernandez*, 2016 WL 5404056 (9th Cir. 2016) (unpublished). It said, "Because an Arizona jury would not be required to find which narcotic drug a defendant possessed to render a conviction for § 13–3408(A)(2), *see* Rev. Ariz. Jury Instructions (Criminal), 34.082 (3d ed.), the statute is indivisible," rather than finding the statute cited alternative means for committing the crime.

We've got a challenging road ahead to make sense of all this. And if you think I've made any mistakes here, I welcome the education and to correct– this made my head hurt.

~ Heather E. Williams, FD-CAE